

Approved: March 14, 1995
Date

MINUTES OF THE SELECT HOUSE COMMITTEE ON ELECTION CONTESTS.

The meeting was called to order by Chairperson David Heinemann at 3:00 p.m. on January 30, 1995 in Room 514-S of the Capitol.

All members were present except:

Representative Delbert Gross - excused - 5:00 p.m. meeting

Committee staff present:

Dennis Hodgins, Legislative Research Department
Norm Furse, Revisor of Statutes
Mary Ann Torrence, Revisor of Statutes
Cindy Wulfsuhle, Committee Secretary

Conferees appearing before the committee:

Victor Miller, Attorney for Joe Shriver
Eric Rucker, Attorney for Danny Jones

Others attending:

Chairman Heinemann announced that the Legislature must consider and resolve the matter within 10 days of the committee being appointed. The purpose of the meeting was to discuss the election contest rules, proposed rules, statutory procedures and constitutional provisions. (Attachment 1)

The committee adopted a new rule in which "No member of the committee shall communicate with the contestant or contestee or the attorney for either party upon any matter under consideration by the committee except during the public hearing by the committee." (Attachment 2)

The committee recessed until 5:00 p.m.

The meeting reconvened at 5:00 p.m. on January 30, 1995 in Room 423-S of the Capitol.

The purpose of the meeting was to unseal court documents sent to the Speaker of the House by the District Judge. Norm Furse, Revisor of Statutes, stated that they had also received two large sacks and one small sack of ballots.

The first package contained a letter to the Speaker of the House which stated that "pursuant to statute; enclosed are the original pleadings in Case 94-C00201W. The submission does not include the transcript nor the exhibits from the hearing. They will be submitted by the court reporter when the transcript is completed."

The second package contained a letter to the Speaker of the House which stated that "enclosed is the balance of the evidence; exhibits and transcripts." The second box contained the exhibits and the last box contained three volumes of transcript. (Attachment 3)

Counsel requested that they be provided copies of the transcript. Staff was directed to provide copies for each of the counsel.

Chairman Heinemann stated that staff would analyze the transcript and exhibits and report back to the committee. The report should not state who was favored by the decision on the issue. Staff would be talking to counsel to see what ballots can be stipulated to, in what precincts there was a consistent count, and how many different totals were arrived at.

Representative Graeber commented that if some of the ballots that are contested have been pulled out of the precinct then the precinct total would not be the same.

MEMORANDUM

From: Norm Furse, Revisor of Statutes
Date: January 20, 1995
Re: Election Contest Procedure

I. CONSTITUTIONAL AND LEGAL BACKGROUND.

- A. Kansas Constitution. Under the Kansas Constitution, article 2, section 8, "Each house shall be the judge of elections, returns and qualifications of its own members."
- B. Statutory procedure. K.S.A. 25-1434 et seq. provides the statutory procedure to contest an election. An election may be contested within five days after the certificate of election is issued under this statutory procedure.
- C. District judge hears contest. If the election contest involves the election of a member of the senate or the house of representatives of the state, a district court judge hears the contest under procedure set out in K.S.A. 25-1442 et seq.
- D. Votes cast for each candidate. When a contest is for the office of state senator or member of the house of representatives, K.S.A. 25-1451 specifies that "the only question to be tried by the court...shall be the question of what number of legally cast votes each of the candidates to the contested office received."
- E. Findings and records of proceedings. The statute directs the judge trying the proceedings to make findings of fact on the question of the number of votes each candidate received. The clerk of the district court then transmits all the evidence, files and records of the proceedings to the president of the senate or the speaker of the house of representatives, as appropriate to the election contest. See K.S.A. 25-1451.

II. LEGISLATIVE PROCEDURE.

- A. Appointment of select committee. K.S.A. 25-1451 provides

that in judging the "election, returns and qualifications of any member of the house of representatives or senate, in the absence of rules providing otherwise, the speaker or president shall appoint a select committee of equal numbers of members of the two parties...and shall also appoint the chairperson and vice chairperson of the select committee."

- B. Select committee functions. The select committee is charged with the following duties under K.S.A. 25-1451:
- (1) The select committee is to consider the files, records and evidence transmitted from the court;
 - (2) the select committee hears the contestant and contestee and their respective counsel;
 - (3) the select committee has the power of compulsory process;
 - (4) hearings of the select committee shall be open;
 - (5) the select committee is to report to the full house of the legislature which is to consider the matter not later than ten days after its appointment;
 - (6) the report of the select committee must be set for the special order of business within five legislative days from the date the report is made.
- C. Member access to the records. All members are to have access to files, records and evidence transmitted from the court "at such reasonable times" as determined by the full house of the legislature which is to consider the matter. See K.S.A. 25-1451.
- D. Special order of business. The report of the select committee is set for the special order of business. When the time of the special order of business arrives, all the members of the house of the legislature which is to consider the matter, except the contestee, determine, after debate, the person who is the elected member.

III. THE 1991 WELLS--CHRISTENSEN-JONES ELECTION CONTEST.

- A. In 1990 Representative Elaine Wells won re-election to the House by two votes after a recount. Her opponent Karlen Christensen-Jones contested the election in district court

under the statutes setting out the procedure for election contests.

- B. Representative Wells was certified by the state board of canvassers as the member-elect from her district and was sworn in as a member of the House at the first regular session. This is consistent with the Kansas Supreme Court case of Rogers v. Shanahan, 221 Kan. 221, at p. 229, which states: "Our statutes provide that the Secretary of State shall, at both the preorganizational meeting and the first regular session, read the roll of members-elect as have been declared elected by the State Board of Canvassers. The filing of an election contest has no effect on this list." The determination of the state board of canvassers stands unless the appropriate branch of the legislature rules otherwise.
- C. The court file and evidence of the election contest proceeding was placed in the custody of the chief clerk of the House of Representatives. See attached Journal of the House, January 16, 1991, p. 48.
- D. Speaker Barkis appointed a select committee on election contest pursuant to the statute to review the matter. The House of Representatives authorized the Select Committee on Election Contest to fix reasonable times during which access to the court records of the election contest proceedings were made available to members of the House. See attached Journal of the House, January 17, 1991, pp. 49 and 50. The Revisor of Statutes Office was requested to hold the key to the room in which the records were kept and to accompany any legislator requesting to review the records during the period of review.
- E. The Select Committee on Election Contest reported its findings to the House on January 28, 1991. The committee found Representative Wells the winner of the election by three votes (not counting one unopened ballot and one ballot which was disputed). See attached Journal of the House, January 28, 1991, pp. 78 through 86 for the complete report.
- F. In accordance with law the matter was set for a special order of business on February 1, 1991. The report of the Select Committee on Election Contest was referred to the Committee on Rules and Journal for consideration of procedural matters

concerning the House debate of the select committee's report. See attached House Calendars for January 29, 1991, January 30, 1991, January 31, 1991, and February 1, 1991.

- G. On the day the matter was scheduled as a special order of business, Karlen Christensen-Jones withdrew her challenge and the matter became moot. See attached Journal of the House, February 1, 1991, pp. 102 and 103.

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25-1448

ELECTIONS

cast for each of the parties to the contest, or for and against a question submitted, for each precinct that is recounted and report any disputed votes upon which the inspectors cannot agree.

History: L. 1978, ch. 138, § 14; July 1.

25-1448. Final determination of contest of person elected to office; disposition by court; applicability of section. Upon final determination of a contest of an election to an office by the court, after the time for appeal thereof specified in K.S.A. 25-1450, and amendments thereto, has expired, or in case of an appeal, upon the final judicial determination of the contest, if the contestant succeeds in the contest, the court may invalidate and revoke any election certificate which has been issued to the contestee, and the secretary of state or county election officer authorized to issue the certificate of election shall issue the certificate to the person the court finds is entitled thereto; except that in cases where the court has found that the contestant prevails in the contest on the grounds provided for in subsection (a), (b), (c) or (e) of K.S.A. 25-1436, and amendments thereto, then the court may order another election for such office to be held within 45 days after the date of such order or may make such other orders as the court deems appropriate. This section shall not apply to any contest of the office of state senator or member of the house of representatives.

History: L. 1978, ch. 138, § 15; L. 1985, ch. 121, § 2; March 28.

CASE ANNOTATIONS

1. Cited: law on voting absentee ballot for another (25-1124) applied. *Lambeth v. Levens*, 237 K. 614, 619, 702 P.2d 320 (1985).

25-1449. Final determination of contest of question submitted elections; disposition by court. Upon final determination of a contest of question submitted election by the court, after time for appeal thereof specified in K.S.A. 25-1450 has expired, or in case of appeal, the final judicial determination of the contest, if the court finds that the greatest number of valid votes were in favor of the question submitted the court shall order that the question submitted has carried and likewise if the court finds that the greatest number of valid votes were against the question submitted the court shall order that the question submitted did not carry, and the court shall make such additional orders as are appropriate.

History: L. 1978, ch. 138, § 16; July 1.

25-1450. Appeals; procedure. An appeal may be taken to the supreme court from the determination of the district court in any contest instituted under this act, other than contests involving the office of state senator or representative. The party appealing shall file in the district court a bond in such sum, not less than five hundred dollars (\$500) or such reasonable greater amount as the court may order, and with such sureties approved by the court, conditioned for the payment of all costs incurred by the respondent or respondents in case appellant fails on appeal. The notice of appeal shall be served upon the other party or parties and filed with the clerk of the district court no later than five days after the entry of the determination of the contest by the district court. The transcript of the case shall be certified and filed in the supreme court as soon as practicable and in any event within fifteen (15) days after filing of notice of appeal. The appeal shall be advanced for hearing as the supreme court may determine and it may be heard and determined summarily by the supreme court.

History: L. 1978, ch. 138, § 17; July 1.

25-1451. Final determination of contest of state representatives and senators; procedure before legislative body. (a) When a contest of election is for the office of state senator or member of the house of representatives, the only question to be tried by the court, notwithstanding any other provision of law, shall be the question of what number of legally cast votes each of the candidates to the contested office received. The judge trying the proceedings shall make findings of fact upon the question so tried. Further evidence upon the points specified in the notice, including but not limited to the question as to the eligibility of any person to office, shall be taken and preserved by the judge trying the contest, but the judge shall make no finding or conclusion thereon. The clerk of the district court shall transmit all the files and records of the proceedings with all the evidence taken to the president of the senate or the speaker of the house of representatives, as the case may be.

(b) In judging the election, returns and qualifications of any member of the house of representatives or senate, in the absence of rules providing otherwise, the speaker or president shall appoint a select committee of equal numbers of members of the two parties having the greatest number of members of the entire

senate or house of representatives as the case may be, and shall also appoint the chairperson and vice chairperson of the select committee. The select committee shall consider the files, records and evidence transmitted from the court and shall hear the contestant and contestee and their respective counsel. Such select committee shall have powers of compulsory process and laws applicable thereto shall apply, except that all hearings shall be open. The select committee shall report to the full house of representatives or senate not later than ten days after its appointment. Such report shall be set for the special order of business within five legislative days from the date the report is made. All members shall have access to files, records and evidence transmitted from the court at such reasonable times as determined by the full house of representatives or senate. When the time of the special order of business arrives the full house of representatives or senate except the contestee shall determine, after debate thereon, the person who is the elected member.

History: L. 1978, ch. 138, § 18; July 1.

25-1452. Costs of contests of elections. If the election be confirmed or the contest be dismissed, judgment shall be rendered against the contestant for all costs. No costs shall be rendered against the contestee unless found responsible for any of the provisions in (a) through (f) of K.S.A. 25-1436. The court, in the interests of justice may waive any costs assessed pursuant to this section in which case the costs shall be paid by the state from any appropriations therefor. Payment by the state shall be made by the director of accounts and reports upon voucher therefor approved by the clerk of the district court.

History: L. 1978, ch. 138, § 19; July 1.

Article 15.—CONTEST OF QUESTION SUBMITTED ELECTIONS

25-1501.

History: L. 1871, ch. 79, § 1; R.S. 1923, 25-1501; L. 1972, ch. 136, § 1; Repealed, L. 1978, ch. 138, § 22; July 1.

CASE ANNOTATIONS

1. Action pending under act of 1869 not affected by repeal. *Gilleland v. Schuyler*, 9 K. 569.
2. Temporary injunction to restrain issue of county bonds: when. *Johnson v. Comm'rs of Wilson Co.*, 34 K. 670, 9 P. 354.
3. Term "municipal corporation" does not embrace school district. *Freeland v. Stillman*, 49 K. 197, 30 P. 235.

4. Cited in discussing methods of contesting elections of public officers. *Berglund v. Hanna*, 149 K. 500, 502, 87 P.2d 581.

5. Act construed and applied; questions justiciable; who may bring action. *Dunn v. Board of County Comm'rs of Morton County*, 165 K. 314, 316, 320, 321, 194 P.2d 924.

6. Taxpayer entitled to injunctive relief under 60-1121 where alleging illegal matters in election for relocation of courthouse site. *Tripp v. Board of County Commissioners*, 188 K. 438, 439, 362 P.2d 612.

25-1502.

History: L. 1871, ch. 79, § 2; R.S. 1923, 25-1502; Repealed, L. 1978, ch. 138, § 22; July 1.

CASE ANNOTATIONS

1. Mandamus where most of votes fraudulent. *The State, ex rel. Wells v. Marston*, 6 K. 524.
2. Poll books are prima facie evidence as to votes and election result. *Russell v. The State, ex rel. Nicholson*, 11 K. 308, 312. Overruled: *Shellabarger v. Nafus*, 15 K. 554.
3. Granting of writ is largely within discretion of court. *Golden v. Elliott*, 13 K. 92; *Light v. The State, ex rel.*, 14 K. 489.
4. Effect of second election held pending the proceedings. *Scott v. Paulen*, 15 K. 162.
5. Mode and time of appeal. *The State, ex rel., v. Smith*, 31 K. 129, 1 P. 251.
6. Act construed and applied; questions justiciable; who may bring action. *Dunn v. Board of County Comm'rs of Morton County*, 165 K. 314, 320, 321, 194 P.2d 924.

25-1503.

History: L. 1871, ch. 79, § 3; R.S. 1923, 25-1503; Repealed, L. 1968, ch. 406, § 145; April 30.

25-1504.

History: L. 1871, ch. 79, § 4; R.S. 1923, 25-1504; Repealed, L. 1978, ch. 138, § 22; July 1.

CASE ANNOTATIONS

1. Action should be brought in name of party in interest. *The State v. Marston*, 6 K. 524.
2. Upon hearing of application defendant may introduce evidence before answer. *Stoddard v. Vanlaningham*, 14 K. 18.

25-1505.

History: L. 1871, ch. 79, § 5; R.S. 1923, 25-1505; L. 1968, ch. 406, § 136; Repealed, L. 1978, ch. 138, § 22; July 1.

CASE ANNOTATIONS

1. Injunction against removal of county seat considered. *Stoddard v. Vanlaningham*, 14 K. 18; *The State, ex rel., v. Eggleston*, 34 K. 714, 10 P. 3; *The State, ex rel., v. Comm'rs of Wabaunsee Co.*, 36 K. 180, 12 P. 942.
2. Injunction against issuance of bonds for county buildings considered. *Johnson v. Comm'rs of Wilson Co.*, 34 K. 670, 9 P. 384.
3. Railroad company not proper party defendant to contest hereunder. *C.K. & W. Rld. Co. v. Evans*, 41 K. 94, 21 P. 216.

JANUARY 14, 1991

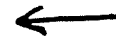
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STATE OF KANSAS
OFFICE OF
SECRETARY OF STATE

I, Bill Graves, Secretary of State, do hereby certify that the following persons were elected members of the House of Representatives of the State of Kansas for a two-year term beginning on the second Monday of January, A.D. 1991.

District

1st District Tim Shallenburger	48th District Joan E. Adam
2nd District L.V. (Sam) Roper	49th District Galen Weiland
3rd District Ed McKechnie	50th District Marvin E. Smith
4th District Gilbert Ernest Gregory	51st District Joan Hamilton
5th District George Teagarden	52nd District Jim W. Cates
6th District Marvin Barkis	53rd District Denise Everhart
7th District Bill Brady	54th District Bill Roy, Jr.
8th District Richard Reinhardt	55th District Joan Wagon
9th District Aldie Ensminger	56th District Kathleen Sebelius
10th District Walker A. Hendrix	57th District George Gomez
11th District Jim D. Garner	58th District Anthony Hensley
12th District Cindy Empson	59th District Elaine L. Wells
13th District Rochelle Chronister	60th District Jeff Freeman
14th District Mark V. Parkinson	61st District Don M. Rezac
15th District Ruth Ann Hackler	62nd District Kent Glasscock
16th District Tim Carmody	63rd District Bruce F. Larkin
17th District Lisa L. Benlon	64th District Steve Lloyd
18th District Eugene P. (Gene) Amos	65th District Alex Scott
19th District Phil Kline	66th District Sheila Hochhauser
20th District Arthur W. Douville	67th District Allan White
21st District Barbara P. Allen	68th District Steve Wiard
22nd District Carol H. Sader	69th District Larry F. Turnquist
23rd District Gary H. Blumenthal	70th District Duane Goossen
24th District Tom Thompson	71st District Eloise Lynch
25th District Al Lane	72nd District Garry Boston
26th District Vincent K. Snowbarger	73rd District Dale M. Sprague
27th District Nancy Brown	74th District Ellen Banman Samuelson
28th District Kerry Patrick	75th District David R. Corbin
29th District Robert (Bob) Vancrum	76th District Rex Crowell
30th District Franklin E. "Frank" Weimer	77th District Kenneth R. King
31st District Bill Wisdom	78th District Dorothy Higginbottom Flottman
32nd District Herman G. Dillon	79th District R. Rand Rock II
33rd District Richard J. (Dick) Edlund	80th District Robert H. Miller
34th District Robert (Bob) Watson	81st District Ann Cozine
35th District Sherman J. Jones	82nd District Elizabeth Baker
36th District Mary Jane Johnson	83rd District Jo Ann Pottorff
37th District Bill Reardon	84th District Barbara Lawrence
38th District Tom Love	85th District Richard Lahti
39th District James E. Lowther	86th District Henry Helgerson
40th District Al Ramirez	87th District Wanda L. Fuller
41st District Clyde D. Graeber	88th District Gwen Welshimer
42nd District Stevi Stephens	89th District Theo Cribbs
43rd District Judith K. Macy	90th District Darlene Cornfield
44th District Sandy Praeger	91st District Tom Bishop
45th District John M. Solbach	92nd District Ken Grotewiel
46th District Betty Jo Charlton	93rd District Rick Bowden
47th District Joann Flower	94th District Georgia Walton Bradford



District

95th District Tom Sawyer
 96th District George R. Dean
 97th District Darrel M. Webb
 98th District Diane Gjerstad
 99th District Susan Wagle
 100th District Jack Sluiter
 101st District Robert E. Krehbiel
 102nd District Donna L. Whiteman
 103rd District Jesse "Jess" Harder
 104th District Michael R. "Mike" O'Neal
 105th District J.C. Long
 106th District Bill Bryant
 107th District Kent Campbell
 108th District Lee Hamm
 109th District Keith Roe
 110th District Carol Dawson

District

111th District Delbert L. Gross
 112th District Bob J. Mead
 113th District Jack Wempe
 114th District Melvin G. Minor
 115th District Melvin J. Neufeld
 116th District Don C. Smith
 117th District Robin Jennison
 118th District Gayle Mollenkamp
 119th District John D. McClure
 120th District Fred Gatlin
 121st District Don E. Crumbaker
 122nd District Gary K. Hayzlett
 123rd District David J. Heinemann
 124th District Eugene L. Shore
 125th District Carl D. Holmes

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and caused to be affixed my official seal this 3rd day of December, A.D. 1990.

BILL GRAVES

Secretary of State

*Rep. Hochhauser will be sworn in at a later time.

Nominations being in order for Speaker, Rep. Sebelius nominated Rep. Marvin Barkis for Speaker of the House. There being no further nominations, Rep. Miller moved the nominations be closed, and that the temporary clerk be instructed to cast a unanimous ballot for Rep. Barkis as Speaker of the House of Representatives. The motion prevailed.

Secretary of State Graves requested Rep. Barkis to approach the bar for the oath of office.

Speaker-elect Barkis subscribed to the following oath of office, which was administered by Chief Justice Holmes:

STATE OF KANSAS, COUNTY OF SHAWNEE, SS:

I do solemnly swear that I will support the constitution of the United States and the constitution of the State of Kansas, and faithfully discharge the duties of the office of Speaker of the House of Representatives, so help me God. Subscribed and sworn to before me, this 14th day of January, 1991.

RICHARD HOLMES

Chief Justice of the Supreme Court.

Speaker Barkis was presented with the gavel by Secretary of State Graves and assumed the chair.

Speaker Barkis requested that Rev. Kuner offer a special prayer for peace.

PRAYER FOR PEACE

God of compassion, we pray for soldiers, offered for the sake of others, and separated from families and loved ones. Cheer them in their loneliness and sustain them through every trial.

Holy God, give those who send the young to war the wisdom, patience and clear judgment to seek peaceful means of resolving conflict.

God of mercy, console those who must suffer the most from war, the innocent, those made homeless, the orphaned, the hungry. Give compassion to all your children that the needs of those who suffer may be filled.

Lord of all nations, we pray for countries whose weapons are aimed at each other. Especially we pray for the people of Kuwait that they may be delivered from despair. Also we pray for the leaders of Iraq, that they may turn to peaceful ways. We pray

Jan. 16, 1991

REPORTS OF STANDING COMMITTEES

Committee on Rules and Journal recommends that HR 6004 be amended on page 5, in line 33, by striking "21" and inserting "19", and the resolution be adopted as amended.

Also recommends SCR 1603 be adopted

COMMITTEE ASSIGNMENT CHANGES

The Chair announced Rep. Neufeld is withdrawn from Committee on Pensions, Investments and Benefits and named to Committee on Agriculture.

Also, Rep. Amos is withdrawn from Committee on Agriculture and named to Committee on Pensions, Investments and Benefits.

The Chief Clerk of the House of Representatives, Janet Jones, announces that she has taken custody of the court file and evidence of the proceeding (90ev87, District Court of Osage County, Kansas Fourth Judicial District) involving the contested House race in the 59th District of the House of Representatives. The House Select Committee, which will be appointed tomorrow, will determine the availability of viewing the court file and evidence.

REPORT ON ENROLLED RESOLUTIONS

HR 6006 reported correctly enrolled and properly signed on January 16, 1991.

On motion of Rep. Whiteman, the House adjourned until 11:00 a.m., Thursday, January 17, 1991.

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January 16, 1991.
:00 a.m., Thursday,

FOURTH DAY

HALL OF THE HOUSE OF REPRESENTATIVES,
TOPEKA, KAN., Thursday, January 17, 1991, 11:00 a.m.

The House met pursuant to adjournment with Speaker Barkis in the Chair.
The roll was called with 124 members present.
Rep. Webb was excused on verified illness.

Prayer by Guest Chaplain, the Reverend W. James Richards, pastor, First
Presbyterian Church, Topeka:

God, in these times of crisis and war, when we swing between fear
and hope, between anxiety and reassurance, be with us all - here in
this place, and in the middle-east. Be with all those who face loss -
whose loved ones are in the midst of battle, on our side and theirs.
Help us all as we do our work today, to listen for your promptings,
to rest in your presence and to rely on your guidance. Amen.

CHANGE OF REFERENCE

Speaker Barkis announced HCR 5001 is withdrawn from Committee on Education
and referred to Committee on Economic Development.

COMMITTEE ASSIGNMENTS

Speaker Barkis announced the formation of the Committee on Computers,
Communication and Technology and appointed the following members: Rep. Dean,
Chairperson; Rep. McKechnie, Vice-Chairperson; and Reps. Rock, Roper, Patrick,
Kline and Mead.

SELECT COMMITTEE ON ELECTION CONTEST

The following committee was appointed by Speaker Barkis to determine the
availability of viewing the court file and evidence of the proceeding (90cv87, District
Court of Osage County, Kansas Fourth Judicial District) involving the contested House
race in the 59th District of the House of Representatives:

Rep. Roy, Chairperson; Rep. Snowbarger, Vice-Chairperson; and Reps. Sawyer,
Solbach, O'Neal and Shallenburger.

COMMUNICATIONS FROM STATE OFFICERS

Janet E. Jones, Chief Clerk of the House, reports receipt of the Fiscal Year 1990
JTPA 3% Older Worker Program and Fiscal Year 1990 Older Kansans Employment
Program (OKEP) from Esther Valladolid Wolf, Secretary of Human Resources.

Also, the receipt of the Kansas Post Secondary Education Profile, Fourth Edition,
from the Kansas Legislative Research Department.

The complete reports are kept on file for inspection in the office of the Chief
Clerk.

MESSAGE FROM THE SENATE

Announcing adoption of SR 1603, a resolution relating to the organization of the 1991 Senate and selection of the following officer:

Gerald L. "Jerry" Karr, minority leader.

MOTIONS AND RESOLUTIONS OFFERED ON A PREVIOUS DAY

On motion of Rep. Crumbaker, **HR 6007**, A resolution congratulating and commending the Colby High School boy's tennis team and Coach David Steve for being the 1989-90 Class 4A State Tennis Champion in Kansas, was adopted.

On motion of Rep. Miller, **HR 6008**, A resolution honoring Gene Haughey for his many years of service to the Kansas House of Representatives.

INTRODUCTION OF GUESTS

Speaker Barkis recognized Gene Haughey who addressed a few remarks to the members of the House.

On motion of Rep. Whiteman, the House went into committee of the Whole, with Rep. Reardon in the chair.

COMMITTEE OF THE WHOLE

On motion of Rep. Reardon, Committee of the Whole report, as follows, was adopted.

Recommended that **SCR 1603** be adopted.

Committee report to **HR 6004** be adopted, also, on motion of Rep. Roy, **HR 6004** as amended by House Committee, be amended on page 5, following line 33, by inserting "5. Computers, Communication and Technology . . . 7"; also, on page 5, in lines 34 to 43 by renumbering items 5 through 14 as items 6 through 15 respectively.

On page 6, in lines 1 through 7 by renumbering items 15 through 21 as items 16 through 22 respectively, and **HR 6004** be adopted as amended.

Upon unanimous consent, the House referred back to the regular order of business, Introduction of Bills and Concurrent Resolutions.

INTRODUCTION OF BILLS AND CONCURRENT RESOLUTIONS

The following bill was introduced and read by title:

HB 2026 by Representatives Freeman, Everhart, Larkin, Mollenkamp, Rezac, Weiland and Wells. An act concerning rural water districts, relating to the dissolution thereof, amending K S A. 82a-629 and repealing the existing section

INTRODUCTION OF ORIGINAL MOTIONS

Rep. Roy moved that the House of Representatives authorize the Select Committee on Election Contest to fix reasonable times during which access to files, records and evidence transmitted from the district court are made available to members of the House. The motion prevailed.

INTRODUCTION OF ORIGINAL MOTIONS AND HOUSE RESOLUTIONS

The following resolution was introduced and read by title:

HOUSE RESOLUTION No. 6009—

A RESOLUTION congratulating and commending the Scott County High School football team and Coach Dave Dunham for winning the 1990 Class 4A State Football Championship in Kansas.

WHEREAS, The Scott County High School football team won the 1990 Kansas State High School Activities Association Class 4A State Football Championship on November 17, 1990, at Cessna Stadium in Wichita, and

TENTH DAY

HALL OF THE HOUSE OF REPRESENTATIVES,
TOPEKA, KAN., Monday, January 28, 1991, 11:00 a.m.

The House met pursuant to adjournment with Speaker Barkis in the Chair. The roll was called with 120 members present.
Reps. Cribbs, Douville and Webb were excused on verified illness.
Reps. Gomez and Goosen were excused on excused absence by the Speaker.

Prayer by Chaplain Kuner:

Blessed are you, O Lord, our God, Ruler of the universe. On this day when we begin our work, we pray that you would fill our minds with knowledge and our hearts with wisdom. Always remind us of the best that is in us and so enable us to use our freedom responsibly. Help us to feel the anguish of the afflicted and the oppressed, inspire us with a vision of justice and love.

Hear our prayers made in your name. Amen.

REFERENCE OF BILLS AND CONCURRENT RESOLUTIONS

The following bills and resolutions were referred to Committees as indicated:

Appropriations: **HB 2044, 2045, 2046, 2047, 2048, 2049.**

Commercial and Financial Institutions: **HB 2042, 2059.**

Education: **HB 2041.**

Judiciary: **HB 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057.**

Pensions, Investments and Benefits: **HB 2058.**

Transportation: **HB 2043.**

REPORT OF SELECT COMMITTEE ON ELECTION CONTEST

Mr. Speaker: Your Select Committee on Election Contest submits the following report on the contest of election for the 59th District seat to the House of Representatives and recommends that the report be adopted. The notice of Contest of Election was filed by Karlen Christesen-Wellman (now known as Karlen Christesen-Jones), Contestant. Elaine L. Wells is the Contestee.

In the original tabulation of the results of the election in the initial canvas by the Lyon and Osage County Boards of Canvassers, it was declared that Christesen-Jones received 3,474 votes and Wells received 3,463 votes. Upon a recount requested by Wells, Wells was declared the winner by the respective County Boards of Canvassers by a vote of 3,476 to 3,474. The State Board of Canvassers declared Wells the winner on November 28, 1990, and issued to her a Certificate of Election.

Following the filing of the notice of the Contest of Election by Christesen-Jones, District Judge Merlin G. Wheeler, Fifth Judicial District Court of the State of Kansas, granted the motions of both parties for the inspection of ballots pursuant to K.S.A. 25-1447.

A Board of Inspection for Lyon County and a Board of Inspection for Osage County were appointed by Judge Wheeler. These Boards recounted all ballots for all precincts in the 59th District in Lyon and Osage counties. The Boards identified 651 ballots for inspection by Judge Wheeler that were questionable in some respect and could not be agreed upon by the unanimous vote of the inspectors.

Counsels to the parties reviewed the questionable ballots and agreed on how they should be counted, except for 62 ballots that remained in question. Judge Wheeler reviewed these ballots and issued the finding that 3,485 legal votes were cast for Wells and 3,480 legal votes were cast for Christesen-Jones.

Pursuant to K.S.A. 25-1451, the Speaker of the House of Representatives appointed the Select Committee to consider files, records, and evidence transmitted from the Court and to hold public hearings on the contested election. The transcript of the Court hearing was not available for the Committee's review and the Committee was told that it would not be available prior to the designated deadline for submitting the Committee's report. The Committee received a document from the Court entitled "Memorandum Decision and Judgement" that contains information on the Judge's findings of fact and conclusions on some, but not all, of the ballots in question.

The Select Committee on Election Contest held public meetings on six different occasions. The Committee first established its rules of order. The respective counsels for the contestant and contestee were asked by Committee members to present arguments for any election ballot that they considered to be at issue. The Committee members also heard testimony from Christesen-Jones and Wells.

Following the oral arguments of the counsels for the parties, the Committee reviewed the election ballots at issue and makes the following recommendations for each of those ballots. (According to the rules adopted by the Committee, a separate recommendation for each ballot at issue is made by the Committee.)

Ballot 59

Issue: Ballot 59 is at issue with regard to whether the intent of the voter can be determined. The ballot has arrows drawn in the left hand column that point to the name of each candidate whose voting box has been marked.

Court Ruling (not addressed in "Memorandum"): According to counsel for the parties, the Judge ruled that this ballot should be counted.

Committee Recommendation: By a unanimous vote, the Committee recommends that Ballot 59 be counted because voter intent is clear.

Related Ballots: Counsel for one party argued that if Ballot 59 is not counted, Ballots 272, 403, 424, 495, 598, 616, and 623 also should not be counted. Based upon the Committee's decision to count Ballot 59, the related ballots are no longer at issue.

Ballot 62

Issue: Ballot 62 is at issue with regard to whether it was properly preserved by methods prescribed by law after the vote had been cast by the voter. K.S.A. 25-3003 requires that a ballot be properly preserved after the vote has been cast. Testimony presented by counsel for one party said that the ballot was treated as spoiled or objected to by election officials. There were derogatory comments written by the names of certain candidates on the ballot.

Court Ruling (not addressed in "Memorandum"): The Judge ruled that Ballot 62 should be counted.

Committee Recommendation: By a vote of four to two, the Committee recommends that Ballot 62 be counted. In the Committee's opinion, Ballot 62 was properly cast but was not properly handled by election officials. Therefore, the Committee recommends that Ballot 62 be counted.

HOUSE OF REPRESENTATIVES,
January 28, 1991, 11:00 a.m.

Speaker Barkis in the Chair.

on verified illness.
res absence by the Speaker.

of the universe. On this
you would fill our minds
Always remind us of the
our freedom responsibly.
and the oppressed, inspire

men.

RESOLUTIONS

to Committees as indicated:

S. 2049.
S. 2059.

S. 2056, 2057.

ELECTION CONTEST

Contest submits the following
District seat to the House of
e adopted. The notice of Contest
now known as Karlen Christesen-
e.

ction in the initial canvas by the
as declared that Christesen-Jones
s. Upon a recount requested by
tive County Boards of Canvassers
vassers declared Wells the winner
ate of Election.

of Election by Christesen-Jones,
trict Court of the State of Kansas,
ion of ballots pursuant to K.S.A.

Ballot 100

Issue: Ballot 100 is at issue with regard to whether it bears an identifying mark. K.S.A. 25-3002 provides that a ballot that bears an identifying mark is void and shall not be counted. The voter who cast Ballot 100 made two errors in marking the ballot. To correct the mistakes, the voter wrote "error" beside the marks and wrote his initials to indicate that he had made the corrections.

Court Ruling: The Judge ruled that Ballot 100 should not be counted. According to "Memorandum Decision and Judgement," the Judge initially ruled that Ballot 100 be counted but then reversed his decision and ruled that the initials of the voter on the ballot were clearly identifying marks and that, therefore, the ballot is void and should not be counted.

Committee Recommendation: By a vote of three to two with one member abstaining, the Committee recommends that Ballot 100 be counted. K.S.A. 25-3002 provides that no ballot shall be invalidated by a technical error as long as it is possible to determine voter intent. In the Committee's opinion, although the ballot bears the voter's initials, the initials alone are not sufficient to establish the voter's identity with any certainty. Therefore, the Committee recommends that Ballot 100 be counted.

Ballot 122

Issue: Ballot 122 was cast by a registered voter who cast her vote at an incorrect polling place. Article 5, section 1, of the *Kansas Constitution* requires a voter to vote in the voting area in which the voter resides. Election workers informed the voter that she was voting in the wrong precinct, permitted her to vote, and informed her that her vote would be challenged. They also suggested that she vote at another precinct, even though they were not able to assure her that the suggested precinct was correct.

Court Ruling: The Judge ruled that Ballot 122 should be counted. According to "Memorandum Decision and Judgement," the Judge found no evidence that the voter meant to violate election laws. Furthermore, the Judge cited K.S.A. 25-3002, which provides that no ballot should be invalidated by a technical error.

Committee Recommendation: By a vote of four to two, the Committee recommends Ballot 122 not be counted. While the Committee agrees that the voter did not mean to violate the law, the law is clear, and an orderly election process demands that there be some system to ensure that voters vote in designated areas. Without such a system, the election process becomes chaotic and its integrity is lost. Therefore, the Committee recommends that Ballot 122 not be counted.

Ballot 123

Issue: Ballot 123 is a vote cast by a voter who changed her surname from that under which she was registered to vote. She failed to reregister under her new surname as is required by K.S.A. 25-2316c. Therefore, this ballot was challenged by election officials, placed in a sealed envelope, and not counted.

Court Ruling: The Judge ruled the envelope should not be opened and, therefore, this ballot has not been counted. According to "Memorandum Decision and Judgement," the Judge had no evidence that the voter was qualified. K.S.A. 25-2316c allows a 30-day grace period preceding an election in which a person who changes his or her name may vote without reregistering, providing that the person fills out an affidavit stating facts relevant to the name change. In the case of this voter, the Judge was not able to determine whether her name change occurred before or after the 30-day grace period began. Therefore, he ruled that the sealed envelope not be opened.

Committee Recommendation: By a vote of 5 to 1, the Committee recommends that the envelope be opened and the ballot, if otherwise valid, be counted. In the Committee's opinion, K.S.A. 25-2316c discriminates against women, who are more

Ballot 426

Issue: Election workers placed Ballot 426 in an envelope and wrote on the envelope that the ballot was "not voted." That envelope, in turn, was placed in a storage envelope for void, objected to, or challenged ballots. However, upon inspection, it appears that the identifying number on the ballot has been properly clipped and the ballot appears to be properly cast.

Court Ruling: The Judge ruled that Ballot 426 be counted. According to "Memorandum Decision and Judgement," the Judge found no evidence that the ballot had been defaced or otherwise invalidated. Therefore, he ruled that the ballot should be counted.

Committee Recommendation: By a vote of 4 to 2, the Committee recommends that Ballot 426 not be counted. In the Committee's opinion, the many irregularities that occurred in the handling of this ballot raise questions as to whether it was cast by an eligible voter. Even though, on its face, the ballot appears to be properly cast, the question of whether it was cast by a qualified voter cannot be answered. Therefore, Ballot 426 should not be counted.

Ballot 428

Issue: It is not known whether Ballot 428 was counted because election workers placed it in a box intended for unused judicial ballots. The inspection board for Osage County appointed by the Court found the ballot when the Board determined that more votes were cast than there were ballots. Although the identifying number in the corner of the ballot was properly clipped, the ballot had not been "strung." That is, it had not been properly preserved after the vote had been cast, raising a question as to whether it had been counted. Therefore, the ballot was placed in a sealed envelope and presented to the Court.

Court Ruling: The Judge ruled that Ballot 428 should be counted. According to "Memorandum Decision and Judgement," the Judge found no reason to consider the ballot invalid nor did he find any evidence of fraud or wrongdoing. Therefore, he ordered the envelope opened and Ballot 428 counted.

Committee Recommendation: By a vote of 3 to 2 with one member abstaining, the Committee recommends that Ballot 428 not be counted. In the Committee's opinion, it is not possible to reconstruct the circumstances surrounding why this ballot was mishandled. The irregularities that occurred raise serious questions as to whether the ballot was cast by a qualified voter. Therefore, the Committee recommends that Ballot 428 not be counted.

Ballot 492

Issue: After a ballot is marked, election workers are required to cut off an identifying number in the corner of the ballot. In the case of Ballot 492, the cut was made in such a way that part of the ballot containing a box beside the name of a candidate in a race not at issue here also was cut off. The part of the ballot that was cut off was retrieved and taped back on the ballot. K.S.A. 25-3002 provides that any ballot which has been defaced, mutilated, or torn shall not be counted. The statute also provides that no ballot shall be invalidated because of a technical error unless it is impossible to declare the voter's intention.

Court Ruling (not addressed in "Memorandum"): The Judge ruled that Ballot 492 be counted. According to counsel for one party, the Judge stated the ballot was mutilated. However, the Judge also said legislative intent is unclear because K.S.A. 25-3002 provides that no ballot shall be invalidated because of a technical error as long as it is possible to declare the voter's intention. Because the intention of the voter is not in question in the case of Ballot 492, the Judge ruled that the ballot should be counted.

envelope and wrote on the envelope. In turn, was placed in a storage envelope. However, upon inspection, it was found that it has been properly clipped and the

Ballot 426 be counted. According to the Judge, he found no evidence that the ballot was properly cast. Therefore, he ruled that the ballot should

to 2, the Committee recommends. In the Judge's opinion, the many irregularities and questions as to whether it was cast. The ballot appears to be properly cast, but the voter cannot be answered. Therefore,

Ballot 426 was counted because election workers found no irregularities. The inspection board for Osage County determined that the ballot was cast. Although the identifying number in the ballot had not been "strung." That the ballot had been cast, raising a question as to whether the ballot was placed in a sealed

Ballot 426 should be counted. According to the Judge, he found no reason to consider the ballot was properly cast. Therefore, he ruled that the ballot should

to 2 with one member abstaining. The ballot should be counted. In the Committee's opinion, the instances surrounding why this ballot was cast raise serious questions as to whether the ballot was properly cast. Therefore, the Committee recommends that

are required to cut off an identifying number in the corner of the ballot. In the case of Ballot 492, the cut was made in such a way that part of the ballot containing a box beside the name of a candidate in a race not at issue here also was cut off. The part of the ballot that was cut off was retrieved and taped back on the ballot. K.S.A. 25-3002 provides that any ballot which has been defaced, mutilated, or torn shall not be counted. The statute also provides that no ballot shall be invalidated because of a technical error unless it is impossible to declare the voter's intention.

Court Ruling (not addressed in "Memorandum"): The Judge ruled that Ballot 492 be counted. According to counsel for one party, the Judge stated the ballot was mutilated. However, the Judge also said legislative intent is unclear because K.S.A. 25-3002 provides that no ballot shall be invalidated because of a technical error as long as it is possible to declare the voter's intention. Because the intention of the voter is not in question in the case of Ballot 492, the Judge ruled that the ballot should be counted.

Committee Recommendation: By a vote of 5 to 1, the Committee recommends that Ballot 492 be counted because voter intent is clear.

Related Ballots: Counsel for one party argued that if Ballot 492 is not counted, Ballots 146, 302, and 454 also should not be counted. Based upon the Committee's decision to count Ballot 492, the related ballots are no longer at issue.

Ballot 493

Issue: After a ballot is marked, election workers are required to cut off an identifying number in the corner of the ballot. In the case of Ballot 493, the cut was made in such a way that part of the ballot containing a box beside the name of a candidate in a race not at issue here also was cut off. The part of the ballot that was cut off was retrieved and taped back on the ballot. K.S.A. 25-3002 provides that any ballot which has been defaced, mutilated, or torn shall not be counted. The statute also provides that no ballot shall be invalidated because of a technical error unless it is impossible to declare the voter's intention.

Court Ruling (not addressed in "Memorandum"): The Judge ruled that Ballot 493 be counted. According to counsel for one party, the Judge stated the ballot was mutilated. However, the Judge also said legislative intent is unclear because K.S.A. 25-3002 provides that no ballot shall be invalidated because of a technical error as long as it is possible to declare the voter's intention. Because the intention of the voter is not in question in the case of Ballot 493, the Judge ruled that the ballot should be counted.

Committee Recommendation: By a vote of 5 to 1, the Committee recommends that Ballot 493 be counted because voter intent is clear.

Related Ballots: Counsel for one party argued that if Ballot 493 is not counted, Ballots 146, 302, and 454 also should not be counted. Based upon the Committee's decision to count Ballot 493, the related ballots are no longer at issue.

Ballot 525

Issue: Ballot 525 is an original of a telefaxed absentee ballot that appears to be properly cast. Because it is a faxed copy, the inspection board appointed by the Judge identified Ballot 525 as questionable.

Court Ruling: The Judge ruled that Ballot 525 should not be counted. According to "Memorandum Decision and Judgement," no evidence was presented to the Court to indicate that the ballot was cast by a qualified voter. The Judge ruled that time did not permit the Court to wait for further information. Therefore, he ruled that Ballot 525 should not be counted, but that, if additional information became available, it should be considered by the Kansas House of Representatives.

Committee Recommendation: By a unanimous vote, the Committee recommends that Ballot 525 be counted. Testimony before the Committee, not available to the Court, indicates that an absentee ballot was faxed to a serviceman in Saudi Arabia who marked the original faxed copy and had it delivered to his wife. (Federal law permits individuals in the military to cast absentee ballots, including a special provision for Operation Desert Shield.) The serviceman's wife testified before the Committee that her husband is a qualified voter and that she had mailed his completed ballot to the proper election officials. Therefore, the Committee recommends that Ballot 525 be counted.

Ballot 529

Issue: K.S.A. 25-1124 requires that a voter must fill out and sign a "declaration of absent voter" form that is printed on the outside of the envelope in which an absentee ballot is placed. The "declaration of absent voter" form for Ballot 529 was neither filled out nor signed.

Court Ruling: The Judge ruled the ballot should be counted. According to "Memorandum Decision and Judgement," evidence presented to the Court indicates

that the voter was qualified to vote and, therefore, failure to sign the ballot was a technical error.

Committee Recommendation: By a unanimous vote, the Committee recommends that Ballot 529 not be counted. The law is clear that declaration of absentee voter forms must be filled out and signed and it is the Committee's finding that the law was not sufficiently complied with. The Court was able to identify the voter and establish that the voter was indeed qualified only because this election was contested. Had the election not been contested, it would not have been possible to validate the qualifications of the voter. K.S.A. 25-1136 prohibits election officials from opening an absentee ballot if the form accompanying the ballot is insufficient. The purpose of the law is to prevent election fraud and to ensure that votes are properly cast by qualified electors. In the case of Ballot 529, the law was not complied with.

Ballot 530

Issue: The "declaration of absent voter" form for Ballot 530 was neither filled out nor signed. Existing law (K.S.A. 25-1124) requires that a voter must fill out and sign a "declaration of absent voter" form that is printed on the outside of the envelope in which an absentee ballot is placed.

Court Ruling: The Judge ruled the ballot should be counted. According to "Memorandum Decision and Judgement," evidence presented to the Court indicates that the voter was qualified to vote and, therefore, failure to sign the ballot was a technical error.

Committee Recommendation: By a unanimous vote, the Committee recommends that Ballot 530 not be counted. The law is clear that declaration of absentee voter forms must be filled out and signed and it is the Committee's finding that the law was not sufficiently complied with. The Court was able to identify the voter and establish that the voter was indeed qualified only because this election was contested. Had the election not been contested, it would not have been possible to validate the qualifications of the voter. Existing law (K.S.A. 25-1136) prohibits election officials from opening an absentee ballot if the form accompanying the ballot is insufficient. The purpose of the law is to prevent election fraud and to ensure that votes are properly cast by qualified electors. In the case of Ballot 530, the law was not complied with.

Ballot 531

Issue: Ballot 531 is an absentee ballot for which the "declaration of absent voter" form was neither filled out nor signed. According to existing law (K.S.A. 25-1124), a voter must fill out and sign a "declaration of absent voter" form that is printed on the outside of the envelope in which an absentee ballot is placed.

Court Ruling: The Judge ruled the ballot should be counted. According to "Memorandum Decision and Judgement" evidence presented to the Court indicates that the voter was qualified to vote and, therefore, failure to sign the ballot was a technical error.

Committee Recommendation: By a unanimous vote, the Committee recommends that Ballot 531 not be counted. The law is clear that declaration of absentee voter forms must be filled out and signed and it is the Committee's finding that the law was not sufficiently complied with. The Court was able to identify the voter and establish that the voter was indeed qualified only because this election was contested. Had the election not been contested, it would not have been possible to validate the qualifications of the voter. Election officials are prohibited by K.S.A. 25-1136 from opening an absentee ballot if the form accompanying the ballot is insufficient. The purpose of the law is to prevent election fraud and to ensure that votes are properly cast by qualified electors. In the case of Ballot 531, the law was not complied with.

... failure to sign the ballot was a
 ... the Committee recommends
 ... declaration of absentee voter
 ... Committee's finding that the law
 ... is able to identify the voter and
 ... cause this election was contested.
 ... it have been possible to validate
 ... election officials from opening
 ... if it is insufficient. The purpose
 ... re that votes are properly cast by
 ... was not complied with.

Ballot 530 was neither filled out
 ... a voter must fill out and sign
 ... the outside of the envelope

... could be counted. According to
 ... presented to the Court indicates
 ... failure to sign the ballot was a

... note the Committee recommends
 ... that declaration of absentee voter
 ... Committee's finding that the law
 ... is able to identify the voter and
 ... cause this election was contested.
 ... it have been possible to validate the
 ... 5-1136) prohibits election officials
 ... accompanying the ballot is insufficient.
 ... and to ensure that votes are
 ... Ballot 530, the law was not complied

... the "declaration of absent voter"
 ... to existing law (K.S.A. 25-1124),
 ... ent voter" form that is printed on
 ... ballot is placed.

... could be counted. According to
 ... presented to the Court indicates
 ... failure to sign the ballot was a

... note, the Committee recommends
 ... that declaration of absentee voter
 ... Committee's finding that the law
 ... is able to identify the voter and
 ... cause this election was contested.
 ... it have been possible to validate
 ... are prohibited by K.S.A. 25-1136
 ... accompanying the ballot is insufficient.
 ... and to ensure that votes are
 ... Ballot 531, the law was not complied

Ballot 532

Issue: Ballot 532 is an absentee ballot that is at issue because a man failed to file an affidavit of assistance as required by K.S.A. 25-1124. The law allows a person to render assistance to someone who is in need of the assistance, providing that an affidavit is signed by the person who provides the assistance. The man obtained an absentee ballot for his paralysed wife and marked it to reflect her voting choices. He then attempted to help her with her signature, but when the signature was unclear, he went ahead and completed his wife's identifying declaration and signed her name. He also identified on the envelope that he had made the signature for his wife.

Court Ruling: The Judge ruled that Ballot 532 should be counted. According to "Memorandum Decision and Judgement," the Judge said that there is no evidence that undue influence had been exerted on the voter nor is there any evidence of wrongdoing.

Committee Recommendation: The Committee was unable to reach agreement on Ballot 532 and therefore makes no recommendation.

Ballot 533

Issue: Ballot 533 is at issue because of failure to fill out or sign the "declaration of absent voter" form. The law (K.S.A. 25-1124) requires that a voter must fill out and sign a "declaration of absent voter" form that is printed on the outside of the envelope in which an absentee ballot is placed.

Court Ruling: The Judge ruled the ballot should be counted. According to "Memorandum Decision and Judgement," evidence presented to the Court indicates that the voter was qualified to vote and, therefore, failure to sign the ballot was a technical error.

Committee Recommendation: By a unanimous vote, the Committee recommends that Ballot 533 not be counted. The law is clear that declaration of absentee voter forms must be filled out and signed and it is the Committee's finding that the law was not sufficiently complied with. The Court was able to identify the voter and establish that the voter was indeed qualified only because this election was contested. Had the election not been contested, it would not have been possible to validate the qualifications of the voter. K.S.A. 25-1136 prohibits election officials from opening an absentee ballot if the form accompanying the ballot is insufficient. The purpose of the law is to prevent election fraud and to ensure that votes are properly cast by qualified electors. In the case of Ballot 533, the law was not complied with.

Ballot 552

Issue: Ballot 552 is at issue because it has a tear in it. The tear has been taped over with transparent tape. It is not known how the ballot was torn, but, according to counsel for the parties, the ballot may have been torn by an optical scanner used by election officials. K.S.A. 25-3002 provides that any ballot which has been defaced, mutilated, or torn shall not be counted. The statute also provides that no ballot shall be invalidated because of a technical error unless it is impossible to declare the voter's intention.

Court Ruling (not addressed in "Memorandum"): According to counsel for the parties, the Judge ruled that this ballot should be counted.

Committee Recommendation: By a vote of 5 to 1, the Committee recommends that Ballot 552 be counted because voter intent is clear.

Related Ballots: Counsel for one party argued that if Ballot 552 is not counted, Ballots 565, 570, 613, 632, 635, 639, and 644 also should not be counted. Based upon the Committee's decision to count Ballot 552, the related ballots are no longer at issue.

Mazie Trail Ballot

Issue: K.S.A. 25-1132 requires that an absentee ballot must reach county election officials by the time the polls close. In the case of the Mazie Trail Ballot, the ballot was placed in a drop box at the Lyon County Courthouse and not discovered until the day after the election. Therefore, the ballot has never been opened. The materials in the drop box are collected once a day between 8:00 a.m. and 8:30 a.m. According to information presented to the Court, the ballot was placed in the box at 8:40 a.m. Information presented also indicated that the drop box has been used by Mazie Trail in past elections to successfully cast her absentee ballot. The box is labeled "Courthouse Business Only — Not for U.S. Mail."

Court Ruling: The Judge ruled that the Mazie Trail Ballot should not be opened or counted. According to "Memorandum Decision and Judgement," the Judge ruled that the law mandates that absentee ballots must be received by the election officials by the time the polls close and places no burden on election officials to seek out ballots that have not been delivered directly to them.

Committee Recommendation: The Committee was unable to reach agreement on the Mazie Trail Ballot and therefore makes no recommendation.

Based on the recommendations of the Select Committee on Election Contest, a total of 3,481 legal votes is cast for Elaine L. Wells and a total of 3,478 legal votes is cast for Karlen Christesen-Jones. These totals do not include sealed Ballot 123, which the Committee recommends be opened by the House. Nor do the totals include the Mazie Trail Ballot, upon which the Committee was unable to reach agreement

Respectfully submitted,

January 28, 1991

Rep. William R. Roy, Jr. Chairperson
Select Committee on Election
Contest

Rep. Vince Snowbarger,
Vice-Chairperson
Rep. Michael O'Neal
Rep. Michael Tom Sawyer

Rep. Tim Shallenburger
Rep. John Sulbach

91-79/PM

MOTIONS AND RESOLUTIONS OFFERED ON A PREVIOUS DAY

On motion of Rep. Cates, **HR 6012**, A resolution congratulating and commending the H.D.B. Construction Company on being selected the 1990 Outstanding Kansas Minority-Owned Construction firm of the year, was adopted.

Upon unanimous consent, the House referred back to the regular order of business, Introduction of Bills and Concurrent Resolutions.

INTRODUCTION OF BILLS AND CONCURRENT RESOLUTIONS

The following bills were introduced and read by title:

HB 2060, by Committee on Transportation: An act relating to handicapped parking, concerning the definition of physician, amending K.S.A. 1990 Supp. 8-1,124 and repealing the existing section.

HB 2061 by Committee on Insurance: An act relating to insurance companies and fraternal benefit societies, excluding certain assessments to pay claims of insolvent insurers from the retaliatory taxation, penalty and fee structure, amending K.S.A. 40-253 and repealing the existing section.

HOUSE CALENDAR

No. 10

TUESDAY, JANUARY 29, 1991
HOUSE CONVENES AT 10:30 A.M. TODAY

ROLL CALL

INVOCATION

READING AND CORRECTION OF JOURNAL

INTRODUCTION OF BILLS AND CONCURRENT RESOLUTIONS

Reference of Bills and Concurrent Resolutions

2060—

House bill No. 2060, An act relating to handicapped parking; concerning the definition of physician; amending K.S.A. 1990 Supp. 8-1,124 and repealing the existing section.

Committee on Transportation

(Transportation)

2061—

House bill No. 2061, An act relating to insurance companies and fraternal benefit societies; excluding certain assessments to pay claims of insolvent insurers from the retaliatory taxation, penalty and fee structure; amending K.S.A. 40-253 and repealing the existing section.

Committee on Insurance

(Insurance)

REPORTS OF SELECT COMMITTEES

Report of Select Committee on Election Contest—

(Rules and Journal)
(Be adopted)

MESSAGES FROM THE GOVERNOR

COMMUNICATIONS FROM STATE OFFICERS

MESSAGES FROM THE SENATE

Reference of Senate Bills and Concurrent Resolutions

Jan. 30, 1991

2068—

House bill No. 2068, An act relating to elections; concerning the minimum votes required for nomination in primary election; amending K.S.A. 25-213 and repealing the existing section.

(Election)

Committee on Elections

2069—

House bill No. 2069, An act relating to elections; concerning certain petitions; amending K.S.A. 25-4005 and 25-4324 and K.S.A. 1990 Supp. 25-4320 and repealing the existing sections.

(Elections)

Committee on Elections

2070—

House bill No. 2070, An act concerning elections; amending the mail ballot election act; concerning school district bond elections; amending K.S.A. 25-432 and repealing the existing section.

(Elections)

Committee on Elections

2071—

House bill No. 2071, An act relating to elections; concerning registration and declaration of party affiliation by voters; amending K.S.A. 1990 Supp. 25-2311 and 25-3304 and repealing the existing sections.

(Elections)

Committee on Elections

REPORTS OF SELECT COMMITTEES

Report of Select Committee on Election Contest—

(Rules and Journal)

(Be adopted)

MESSAGES FROM THE GOVERNOR

COMMUNICATIONS FROM STATE OFFICERS

MESSAGES FROM THE SENATE

Reference of Senate Bills and
Concurrent Resolutions

INTRODUCTION OF ORIGINAL MOTIONS AND HOUSE RESOLUTIONS

MOTIONS AND RESOLUTIONS OFFERED ON A PREVIOUS DAY

THE UNFINISHED BUSINESS BEFORE THE HOUSE

Consent Calendar

2084—

House bill No. 2054, An act establishing the governor's commission on mental retardation and other developmental disabilities; relating to the composition thereof; prescribing functions therefor.

Representatives Helgerson and Blumenthal
(Governmental Organization)

REPORTS OF SELECT COMMITTEES

Report of Select Committee on Election Contest—

(Rules and Journal)
(Be adopted)

MESSAGES FROM THE GOVERNOR

COMMUNICATIONS FROM STATE OFFICERS

MESSAGES FROM THE SENATE

**Reference of Senate Bills and
Concurrent Resolutions**

INTRODUCTION OF ORIGINAL MOTIONS AND HOUSE RESOLUTIONS

MOTIONS AND RESOLUTIONS OFFERED ON A PREVIOUS DAY

THE UNFINISHED BUSINESS BEFORE THE HOUSE

Consent Calendar

Final Action on Bills and Concurrent Resolutions

2003—

House bill No. 2003, An act concerning certain correctional facilities; amending K.S.A. 1990 Supp. 75-52,133 and repealing the existing section.

Special Committee on Judiciary
Re Proposal No. 12

(Judiciary)
(Be passed as amended)

2011—

House bill No. 2011, An act concerning juveniles; relating to moneys credited to the juvenile detention facilities fund and disposition thereof; abolishing the juvenile detention facilities capital improvements fund, amending K.S.A. 1990 Supp. 8-241, 8-2110 and 79-4803 and repealing the existing sections; also repealing K.S.A. 1990 Supp. 38-556.

Special Committee on Judiciary
Re Proposal No. 16

(Judiciary)
(Be passed as amended)

INTRODUCTION OF ORIGINAL MOTIONS AND HOUSE RESOLUTIONS

MOTIONS AND RESOLUTIONS OFFERED ON A PREVIOUS DAY

THE UNFINISHED BUSINESS BEFORE THE HOUSE

Consent Calendar

Final Action on Bills and Concurrent Resolutions

Bills Under Consideration to Concur or Nonconcur

General Orders

2004—

House bill No. 2004, An act concerning children and minors; relating to the Kansas parentage act; amending K.S.A. 38-1118 and 38-1119 and repealing the existing sections.

Special Committee on Judiciary Re Proposal No. 12

(Judiciary)

(Be passed as amended)

2015—

House bill No. 2015, An act concerning counties and townships; relating to township roads; amending K.S.A. 1990 Supp. 68-560 and repealing the existing section.

Special Committee on Local Government Re Proposal No. 25

(Local Government)

(Be passed as amended)

REPORTS OF STANDING COMMITTEES

Bills Adversely Reported

Special Order of Business

Friday, February 1, 1991, 9:00 a.m.

REPORT OF SELECT COMMITTEE ON ELECTION CONTEST—

In accordance with K.S.A. 25-1451, a special order of business is set to consider the Report of Select Committee on Election Contest on the contest of election for the 59th District seat.

House bills p
House bills k
House bills p
House bills i
House bills k
House bills s
House bills v
House bills l
House bills t
House bills j
House resolu
6009, 6010, 601
House resolu
House concu
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Executive Re
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Senate bills j
Senate bills i
Senate bills l
Senate concu
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Senate concu

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Agriculture—
House bills:
House concu
House resolu
Senate bills:
Senate concu

Appropriations
House bills:
House concu
House resolu
Senate bills:
Senate concu

Calendar and
House bills:
House concu
House resolu
Senate bills:
Senate concu

FOURTEENTH DAY

HALL OF THE HOUSE OF REPRESENTATIVES,
TOPEKA, KAN., Friday, February 1, 1991, 9:00 a.m.

The House met pursuant to adjournment with Speaker pro tem Reardon in the Chair.

The roll was called with 122 members present.

Reps. Cribbs, Douville and Webb were excused on verified illness.

Prayer by Chaplain Kuner:

On this day, O God, we seek your guidance and your care, for our actions and reactions, for our decisions and indecisions, for our thoughtfulness and our weariness; Give us grace to face this day. Give us smiles to lift our spirits; Give us patience to raise our shortcomings. Give us wisdom to know your will, and give us your stirring presence.

Enter into the hearts and minds of the leaders of this world that peace may be achieved swiftly, and our young men and women may quickly return to their families. Make each of us peacemakers as we work and live in this place and always. Amen.

Speaker pro tem Reardon announced a letter was received by the office of the Speaker of the House, this morning (February 1, 1991) regarding the contested election of Karlen Christensen-Jones. Karlen Christensen-Jones withdrew her challenge and the matter became hereby moot.

PERSONAL PRIVILEGE

Rep. Whiteman rose on a point of personal privilege and read the following letter to the members of the House of Representatives:

Dear Speaker Barkis and Honorable Members of the House:

The issue of the day is who will be seated as the representative from the 59th Kansas House district. The process has been long and difficult. To vote is an important duty and the most important right in our democracy. Preserving this right requires that our election laws and voting procedures be clear.

I pursued this matter because I believed that election laws and procedures had been misinterpreted in the recount and judicial review process. As a result the will of the people in the 59th district remained in question.

The 59th district election was counted or reviewed four times. Each time the count changed. Each time, fair minded people differed in their understanding of the intent of the Kansas election laws. Even in the House, in a committee balanced between the parties, a judge's interpretations of the law as it applied to 11 separate ballots were overturned.

If we want fair elections, we must have clear laws. I urge you as a House to address this problem this session, so that no candidates will have to face what I and Rep. Wells have faced.

On the matter of the 59th district race, I have been advised and I firmly believe that it is still possible to win this election on the floor. However, I have no desire for you to be put into the partisan storm that many believe would result.

For your sake and for the sake of the people of the 59th district, I ask you instead to get on with the business of government, addressing the programs of our new Governor and the legislative matters of your districts. I hereby withdraw my challenge.

While I am disappointed that I will not be serving with you this session, I have been assured and am certain that our laws will be made more fair as a result of my efforts.

Thank you for your sincere attention to this matter, and I wish each of you a productive session.

Very truly yours,
KARLEN CHRISTENSEN-JONES

PRESENTATION OF PETITIONS

The following petitions were presented and filed:

HP 2005, by Rep. Gregory, A petition urging that K.S.A. 21-3208 (2) should be repealed so as not to permit voluntary intoxication to be a defense to any crime, signed by Donna C. Douglas and 103 others from the Ft. Scott area.

REFERENCE OF BILLS AND CONCURRENT RESOLUTIONS

The following bills and resolutions were referred to Committees as indicated.

Appropriations: **HB 2086; SB 36, 37.**

Education: **HB 2085, 2090.**

Energy and Natural Resources: **HB 2088, 2097.**

Federal and State Affairs: **HB 2089; HCR 5003, 5004, 5005.**

Labor and Industry: **HB 2087.**

Pensions, Investments and Benefits: **HB 2092, 2093, 2094, 2095, 2096.**

Public Health and Welfare: **HB 2091.**

INTRODUCTION OF BILLS AND CONCURRENT RESOLUTIONS

The following bills and concurrent resolutions were introduced and read by title:

HB 2098, by Committee on Judiciary: An act concerning civil procedure; relating to redemption of real property; amending K.S.A. 60-2414 and repealing the existing section.

HB 2099, by Committee on Judiciary: An act concerning civil procedure; relating to garnishment, amending K.S.A. 1990 Supp. 60-718 and repealing the existing section, also amending Form No. 8a in the appendix of forms following K.S.A. 1990 Supp. 61-2605 and repealing the existing form.

HB 2100, by Committee on Judiciary: An act concerning adoption, relating to the proceedings to terminate parental rights, amending K.S.A. 1990 Supp. 59-2136 and repealing the existing section.

HB 2101, by Committee on Judiciary: An act concerning children in need of care; relating to notification of grandparents, amending K.S.A. 38-1562 and K.S.A. 1990 Supp. 38-1584 and 59-2129 and repealing the existing sections.

HB 2102, by Committee on Judiciary: An act concerning child support; extending such support through high school, amending K.S.A. 1990 Supp. 38-1121 and 60-1610 and repealing the existing sections.

HB 2103, by Committee on Pensions, Investments and Benefits: An act concerning the Kansas public employees retirement system; relating to postretirement benefit increase.

HB 2104, by Committee on Public Health and Welfare: An act providing for licensure of speech-language pathologists and audiologists; establishing a speech-

DAY

HOUSE OF REPRESENTATIVES,
February 1, 1991, 9:00 a.m.

Speaker pro tem Reardon in the

on verified illness.

nce and your care, for our
and indecisions, for our
race to face this day; Give
to raise our shortcomings;
us your stirring presence.
leaders of this world that
ing men and women may
of us peacemakers as we
en.

as received by the office of the
(1991) regarding the contested
Christensen-Jones withdrew her

lege and read the following letter

he House:

the representative from the 59th
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their understanding of the intent
n a committee balanced between
it applied to 11 separate ballots

laws. I urge you as a House to
lates will have to face what I and

Rules of Select Committee on Election Contests

Rule 1. No member of the committee shall communicate with the contestant or contestee or the attorney for either party upon any matter under consideration by the committee except during the public hearing conducted by the committee.

IN THE DISTRICT COURT OF COWLEY COUNTY
STATE OF KANSAS
SITTING IN WINFIELD

1			
2			
3			
4	DANNY P. JONES,)	
5)	
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Petitioner,

vs. Case No. 94 C00201 W

JOE D. SHRIVER,

Contestee.

VOLUME I
TRANSCRIPT OF PROCEEDINGS,
taken before the HONORABLE STEPHEN D. HILL, at Winfield,
Kansas, on the 27th and 29th days of December, 1994
at 9:00 a.m. and 10:00 a.m. respectively.

A P P E A R A N C E S :

The Petitioner appeared by his counsel,
Mr. Douglas P. Witteman of Patterson, Nelson, Nolla &
Witteman, L.C., 8100 East 22nd Street North, Building 800,
Suite 102, Wichita, Kansas - 67226; and Eric K. Rucker,
Dickinson County Attorney, PO Box 696, Abilene,
Kansas - 67410.

The Contestee appeared by his counsel,
Mr. Victor W. Miller, Attorney at Law, 700 Southwest
Jackson, Suite 404, Topeka, Kansas - 66603.

I N D E X

WITNESSESFor the Petitioner DX CX RDX RCX FRDX FRCX

Mr. H. Joe Gaston

29

36

Ms. Barbara E. Warren

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Ms. Donna Schalk

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Mr. Walter E. Simmons

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Mr. Curtis Richards

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Ms. Donita J. Richards

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Ms. Ruby Schalk

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Mr. Russell Keefe

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Ms. Filomena Garcia

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Ms. Edith J. Dickerson

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133

Ms. Barbara E. Warren

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161

Ms. Moddie G. Graham

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172

Ms. Barbara E. Warren

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184

186

Ms. Carmelita Clarkson

187

Ms. Doris E. Madden

192

Ms. Dorothy L. Bohrer

200

205

Ms. Barbara E. Warren

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Mr. Hal Bumgarner

226

Ms. Barbara E. Warren

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	<u>DX</u>	<u>CX</u>	<u>RDX</u>	<u>RCX</u>	<u>FRDX</u>	<u>FRCX</u>
1						
2	Ms. Jackie Muhlheim	268	278			
3	Ms. Catherine Koenke	281	287	287	288	289 291
4	Ms. Ruby Schalk	315	321			
5	Ms. Barbara E. Warren	323	326	330	334	334
6						
7	<u>For the Contestee</u>					
8	Ms. Julie Coldwell	368				
9	Ms. Barbara E. Warren	373				
10	Mr. Robert D. Wilson	377	387			
11	Ms. Barbara E. Warren	395	407	414		
12						
13	<u>Rebuttal</u>					
14	Ms. Donna J. Athearn	417	421	425		
15	Ms. Virginia B. Boyd	426	429	430	430	
16	Ms. Penny Dorrell	437	444			
17	Mr. Mike Dorrell	447	455	459		
18	Ms. Gladys Weigand	461	467			
19	Mr. Norman Weigand	469	474			
20	Ms. Barbara Warren	475	484	485		
21						
22	<u>Surrebuttal</u>					
23	Ms. Cheryl Wilson	487				
24	Mr. Robert Wilson	489	489			
25	Mr. H. Joe Gaston	495				

EXHIBITS

	<u>MARKED</u>	<u>OFFERED</u>	<u>ADMITTED</u>
<u>For the Petitioner</u>			
Nos. WI 1-9	Previous	34	34
	to trial		
Nos. RB 1-4	Previous	35	36
	to trial		
Nos. 1A - 1E	48	57	59
No. 2F	131	130	130
No. 3A	136	152	152
Nos. 3B - 3D	144	152	152
No. 4	136	153	153
No. 5	136	153	153
No. 6	136	153	153
No. 7	155	155	157
No. 8	179	183	184
Nos. 9A - 9D	179	183	183
Nos. 10A - 10D	199	208	208
No. 11	199	208	208
No. 12	199	208	208
No. 13	199	208	208
No. 14	199	208	208
Nos. 15A - 15E	199	204	205
No. 16	199		

For the Petitioner

Nos. WI 1-9

Previous

34

34

to trial

Nos. RB 1-4

Previous

35

36

to trial

Nos. 1A - 1E

48

57

59

No. 2F

131

130

130

No. 3A

136

152

152

Nos. 3B - 3D

144

152

152

No. 4

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No. 5

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No. 6

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No. 7

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No. 8

179

183

184

Nos. 9A - 9D

179

183

183

Nos. 10A - 10D

199

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No. 11

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No. 12

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No. 13

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No. 14

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Nos. 15A - 15E

199

204

205

No. 16

199

	<u>MARKED</u>	<u>OFFERED</u>	<u>ADMITTED</u>
1			
2	No. 17	199	
3	No. 18	199	
4	Nos. 19A - 19C	199	208
5	Nos. 20A - 20H	199	208
6	No. 21	199	208
7	Nos. 22A - 22D	199	208
8	Nos. 23A - 23D	199	208
9	No. 24	199	208
10	No. 25	199	208
11	No. 26	255	
12	No. 27	268	279
13	No. 28	268	279
14	No. 29	268	
15	No. 30	268	
16	No. 31	268	
17	No. 32	268	
18	Nos. 33A - 33E	268	
19	No. 1F	357	
20	No. 15F	525	
21			
22	<u>For the Contestee</u>		
23			
24	No. 1A	58	59
25	No. 2	265	266

	<u>MARKED</u>	<u>OFFERED</u>	<u>ADMITTED</u>
1			
2	No. 3	327	
3	No. 4	370	381 385
4	No. 5	370	381 385
5	No. 6	370	381 385
6	No. 7	370	381 385
7	No. 8	370	381 385
8	No. 9	370	381 385
9	No. 10	370	381 385
10	Nos. 11A - 11C	370	372 373
11	Nos. 12A - 12C	370	372 373
12	Nos. 13A - 13E	370	372 373
13	Nos. 14A - 14D	370	372 373
14	Nos. 15A - 15C	370	372 373
15	Nos. 16A - 16C	370	372 373
16	No. 17	370	372 373
17	No. 18	370	372 373
18	No. 19	414	415 415
19	No. 20	414	415 415
20			

(REPORTER'S NOTE: All exhibits not admitted are in the custody of the county clerk with the exception of 1F and 15F which were marked in-camera.)

CERTIFICATE OF CERTIFIED SHORTHAND REPORTER

557

1 MR. WITTEMAN: Your Honor, I'm Doug
2 Witteman, attorney for the contestant, Dan Jones. At this
3 time I think most of the parties and their attorneys, other
4 than myself, are out in the hallway with witnesses. It's
5 all a little bit disorganized with all the witnesses that
6 flooded in.

7 THE COURT: Well, let's get at least the
8 attorney or the attorneys in here. We'll just get
9 started. Then if you want to take a short recess, we can
10 do that.

11 MR. WITTEMAN: Very well.

12 THE COURT: I think I'll call the case
13 now. This is in the District Court of Cowley County,
14 Kansas, Danny P. Jones, contestant, versus Joe D. Shriver,
15 contestee. It's Case No. 94 C201 W. In this particular
16 case, the Court is sitting as a court of contest. I would
17 ask counsel if they would please enter their appearances at
18 this time.

19 MR. WITTEMAN: Your Honor, I'm counsel
20 for Mr. Jones, who appears in person, Douglas P. Witteman
21 and Eric Rucker at my side appearing on behalf of
22 Mr. Jones.

23 MR. MILLER: Thank you, Your Honor. The
24 contestee, Joe D. Shriver, appears in person and by and
25 through his attorney, Victor W. Miller.

1 THE COURT: Please be seated. My name is
2 Stephen D. Hill. I'm a district judge from the Sixth
3 Judicial District. I'm the administrative judge and have
4 been assigned here by the Supreme Court. I would ask the
5 parties if they have any objection to me proceeding with
6 this case, contestant?

7 MR. WITTEMAN: No, Your Honor.

8 THE COURT: All right.

9 MR. MILLER: None on the part of
10 contestee, Your Honor.

11 THE COURT: All right. Thank you. And
12 counsel, do you, both parties, stipulate that the venue is
13 properly in the Cowley County District Court at this time?

14 MR. WITTEMAN: We so stipulate.

15 MR. MILLER: We do as well, Your Honor.

16 THE COURT: All right. As a preliminary
17 matter, the parties have previously entered into a
18 stipulation, and I believe that's been filed, that certain
19 vote totals for Jones and Shriver were enumerated in your
20 stipulation and there is no contest with respect to those,
21 and that's 3 South, 6A, 1D, 2A, 2C, 2D, Liberty, Beaver,
22 Grant and Spring Creek and the vote totals are listed in
23 your stipulation, is that correct?

24 MR. WITTEMAN: Your Honor, the
25 stipulation was provided. We have not signed nor filed

1 that document. We would based on -- we would like a point
2 of clarification. Certainly those numbers we don't have a
3 problem with but with the definite understanding that, in
4 fact, there are legal votes contained therein, that those
5 votes, if determined to be illegal, should be deducted from
6 those numbers.

7 THE COURT: Well, Mr. Witteman, those
8 votes were not examined by the inspectors in this case,
9 were they?

10 MR. WITTEMAN: That is correct.

11 THE COURT: All right. You accept that
12 stipulation then, counsel?

13 MR. MILLER: Yes, Your Honor. I drafted
14 and proposed it.

15 THE COURT: All right. Very well. With
16 that proviso --

17 MR. WITTEMAN: With that proviso.

18 THE COURT: With that proviso, it will be
19 recognized and the Court will make no inquiry as to those
20 sacks of ballots. As I understand it, you have some
21 last-second matters you wish to attend to, is that
22 correct?

23 MR. WITTEMAN: That is correct, Your
24 Honor.

25 THE COURT: And you want a couple of

1 moments and desire to recess before we have opening
2 statements?

3 MR. MILLER: I don't know what counsel
4 has in mind, what matters they want to take up, but I think
5 one thing we can do either now or discuss it during a break
6 or take it up when the Court reconvenes, I think at this
7 point we ought to be ready to stipulate to almost all the
8 other precincts that the inspectors inspected, and the
9 numbers now match, which appeared to be the case before, so
10 I don't know as far as timing on that, but I think we can
11 dispose of the bulk of numbers at some juncture here early
12 on in the proceedings.

13 MR. WITTEMAN: I think that's probably
14 correct, Your Honor.

15 THE COURT: You wish to take a short
16 recess while you prepare those numbers and enter into the
17 stipulation for the record?

18 MR. WITTEMAN: Please, Your Honor.

19 THE COURT: Do you have any objection to
20 that, counsel?

21 MR. MILLER: No, Your Honor.

22 THE COURT: All right. Court will take a
23 short recess at this time. I'll probably reconvene in
24 about oh, 15 minutes, and then we'll have the stipulations
25 and the opening statements and presentation of any evidence

1 that the parties so desire.

2 MR. WITTEMAN: One other matter if I
3 could bring it to the Court's attention, we've been
4 notified by a witness that we subpoenaed today that she
5 will not be here today, and we, in fact, need her today and
6 we may need the Court's intervention in that regard.

7 THE COURT: We might have to take it up.
8 If there is nothing further, the Court will be in recess
9 according to my watch until 25 after.

10 (A brief recess was here had from 9:05 to 9:40 a.m.)

11 THE COURT: After the recess, are counsel
12 desirous of giving an opening statement?

13 MR. RUCKER: Your Honor, while it is not
14 the contestant's position at the current time to make an
15 opening statement, I believe that there were some
16 preliminary matters to be discussed before we proceed with
17 evidence.

18 THE COURT: That's true, and concerning
19 the report of the inspectors?

20 MR. RUCKER: Yes, Your Honor.

21 THE COURT: And let's have that now
22 before we have any opening statements. Do the parties have
23 some totals that they can agree to?

24 MR. MILLER: Not a total.

25 THE COURT: Well --

1 MR. MILLER: But I'll try to make it easy
2 for you, Your Honor.

3 THE COURT: All right.

4 MR. MILLER: I believe the parties can
5 stipulate to the report of the board of inspectors in all
6 the precincts and to the numbers that the board of
7 inspectors reported with the exceptions of --

8 THE COURT: There was a substitute
9 inspector, was there not?

10 MR. MILLER: Yes, Your Honor. For the
11 record, the contestee -- the Court had previously ordered
12 that the contestee's inspector be R.J. Wilson but he took
13 ill. A substitution was made with the consent of the
14 contestant. His name is Lee Gregg, spelled with three G's.

15 THE COURT: L double E, G-R-E double G,
16 is that correct?

17 MR. MILLER: Yes, Your Honor.

18 THE COURT: So noted. Is there any
19 objection on the part of contestant that Mr. Lee Gregg was
20 the inspector?

21 MR. WITTEMAN: No objection, Your Honor.

22 THE COURT: All right. Thank you.
23 Proceed.

24 MR. MILLER: As I indicated, we'll
25 stipulate to the report of inspectors with these

1 exceptions: The sack of ballots labeled write-ins, the
2 sack of ballots labeled resolution ballots, the sack of
3 ballots labeled hand count. And if I did not make a
4 mistake, I believe those to be the only exceptions to the
5 report of the inspectors.

6 MR. WITTEMAN: Your Honor, that would be
7 correct. In contestant's viewpoint, however, we would note
8 once again the same provisos which I do believe is
9 understood, the same about the letters contained therein
10 if, in fact, that is determined later and the group of
11 ballots noted as absentee ballots and challenged ballots
12 and also the hand-count ballots.

13 In not only the notice of contest but also the
14 amended notice of contest, we have raised particularly
15 separate issues and the hand counts, essentially all the
16 counts were 18 to 9 throughout and that the certification
17 once again at the board of inspectors, 17 to 9, is the
18 number we come up with and we just -- we still have
19 curiosity as to where that extra vote went.

20 The absentee ballots when originally counted and
21 canvassed on November 1 had approximately 14 more absentee
22 ballots that have ever been accounted for since, and that
23 is an issue we would like to explore and take evidence on
24 as well as the challenged ballots.

25 When they were originally canvassed on November

1 the 11th, there were 95 challenged ballots counted and
2 added to the total. Since that time, only 85 have been
3 able to be accounted for and we want -- we'll stipulate as
4 to all of these are in the sacks contained therein although
5 they are at least a preferential issue that needs to be
6 raised.

7 MR. MILLER: Just for the record, we
8 don't agree with anything he said about --

9 THE COURT: I understand.

10 MR. MILLER: -- about the discrepancies
11 of the numbers and most particularly that the hand count
12 has always been 18 to 9. The board of inspectors certified
13 the hand count to be 17 for Jones, 9 for Shriver. It
14 hadn't always been 18 to 9.

15 MR. WITTEMAN: That's correct, and if I
16 misspoke, that certainly was the verified number but at the
17 previous counts, as the Court's well aware, there have been
18 numerous counts done in this thing, it was 18 to 9 prior to
19 that.

20 THE COURT: Do you have a report from the
21 board of inspectors?

22 MR. MILLER: I thought the Court had
23 that, Your Honor. What I have, if you don't have it, are
24 individual pages for each precinct that were made copies,
25 and I thought one was -- they are probably with the

1 ballots. Is Mr. Gaston here?

2 MR. GASTON: They are right here in the
3 envelope.

4 MR. MILLER: I think we have a report for
5 you, Your Honor.

6 THE COURT: That needs to be filed with
7 the Court.

8 MR. MILLER: Your Honor, I'm going to
9 hand you what's been marked as WI which I think denotes
10 write-in. That's an envelope with some ballots inside it
11 that were pulled and identified, another envelope marked
12 with a label entitled RB which appears to be resolution
13 ballots that were pulled and questioned by the inspectors,
14 another envelope which I'll let you open. It says for the
15 judge.

16 THE COURT: The record should reflect
17 that Petitioner's Exhibit WI and Petitioner's Exhibit RB
18 have been sealed and not opened yet by this Court, and
19 we'll do so when the time's right.

20 MR. MILLER: If you'll look in the
21 envelope for the judge, I believe that to be the report of
22 inspectors that we referenced.

23 THE COURT: Correct. In the envelope
24 marked for judge are the board of inspection logs with
25 various precincts, with vote totals for various precincts

1 and one called resolution ballots and hand count, and those
2 are filed with the Court at this time. Are there any other
3 preliminary matters?

4 MR. WITTEMAN: If I could have a moment,
5 Your Honor, to confer with counsel.

6 (An off-the-record discussion was here had.)

7 MR. WITTEMAN: I think as a preliminary
8 matter, Your Honor, given the Court's instructions last
9 Wednesday during a conference call between counsel and the
10 Court, we would like to note for the record per the Court's
11 instructions, we have added four names to the list of our
12 second amended, or excuse me, to our amended notice of
13 contest which counsel have been advised of three and then
14 this morning was advised of the fourth although the letter
15 was faxed last night after 10 o'clock.

16 THE COURT: What was that fourth name?

17 MR. WITTEMAN: Fourth name was Walter
18 Eugene Simmons.

19 THE COURT: S-I double M-O-N-S?

20 MR. WITTEMAN: That is correct, Your
21 Honor.

22 THE COURT: Thank you.

23 MR. WITTEMAN: And given the fact that we
24 conscientiously advised counsel as soon as we were aware of
25 these, we would ask that the Court allow the oral amendment

1 of our notice, amended notice of contest to include these
2 before the Court with the understanding that, in fact, our
3 investigation is ongoing and if, in fact, other voters are
4 identified that fall within the categories at the earliest
5 moment we are aware, we would advise the Court and ask they
6 be added, too.

7 THE COURT: There will come a time that
8 we'll call a close to this.

9 MR. WITTEMAN: I understand.

10 THE COURT: Because there needs to be
11 some final determination made of this. Your response to
12 his amending his amended notice by the addition of that
13 name?

14 MR. MILLER: No formal objection.

15 THE COURT: All right. That will be
16 sustained. Counsel, you have filed an answer to the
17 amended notice of contest and did you wish to speak to that
18 at this point?

19 MR. MILLER: No, Your Honor. I think I
20 filed it as a matter of writ. I don't believe any
21 additional effort is incumbent upon me at this point.

22 THE COURT: Okay. Counsel?

23 MR. WITTEMAN: Your Honor, we would
24 object to the filing of that amended notice of contest, or
25 excuse me, the amended answer on the basis that we feel the

1 Court's instructions as of last Wednesday were quite clear
2 that if, in fact, counsel did -- as I understood for either
3 party, counsel did, in fact, identify on our part
4 additional names to add to our list of votes that we
5 believe were legally cast or legally cast and not counted,
6 that forthwith we were to advise other counsel of such, and
7 I believe in regard to the Court's comments during that
8 telephone conference that neither party would be allowed to
9 be blindsided.

10 And I felt, and the Court can certainly correct
11 me if I'm wrong, that the instruction was given to
12 contestee's counsel, make the same indications and advise
13 other counsel of anything if he did, in fact, intend to
14 amend his answer and take a different position than what he
15 previously had which was, in fact, there were no legal
16 votes cast and there were no legal votes cast and not
17 counted.

18 That appears -- and I would advise the Court and
19 present the Court, which as I did indicate to the Court,
20 that we faxed a copy of a letter last night as soon as we
21 were aware of Mr. Simmons, both to counsel and to the Court
22 at 10:45 p.m. which I think makes it quite clear that we
23 have done everything to follow the Court's directions in
24 regard to advising counsel at the quickest possible moment
25 of any additions and/or amendments if it's to be

1 necessary.

2 Simply stated, this morning we're now handed an
3 amended notice of contest wherein the contestee takes a
4 different position than he has since day one of this
5 contest.

6 THE COURT: Well, technically, the answer
7 to your amended notice.

8 MR. WITTEMAN: I apologize if, in fact, I
9 misstated that. We would ask, in fact, that the amended
10 answer not be -- not be filed on the basis of the Court's
11 direction.

12 THE COURT: You wish to respond,
13 counsel?

14 MR. MILLER: Yes, Your Honor. And I know
15 that counsel has not had a -- has not had ample opportunity
16 to review my amended answer, but if he would read it, our
17 position has not changed. We still at this moment contend
18 that there have been no illegal votes cast, and if my
19 answer indicates that, until such time as the Court finds
20 that there have been illegal votes counted that should not
21 have been counted or until such time as the Court finds
22 that there are legal votes that have not been counted that
23 should be, our position remains the same.

24 At such time as that occurs -- and we've included
25 that in our answer, at such time that either of those

1 events should occur, we wish our position to be reflected
2 that we intend to offer our own evidence of illegality.
3 There are a lot of questions surrounding whether or not a
4 vote was quote illegal, whether or not if it was illegal,
5 it should not be or should be extracted from the present
6 totals and until such time that issue's addressed, we are
7 not ready to say as a matter of law that any of these
8 people cast illegal votes.

9 As far as counsel's extraordinary efforts to keep
10 the contestant's counsel informed of their efforts, Your
11 Honor, I would simply inquire as to why it is if we are
12 being given information as to their position on legal votes
13 and illegal votes, why it is so many of the people that I
14 talked to who are on my list indicate that they have
15 already visited with counsel of the contestee and indicated
16 the same information to me that they had -- that they
17 indicated to the contestee why it is that as the Court
18 instructed, we've not been provided with all names rather
19 than just the names that they chose to provide.

20 THE COURT: I believe you probably
21 misspoke when you said the contestee. You represent the
22 contestee.

23 MR. MILLER: I'm sorry. Yes, thank you.

24 THE COURT: Well, under the statute, he
25 is permitted to file an answer, and I think it's fair that

1 he be permitted to file an answer to your amended notice.
2 I think I'll overrule your objection and we'll proceed
3 accordingly.

4 MR. WITTEMAN: With that understood, Your
5 Honor, we may need to request, and will do everything to
6 avoid such, but some extra time to take a look at some of
7 this information that's just been received.

8 THE COURT: I understand that and that
9 could be an ongoing concern for this entire court of
10 contest. Are there any other preliminary matters that need
11 to be adressed?

12 MR. RUCKER: Yes, there are, Your Honor,
13 at least one. We had issued a subpoena for one of the
14 witnesses to be here today. We have had telephonic
15 communications with this one witness which has failed to
16 show today. There may be others. This particular witness
17 is indispensable to our case.

18 I believe that opposing counsel has also had the
19 opportunity to speak with this particular witness, and
20 while we are in agreement with certain aspects of her
21 testimony, still some indispensable aspects of her
22 testimony must be heard by the Court for the Court, in our
23 opinion, to make an appropriate decision, and we are asking
24 the Court to assist us in every way possible to bring this
25 particular individual before the Court.

1 THE COURT: And what is that witness's
2 name?

3 MR. RUCKER: Moddie, M-O-D-D-I-E, middle
4 initial G, last name Graham, G-R-A-H-A-M. I believe her
5 current address is 307 South First in Arkansas City.

6 THE COURT: How do you spell Herst?

7 MR. RUCKER: First. I'm sorry, Your
8 Honor.

9 MR. MILLER: F-I-R-S-T.

10 THE COURT: I'm sorry, First.

11 MR. RUCKER: And I have no telephone
12 number for her.

13 THE COURT: And what was the reason that
14 she's not appearing today in response to the subpoena?

15 MR. RUCKER: I would have to allow
16 cocounsel to answer that given that he corresponded.

17 MR. WITTEMAN: Having spoke to her this
18 morning here at the Court -- and I do have a phone number,
19 Your Honor, 442-4104, which she gave to me. Miss Graham
20 just indicated that she doesn't have any interest in this
21 matter, neither one of these candidates will do anything
22 for her.

23 She's sick, can't get out of the house, although
24 she was calling me from someone else's house at that
25 time getting ready to return to her home, and on the

1 basis of the tenure of the conversation, I would say that
2 Miss Graham doesn't want to be here.

3 MR. MILLER: We might ask if she's here,
4 Your Honor.

5 THE COURT: Moddie Graham present?
6 (No response.)

7 THE COURT: I don't see any return on the
8 service.

9 MR. WITTEMAN: We were advised this
10 morning, Your Honor, the sheriff's department, in fact, had
11 made several last minute services. She indicated she does
12 have the subpoena. That's why she called me. I
13 accompanied it with a letter with my phone number. She has
14 been served.

15 THE COURT: Well, you are entitled to
16 some assistance. I'll issue an order to the sheriff to
17 provide some assistance to this lady so her attendance can
18 be compelled.

19 MR. WITTEMAN: Thank you.

20 THE COURT: Any other preliminary
21 matters?

22 MR. RUCKER: No, Your Honor.

23 MR. MILLER: I can't think of any, Your
24 Honor. I'm sure I'm overlooking something.

25 THE COURT: Do you wish opening

1 statements?

2 MR. WITTEMAN: No, Your Honor, we do
3 not. For the sake of judiciousness, we plan to put on as
4 much possible testimony as we can today.

5 MR. MILLER: Just a brief one, Your
6 Honor.

7 THE COURT: Very well.

8 MR. MILLER: I think at this point this
9 will probably go without saying, but for the benefit of the
10 record, every issue, and there will be a multitude of
11 issues, both factual and legal, that are raised in these
12 proceedings, every single issue, some of which may appear
13 to be the most minute I think can safely be placed in the
14 category of while minute, particularly critical.

15 We ask that the Court with scrutiny apply the
16 laws of the State of Kansas as they are drafted and as were
17 intended by the legislature in each and every case that
18 issues arise on each and every ballot involved in this
19 case.

20 We caution the Court from departing particularly
21 from the statute because once that occurs and as this case
22 unfolds, I believe the Court will see clearly the points
23 I'm making. Once that occurs, there will be no end to
24 ignoring the clear wording of the statutes relating to
25 election laws of this state.

1 We simply ask that before that bubble is burst
2 that it be done so with the idea that there will be a very
3 difficult time drawing a distinction between one particular
4 set of facts nad another as it relates to ignoring the
5 clear wording of the statute.

6 With that, Your Honor, the only thing that I
7 would add is that while it may appear to the Court and to
8 the public in this matter that there has been an
9 extraordinary number of what might be termed mistakes, we
10 believe that elections and the complexities and the
11 situations in which they arise relate to crunch time, the
12 multitude of votes that have to be cast and the multitude
13 of situations that arise that this is to be expected in any
14 circumstance relating to this many ballots cast in a
15 particular election.

16 There is to be expected that a human being, being
17 what he or she is, will error and that is a matter of
18 course. Even in the best scenario, there will be errors
19 committed because of the nature of the election and not
20 because it reflects poorly on the professionalism of those
21 officials that conducted this election. We maintain this
22 position.

23 At this moment we expect to maintain that
24 position when all the evidence is completed that the people
25 in Cowley County and the 79th District should be grateful

1 for the level of professionalism that was exercised and
2 continues to be exercised by their public officials in this
3 particular race. Thank you, Your Honor.

4 THE COURT: As I understand it, the
5 matter that the Court is to decide here today, besides
6 making the record, is to determine what number of legally
7 cast votes each of the candidates in the contested election
8 for the 79th District, House of Representatives received.
9 Then, pursuant to the statute, I'll direct the clerk of the
10 court to submit my findings and conclusions on that issue
11 and all of the records and everything else to the House of
12 Representatives for their consideration.

13 I believe we'll hear from the contestant at this
14 time.

15 MR. RUCKER: Your Honor, as a preliminary
16 matter that was overlooked, we are asking for sequestration
17 of the witnesses before we proceed and then we'll call our
18 first that's in order.

19 THE COURT: Well, call your first
20 witness. If you are not the first witness called, I would
21 ask that you have a seat outside until you are called to
22 testify, and the parties have requested that you not
23 discuss your testimony with any other witnesses until such
24 time as you are permitted to by the Court, so call your
25 first witness.

1 MR. MILLER: I'm not sure everyone in the
2 audience knows whether or not they are going to be called
3 as witnesses or not.

4 THE COURT: Well, name your witnesses
5 that you know you are going to call.

6 MR. RUCKER: Donna Schalk, Ruby Schalk,
7 Edith Dickerson, Filomena Garcia, Russell Wayne Keefe, Hal
8 Bumgarner, Moddie Graham, Curtis and Donita Richards,
9 Barbara Warren, Joe Gaston, Walter Eugene Simmons, Dorothy
10 Boorer, could be Bohrer. I don't remember the
11 pronounciation. Maurine Prater, Donna Swartz, Virginia
12 Boyd.

13 If I didn't say Maurine Prater, I intended to.
14 Janice Stacy, Doris Madden, Charrie Vaden, Betty Mulner,
15 Lula Bracken and Bernice Rush, Sara Ward, Jacqueline
16 Muhlheim, Virginia Boyd and Cathy, K-O-E-N-K-E. I believe
17 that's an exhaustive list, Your Honor. However, again,
18 there will be modifications to your list.

19 THE COURT: Who's your first one?

20 MR. RUCKER: Joe Gaston.

21 MR. MILLER: Do you want mine, Your
22 Honor?

23 THE COURT: Yes.

24 MR. MILLER: I don't know if any of these
25 people are here, but Kirk Branscum, Penny Dorrell, Michael

1 Dorrell, Phillip Coplen, that's spelled C-O-P-L-E-N. Mary
2 J. Lenix, L-E-N-I-X, Ray Vick, spelled V-I-C-K. Gladys
3 Weigand and Norman Weigand, spelled W-E-I-G-A-N-D, and
4 Dorrell by the way is D-O-R-R-E-L-L.

5 Branscum is B-R-A-N-S-C-U-M. Alex Garcia, Sandy
6 Jones, Jack McVey and I intend to call the contestant, but
7 I believe he's entitled to be here notwithstanding a motion
8 to sequester.

9 THE COURT: Okay. If your name was
10 called, you have to wait outside until you are called to
11 testify.

12 H. JOE GASTON,
13 of lawful age, having been first duly sworn on his oath to
14 state the truth, and nothing but the truth, testifies as
15 follows:

16 THE COURT: Mr. Rucker, you may inquire.

17 MR. RUCKER: Your Honor --

18 THE COURT: I'll remind counsel that we
19 have the one-counsel rule, so if you examine, you get to
20 make the objections. He examines, he gets to make the
21 objections. There's just one counsel on the other side, so
22 one-counsel rule applies for him.

23 MR. RUCKER: Yes, sir.

24 THE COURT: All right. You may proceed.

25 MR. RUCKER: Opposing counsel is not

1 present in the courtroom.

2 THE COURT: He had his back to you.

3 MR. RUCKER: Yes, he is.

4 DIRECT EXAMINATION

5 MR. RUCKER:

6 Q. If you will, state your full name.

7 A. My name is H. Joe Gaston.

8 Q. Your position, sir?

9 A. Cowley County clerk.

10 Q. When were you elected to that position?

11 A. Last time I think it was in November of 1989.

12 Q. All right. As part and parcel of being elected
13 county clerk, you are also the county election officer, is
14 that not accurate?

15 A. That's true.

16 Q. All right. As part of your responsibilities of
17 running elections in the jurisdiction of Cowley County, do
18 you have assistants that assist you in that regard?

19 A. We do.

20 Q. All right. Is there one individual in your office
21 that is primarily responsible for assisting you and
22 conducting the elections in Cowley County?

23 A. Barbara Warren, who is our executive secretary and
24 is very professional and very learned along the election
25 line.

1 Q. All right. She participated in all aspects of the
2 conduction of this particular election in 1994 in the 79th
3 District?

4 A. Yes, sir.

5 Q. On a day-to-day basis, Mr. Gaston, who works with
6 the challenged ballots in your office?

7 A. Barbara Warren primarily. However, with the time
8 constraints and so forth in this election, why, practically
9 everybody in the office works some towards it.

10 MR. RUCKER: I have no further questions
11 of the witness at this time.

12 THE COURT: You want to lay a foundation
13 with respect to these exhibits since he's here?

14 MR. RUCKER: Certainly.

15 MR. RUCKER:

16 Q. I would hand you, Mr. Gaston, what has been
17 identified on the outside of the envelope as write-ins,
18 Exhibit WI 1 through 9. Would you tell the Court what the
19 contents of that particular manila envelope is.

20 A. The inspectors who inspected the ballots found some
21 that they wondered about and so forth and they put them in
22 sealed envelopes for the judge, and there was two of them I
23 believe.

24 Q. This particular exhibit, was it sealed in your
25 presence?

1 A. Yes, it was sealed in my presence, and it was put in
2 the vault and has remained in the vault until we brought it
3 up a few moments ago.

4 MR. RUCKER: Your Honor, for the record,
5 this particular petitioner's record has already been
6 identified as WI 1 through 9 as indicated. I'm handing it
7 to counsel.

8 THE COURT: Any objection to its
9 admission?

10 MR. MILLER: Not till I see what's in
11 it. I need to see what's in it before I can pose an
12 objection or waive its admission.

13 MR. RUCKER:

14 Q. At the time it was sealed -- on your inspection
15 currently, is it in substantially the same condition it was
16 in when it was sealed in your presence?

17 A. Yes, sir.

18 Q. When's the date and time it was sealed, sir?

19 A. Is it on here?

20 Q. I'm asking for your recollection. I don't believe
21 that it is, Mr. Gaston.

22 A. No, huh-uh. When we had inspectors, what day was
23 that, and it's upon their receiving the ballots from this
24 particular -- from the write-ins when they were making the
25 inspection of the write-ins. Whatever date that was.

1 Q. All right.

2 MR. RUCKER: I would ask the Court's
3 permission to break the seal and the Court may do so.

4 THE COURT: I'm not going to break the
5 seal. I'm going to open it from a different area. Let the
6 record reflect that I'm opening the exhibit, Petitioner's
7 Exhibit WI, and leaving the seal intact.

8 MR. RUCKER:

9 Q. Now I would hand you what has been opened by the
10 Court, and again, is identified as Petitioner's Exhibit
11 WI. Would you relate to the Court and to counsel what the
12 contents of the particular exhibit is.

13 A. This is particular ballots that examiners were
14 looking at and thought maybe the judge should make the
15 decision on them rather than to add them in. In particular
16 here's a 78th District ballot that there is a write-in
17 addenda on, and here's one, two, three along these lines
18 and another ballot here to where the write-in oval has been
19 darkened but there is nobody wrote in for it, and there is
20 two, three, four, five, six ballots along those lines, and
21 the other three are write-ins for the 78th.

22 MR. MILLER: Your Honor, we would have no
23 objection to the introduction of what's been marked
24 Petitioner's Exhibit WI 1, 2, 3, 4, 5, 6, 7, 8, 9,
25 indicating there are nine individual documents individually

1 marked.

2 MR. RUCKER:

3 Q. And again, that is the contents of the envelope?

4 A. Yes.

5 Q. These have been individually marked 1 through 9, is
6 that not accurate?

7 A. Yes.

8 Q. So when you were referring earlier, Mr. Gaston, to
9 groups of ballots, you were referring to the nine exhibits
10 that Mr. Miller has referred to as being individually
11 marked, is that not accurate?

12 A. That's right.

13 Q. In fact, there are one, two, three, four, five, six,
14 seven, eight, nine, and I would ask that you identify each
15 and every one of them as being individually identified as
16 1 through 9.

17 A. Yes, they are.

18 Q. And were these originally identified in your
19 presence?

20 A. Yes, they were.

21 Q. All right. And are they in substantially the same
22 condition as they were?

23 A. They have not been touched.

24 Q. Other than for the sticker?

25 A. That's right.

1 Q. All right. Which is the petitioner's exhibit.

2 MR. RUCKER: We'd offer WI 1 through 9
3 into evidence, Your Honor.

4 MR. MILLER: And again, no objection,
5 Your Honor.

6 THE COURT: It will be admitted.

7 MR. RUCKER:

8 Q. I have in my hand what has been identified as
9 resolution ballots, RB 1, 2, 3, 4, supposedly enclosed in a
10 large manila envelope, and I ask you to identify the
11 envelope.

12 A. These are question ballots that the inspectors
13 sealed in the envelope at the time of inspection.

14 Q. All right. And it is sealed, is that accurate?

15 A. Very true.

16 Q. How is it sealed and how is it identified?

17 A. Petitioner's Exhibit RB. All the inspectors have --
18 RB and all the inspectors have initialed it.

19 MR. RUCKER: I'll hand it to counsel,
20 Your Honor.

21 MR. MILLER: Don't have any comment until
22 it's opened.

23 MR. RUCKER: All right. Then I would ask
24 the Court to open the resolution ballot envelope.

25 THE COURT: Let the record reflect that

1 the Court is opening Petitioner's Exhibit RB. I'm
2 attempting to do so without disturbing the seal that's been
3 placed on there by the inspectors.

4 MR. MILLER: We wouldn't have any
5 objection, Your Honor, to the introduction of what's been
6 marked Petitioner's Exhibit RB 1, RB 2, RB 3 and RB 4,
7 being four individual documents individually marked.

8 MR. RUCKER:

9 Q. I would still ask, Mr. Gaston, whether or not you
10 can identify the individual ballots that have been referred
11 to by counsel as RB --

12 A. RB 1, 2, 3 and 4.

13 Q. All right. And they were contained inside the
14 larger manila envelope?

15 A. They were contained inside the larger manila
16 envelope and sealed by the inspector.

17 Q. All right. Are they, sir, upon your inspection, in
18 substantially the same condition they were in when they
19 were placed inside the larger manila envelope after the
20 inspectors concluded the inspection of ballots last week, I
21 believe Thursday?

22 A. Last Thursday, that's correct.

23 MR. RUCKER: I would offer Exhibits RB 1
24 through 4 and the larger manila envelope into evidence,
25 Your Honor.

1 MR. MILLER: Again, no objection.

2 THE COURT: Will be admitted.

3 MR. RUCKER: Your Honor, I have no more
4 questions of this particular witness at this particular
5 time.

6 THE COURT: You may cross-examine.

7 MR. MILLER: Thank you, Your Honor.

8 MR. RUCKER: Your Honor, I would reserve
9 the right to recall this witness at a later time.

10 THE COURT: Certainly.

11 CROSS-EXAMINATION

12 MR. MILLER:

13 Q. I would take it you know more than what you've
14 already testified to then?

15 A. I hope so.

16 Q. Mr. Gaston --

17 MR. MILLER: Your Honor, I'd ask if I
18 could look over the witness's shoulder. It might --

19 THE COURT: If he doesn't find it --

20 MR. MILLER: Do you find it
21 objectionable?

22 THE WITNESS: No.

23 THE COURT: All right.

24 MR. MILLER: We've gotten to be close
25 friends, Your Honor.

1 MR. MILLER:

2 Q. You said something about the 78th District on some
3 of these ballots. Would you identify which ones you were
4 referencing when you referenced the 78th District?

5 A. It was Write-ins 1, 2, 3. These were all three
6 ballots that were in the 78th District and there was a
7 write-in candidate on these ballots. When we looked at the
8 write-ins, the sack of write-ins had 78th and 79th
9 District, and when they were looking through the 78, they
10 found these particular write-ins.

11 Q. So it's clear to everyone, there is nothing improper
12 about that kind of thing occurring, is there?

13 A. No, none whatsoever.

14 Q. When the ballots are counted -- well, let's
15 establish this. In Cowley County, there are how many
16 legislative districts?

17 A. Two, 78 and 79th.

18 Q. Two districts numbered 78 and -9. The contest of
19 these proceedings is with regard to the 79th District?

20 A. Very true.

21 Q. Who were the candidates for the office of State
22 Representative for the 78th District?

23 A. Was Greta Hall Goodwin and she was running unopposed
24 and there was -- under these circumstances, why, there is a
25 place for a write-in and that's what happened.

1 Q. Thank you. Would you explain to the Court how it is
2 that we have before us ballots for the 79th District and
3 ballots for the 78th District. At some juncture apparently
4 these differing ballots have been comingled. Would you
5 explain to the Court how that occurs in the ordinary course
6 of election.

7 A. When we run the ballots through the machine, it will
8 kick out the write-ins no matter what district it is, and
9 they were all sealed together and that is the reason why we
10 have 78th and 79th together.

11 Q. Now tell me what you are referring to when you say
12 the machine.

13 A. In other words, we count our ballots on an AIS 315
14 and when the -- we turn on a key telling us and the machine
15 will kick it out, kick the ballots out if there is
16 write-ins on it so we can inspect it by hand.

17 Q. Any ballot that has a write-in for any race --

18 A. Any race.

19 Q. Let me finish. -- will get segregated from the
20 other ballots, that is, the office ballots are grouped in
21 bags according to their point of origin. Is that a fair
22 statement?

23 A. That's fair.

24 Q. And the bag is labeled as to the point of origin, be
25 it a precinct or a particular category such as absentee?

1 A. True.

2 Q. Any ballot that has a write-in actually written in,
3 the machine will separate those ballots and the ballots
4 become commingled across Cowley County if they've got a
5 write-in for any race?

6 A. That's a correct description.

7 Q. Now, there are three ballots that we've identified
8 and they are WI 1, WI 2 and WI 3. In each case under the
9 race for state representative it indicates 78th District,
10 and the only candidate printed on the ballot is Greta Hall
11 Goodwin?

12 A. True.

13 Q. In each of these three exhibits someone has written
14 in the name in one case Danny Jones for WI 1, Danny P.
15 Jones on WI 2 and Danny Jones on WI 3, correct?

16 A. Correct.

17 Q. It's my understanding that Mr. Jones was a candidate
18 for the 79th District, not the 78th.

19 A. Yes. His name was on the ballot for the 79th.

20 Q. Would it be fair to conclude then that these
21 writings have no legal significance as it relates to these
22 proceedings?

23 A. That's the way we judge them.

24 Q. Do you have any evidence or any knowledge as to
25 whether or not these ballot were, in fact, case by

1 qualified voters of the 79th District?

2 A. No, none whatsoever.

3 MR. RUCKER: Your Honor, any additional
4 questions along these lines I think goes beyond what the
5 Court's intentions were. We have a number of witnesses out
6 in the hall. We agreed earlier that we would not take up
7 the substantial matters related to these envelopes, to get
8 along with the witnesses and to get them out of here as
9 quickly as possible.

10 And again, I'm not trying to preclude Mr. Miller
11 from questioning this witness at another time. Mr. Gaston
12 is an employee of the courthouse and available at any
13 time. So is Barbara Warren who he has testified to, but
14 the balance of witnesses, Your Honor, will be unduly
15 inconvenienced unless we get on with it.

16 MR. MILLER: I, too, Your Honor, was
17 perplexed as to why this was offered as direct testimony at
18 this time.

19 THE COURT: I simply wanted some
20 foundation. I did not realize that you were going into an
21 extensive cross-examination on this.

22 MR. RUCKER: We didn't offer it, Your
23 Honor.

24 THE COURT: I asked him to do that so it
25 was for my benefit so I had control of them. You are

1 subject to recall. You intend to recall him anyway. If
2 you have any objection to that --

3 MR. RUCKER: Your Honor--

4 THE COURT: -- you can go into more
5 detail.

6 MR. RUCKER: Thank you, Your Honor.

7 THE COURT: These have been admitted into
8 evidence and that's basically what I wanted. You are
9 subject to recall so don't leave the courthouse today.

10 MR. RUCKER: Your Honor, if I might, the
11 contestant would like to call Barbara Warren to the stand.

12 THE COURT: Okay.

13 BARBARA E. WARREN,
14 of lawful age, having been first duly sworn on her oath to
15 state the truth, and nothing but the truth, testifies as
16 follows:

17 DIRECT EXAMINATION

18 MR. RUCKER:

19 Q. If you would, state your name and your address for
20 the benefit of the Court.

21 A. Barbara Warren, 1407 East Eleventh, Winfield.

22 Q. And Miss Warren, how are you employed?

23 A. As an administrative secretary in the county clerk's
24 office.

25 Q. And would you indicate to the Court what your duties

1 and responsibilities are, if any, with relation to
2 conducting of elections in Cowley County, Kansas.

3 A. Okay. I assist the county election officer, who is
4 Mr. Gaston, with the preparation of the ballots, preparing
5 polling places, supervising judges, filing candidates and
6 the processing of voter registration.

7 Q. And ma'am, are you more than anyone in the office
8 chiefly responsible for election preparation as well as any
9 assistance to the county board of canvassers after the
10 conducting of an election?

11 A. Under the county clerk, yes.

12 Q. All right. And in that regard, were you involved in
13 the reviewing of challenged ballots after the conducting of
14 the Tuesday election, November 8th, 1994?

15 A. I was one of the people involved, yes.

16 Q. All right. And in that review of the challenged
17 ballots, what, if any, contact did you have with a voter by
18 the name of Donna -- I'm going to say this, Your Honor,
19 then I'll spell it -- Schalk, S-C-H-A-L-K?

20 A. Okay.

21 Q. Also known as a/k/a --

22 A. Donna Lloyd.

23 Q. Donna Lloyd, yes, ma'am.

24 A. Okay. Do you have her challenged ballot?

25 Q. All of the challenged ballots I believe are in your

1 custodial care.

2 A. I have notes here. May I look at them?

3 Q. You may not only look at them, but if you have
4 Donna Schalk's challenged ballot --

5 A. I do over there but I do have my notes if I may look
6 at them.

7 Q. I believe, Miss Warren, it may become necessary for
8 the Court to actually physically see the challenged ballot
9 so I believe it will be in order for you to bring the
10 challenged ballot forward as well for presentation.

11 THE COURT: Is there more than one? You
12 want to wheel that up there where it's closer to you.
13 Well, one of these attorneys can do that. You don't have
14 to do that.

15 THE WITNESS: Okay. Is she in the count
16 box or do not count box?

17 MR. RUCKER: She is in the do not count
18 box.

19 THE WITNESS: She's in the short box,
20 yeah.

21 MR. MILLER: She may be making a move.

22 (An off-the-record discussion was here had.)

23 MR. RUCKER:

24 Q. When you challenge -- pardon me, strike that. When
25 a vote was challenged in the 79th Legislative District,

1 indeed when a vote is challenged in any legislative
2 district, what is the general procedure at the polls when a
3 determination is made to challenge a ballot?

4 A. Well, if a person's name is not in the book, that's
5 a primary reason.

6 Q. Okay. When you say book, ma'am, what do you mean?

7 A. Okay. The registration book.

8 Q. Why is it that registration book is required?

9 A. That's a listing of all the qualified voters in that
10 precinct.

11 Q. All right.

12 A. That we have registered at that time.

13 Q. What occurs if, in fact, an individual presents
14 themselves and they are not in the registration book?

15 A. The supervising judges have been instructed to
16 challenge the ballot.

17 Q. All right.

18 A. We cannot disenfranchise anybody from their right to
19 vote.

20 Q. What is the policy in regard to your office with
21 individuals presenting themselves and not being in the
22 policy book? Are they given the opportunity to vote?

23 A. Mr. Gaston has instructed the supervising judges to
24 go ahead and allow that person to vote rather than to send
25 them on to another polling place.

1 Q. All right. Is that also the occasion of when -- in
2 the case of a name change?

3 A. In the case of a name change, and with Donna Schalk,
4 I believe she was in the book under her former name. She
5 had gotten married as I recall.

6 MR. RUCKER: Miss Schalk, Your Honor, is
7 subject to cross-examination, is, in fact, a subpoenaed
8 witness.

9 A. We had her registered under her former name of Lloyd
10 and when she went in to vote, she had changed her name to
11 Schalk. The supervising judge had her fill out an
12 affidavit. However, the affidavit was not found.

13 Q. All right. When you say affidavit, for the benefit
14 of the Court --

15 A. Okay.

16 Q. -- what is it that you are indicating occurred?

17 A. It's an affidavit that allows the voter to vote at
18 the polls on election day. If they fill out the affidavit,
19 that allows the supervising -- that allows the county
20 clerk's office to change that person's registration.

21 Q. Do you recall the statutory citation in which that
22 affidavit is qualified?

23 A. 2316c, Subsection A I believe.

24 Q. Yes, ma'am. That is correct. 25-2316c,
25 Subsection A. And what is it -- in your estimation,

1 what is the gist of that? If they fill out that particular
2 affidavit, they are qualified, is that your testimony?

3 A. If they are qualified -- well, I believe the law
4 says that if they are a qualified voter at that address and
5 qualified other than the name and an active voter on the
6 active list, if the affidavit is filled out and signed that
7 they are allowed to vote and the county election officer
8 has the permission to sign the -- to change their
9 registration.

10 Q. What, to your knowledge, happened in Miss Lloyd's,
11 or pardon me, Miss Schalk's, a/k/a Miss Lloyd's ballot?

12 A. We did not find the affidavit.

13 Q. Well, first of all, was it challenged, ma'am?

14 A. It was challenged, yes, yes.

15 Q. All right. As a result of it being challenged, do
16 you recall why it was challenged?

17 A. It was challenged because of the name difference.

18 Q. How do you know that, ma'am?

19 A. The challenged ballot -- I think on the challenged
20 ballot, the explanation states that.

21 Q. All right. And was the ballot then counted?

22 A. No, it was not counted because we did not find the
23 affidavit.

24 Q. All right.

25 A. The supervising judges don't always put the

1 affidavits in the affidavit folder.

2 Q. All right. Was it subsequently found?

3 A. Yes, ma'am -- yes, sir.

4 Q. Okay. That's fine. And who subsequently found it,
5 Miss Warren?

6 A. Oh, I couldn't -- I couldn't tell you.

7 Q. All right.

8 A. I couldn't tell you. I'm sorry.

9 Q. That's all right. But it has been retrieved?

10 A. Uh-huh.

11 Q. All right. Could you produce the challenged ballot
12 as well as the affidavit you are speaking of for the
13 benefit of the counsel and Court.

14 MR. MILLER: Your Honor, when we -- she
15 finds that, can we have it marked, and there are several
16 documents stapled together. Can we have them separate and
17 individually marked, please.

18 THE WITNESS: Can I pull these others
19 that you guys have mentioned earlier, get those pulled?

20 MR. RUCKER: Ma'am, you can -- it's the
21 position of the contestant that you can do as you desire
22 outside of disposing of them.

23 THE COURT: Will you be asking questions
24 about those?

25 MR. RUCKER: Yes, Your Honor.

1 THE COURT: You might as well because
2 they'll be asking questions about those as well.

3 MR. MILLER: State for the record we
4 don't have it, Your Honor.

5 (Petitioner's Exhibit Nos. 1A - 1E were marked
6 for identification.)

7 MR. RUCKER:

8 Q. Miss Warren?

9 A. Yes.

10 Q. I was asking you some questions with regard to Donna
11 Schalk and whether or not her challenged ballot had been
12 counted. Had it been counted?

13 MR. WITTEMAN: I think perhaps maybe one
14 of the ways that you could determine that, ma'am, is look
15 at the envelope and see if it has been sealed.

16 A. Well, that's true.

17 MR. RUCKER:

18 Q. So it is sealed and it has not been counted, is that
19 right, ma'am?

20 A. That's true.

21 Q. And in regard to the affidavit change of name to
22 which you earlier referred to and the exhibit that has been
23 marked for -- and the specific exhibit that has, in fact,
24 been marked as 1B, would you indicate to the Court whether
25 or not in all aspects that particular affidavit of name

1 change fulfills the statutory requirements as outlined in
2 25-2316c, Subsection A?

3 MR. MILLER: Your Honor, before she
4 answers that, wage an objection. That calls for a legal
5 conclusion and I think the Court can reach that conclusion
6 after gathering facts.

7 THE COURT: I'll sustain it. Rephrase
8 it, counsel.

9 MR. RUCKER:

10 Q. To the best of your knowledge and experience you
11 have had in conductions of elections, did she sufficiently
12 fill out that affidavit?

13 MR. MILLER: Before she answers that,
14 Your Honor, I would object to the question being relevant.
15 Again, he can ask about the facts and the Court can reach a
16 conclusion, but her opinion is irrelevant at this point.

17 MR. RUCKER: May I respond?

18 THE COURT: You may.

19 MR. RUCKER: Foundation has already been
20 laid, Your Honor, that she, between the time that the
21 election was held on November 8th and the canvass was held
22 on the 11th of November, is one of the individuals
23 responsible for making determinations as to whether to
24 count these ballots or not. A determination of sufficiency
25 is, in fact, within her sphere of control.

1 THE COURT: Well, did you ask her that,
2 whether she determined that was sufficient?

3 MR. RUCKER: I asked whether or not it
4 had been counted, and she is the individual that determines
5 whether a ballot is counted or not.

6 THE COURT: You may inquire.

7 MR. RUCKER:

8 Q. If you would respond.

9 A. What was the question now?

10 Q. That's fine. What I asked was in your estimation --
11 first of all, just for clarification of the Court because
12 perhaps maybe it was oblique, between the time the election
13 is concluded on the 8th of November and the 11th of
14 November when the county board of canvassers come in and
15 canvass, the votes are challenged, ballots are taken a look
16 at by your office?

17 A. Yes, sir.

18 Q. By you specifically?

19 A. I am one of the people, yes.

20 Q. All right. That --

21 A. Works on that.

22 Q. And are the individuals that are tasked with the
23 responsibility of reviewing the challenged ballots, how it
24 is they go about the business of determining sufficiency?

25 A. Okay. First we check to see if that person is

1 registered to vote. We look at the explanations on the
2 envelopes.

3 Q. All right. As far as that first -- that first
4 criteria, are they registered to vote, was Miss Donna Lloyd
5 registered to vote?

6 A. She was correctly registered to vote as far as
7 address is concerned. She was a qualified elector.

8 Q. She was in the registration books of the precinct
9 that she was registered in, is that accurate?

10 A. Yes, sir.

11 Q. All right. Did she present herself to the polls at
12 the correct precinct on election day?

13 A. Yes, sir.

14 Q. Had she not been at the correct precinct on election
15 day, would she still have had the opportunity to cast a
16 ballot?

17 A. Yes, sir.

18 Q. All right. You've indicated that the reason that is
19 is that's the policy of the Cowley County clerk?

20 A. Yes.

21 Q. You indicated that earlier, did you not?

22 A. Yes.

23 Q. But she presented herself at the correct precinct,
24 did she not?

25 A. I can check that out real quick. Yes, she went to

1 the right polling place.

2 Q. All right. But she was challenged and you've
3 indicated the reason she was challenged was because of a
4 name change?

5 A. Uh-huh.

6 Q. You've already indicated to the Court when, in fact,
7 there has been a name change there is a specific affidavit
8 that one can fill out at the polls?

9 A. Yes, sir.

10 Q. You've also recited the statutory --

11 A. Yes.

12 Q. Did she fill out that affidavit to the best of your
13 knowledge?

14 A. In its entirety correctly.

15 Q. All right. Did she sign the document?

16 A. Yes, sir.

17 Q. All right. And is there any basis -- well, let me
18 ask, the ballot you've already testified was not counted.
19 Why was it not counted, ma'am?

20 A. Because we did not have that affidavit to
21 substantiate counting that ballot.

22 Q. All right. And how did the affidavit surface?

23 A. Well, we have two days' time in which to process
24 these challenged ballots.

25 Q. Yes, ma'am.

1 A. And supervising judges don't always put the
2 affidavits into the affidavit folder where it should be.
3 Subsequently, this affidavit was found after the canvassing
4 was done. This should have been counted if we had the
5 affidavit in hand, so she should be a valid voter.

6 Q. The affidavit that you referred to, is this a
7 document that you utilized in the regular course of
8 business that has been identified as 1B?

9 A. That will be attached to her permanent voting
10 record.

11 Q. All right. However, is it not your office that
12 prints these and distributes them to the individual poll
13 workers, the affidavits of name change?

14 A. Those go into the election supplies.

15 Q. All right. From the time that this affidavit of
16 name change was first discovered by your office, has it
17 changed in any substantial way?

18 A. No, sir.

19 Q. All right. I'd ask you to identify then what has
20 been marked 1D. Could you identify to the Court what that
21 is.

22 A. That's her voter registration card that is on file
23 in our office.

24 Q. All right. Who creates the voter registration card?

25 MR. MILLER: Your Honor, if I may, maybe

1 I can help here. We'll stipulate that Donna -- what was
2 her maiden name, Lloyd?

3 MR. RUCKER: Lloyd.

4 MR. MILLER: That Donna Lloyd is one and
5 the same as Donna Schalk and that she was a properly
6 registered voter and she voted at the correct precinct, and
7 we reserve only the right to object to the completion of
8 the affidavit in question, and anything else about the
9 legalities of her vote, I think I can stipulate to. I only
10 have a concern about the sufficiency of the affidavit.

11 MR. RUCKER: All right.

12 MR. RUCKER:

13 Q. Is the affidavit filled out -- what sort of
14 information does the affidavit request, ma'am, which has
15 been identified as 1B?

16 A. It asks for her former name and she swears or
17 affirms that she has changed her name as to marriage,
18 divorce or legal proceeding. Prior to that change she was
19 registered as and then her name as she was registered and
20 her address.

21 Q. Did she fill it out in its entirety?

22 A. Yes, sir.

23 Q. Did she also sign her name?

24 A. She signed her name, her new name --

25 Q. All right.

1 A. -- to that.

2 Q. Yes, ma'am. Was it attested to?

3 A. It was attested to by the election officer.

4 Q. All right. And what was the election officer's
5 name?

6 A. Doris Madden is the election officer.

7 Q. Yes, ma'am. And did Miss Madden fill it out
8 correctly to the best of your knowledge and belief?

9 A. Mrs. Madden put the date down and didn't sign her
10 full name.

11 Q. Okay. All right. Did she attempt to do that, do
12 you believe?

13 A. Yes, yes.

14 MR. MILLER: Well, Your Honor --

15 MR. RUCKER: I understand that it calls
16 for speculation on the part of the witness, Your Honor.

17 MR. MILLER: I ask the question be
18 withdrawn and that answer be stricken.

19 THE COURT: Well, the affidavit is going
20 to speak for itself.

21 MR. MILLER: That's right.

22 MR. RUCKER: And I would hand at least
23 what has been marked as 1D and 1B to opposing counsel and
24 have him take a look at those documents.

25 MR. MILLER: No objection as to

1 foundation, Your Honor.

2 MR. RUCKER:

3 Q. Now, there is an item that has, in fact, been
4 identified as 1A. Could you describe that for benefit of
5 counsel and Court.

6 A. That's the challenged ballot envelope with the
7 ballot inside that she voted.

8 Q. All right. And was there an -- and who creates this
9 challenges ballot envelope?

10 A. The election board, upon finding someone that needs
11 to be challenged, fills out the challenges ballot envelope.

12 Q. All right. And we also have a document which has
13 been marked as Petitioner's Exhibit 1E. Would you describe
14 to the Court what that is.

15 A. That's a screen print of what I have on the computer
16 in regard to Donna Lloyd Schalk's voter registration
17 status.

18 Q. All right. And what is her status?

19 A. She is on the active role.

20 Q. All right.

21 A. Under the name of Lloyd.

22 Q. So your testimony is that the only reason that this
23 lady's vote was not counted was because the affidavit of
24 name change was not found --

25 A. That is correct.

1 Q. -- in time to be counted?

2 A. That is correct.

3 Q. It is the position of your office that this ballot
4 should be counted?

5 A. Yes, sir.

6 Q. All right.

7 MR. RUCKER: I would ask that
8 Petitioner's Exhibits 1D, 1B, 1A, 1C and 1E be admitted.

9 MR. MILLER: Well, before you do that --
10 no objection to 1D or 1A or 1C or 1E and would simply
11 request a short voir dire on 1B prior to waiving it.

12 THE COURT: You may inquire.

13 MR. MILLER: Miss Warren, I need you -- I
14 believe in the box that you have categorized as counted, I
15 need, if you would for me, to pull the ballot and the
16 packets of Rosene Kilgore. That's spelled R-O-S-E-N-E,
17 Kilgore, K-I-L-G-O-R-E, and that may also be under Rosene
18 McCracken.

19 THE WITNESS: McCracken/Kilgore.

20 (An off-the-record discussion was here had.)

21 MR. RUCKER: I believe that we were in
22 voir dire.

23 MR. MILLER: Did you find that?

24 THE WITNESS: Sure did.

25 MR. MILLER: Let's mark it.

1 (Contestee's Exhibit No. 1A was marked for
2 identification.)

3 MR. MILLER: Now, Miss Warren, you have
4 in your hand what's been marked Contestee's Exhibit 1A, is
5 that correct?

6 THE WITNESS: Uh-huh.

7 MR. MILLER: Would you briefly tell the
8 Court what that document is.

9 THE WITNESS: That's an affidavit of
10 change of name.

11 MR. MILLER: That's an affidavit similar
12 to the one you described or document at least Donna Schalk
13 completed?

14 THE WITNESS: Uh-huh.

15 MR. MILLER: Now on that particular
16 Exhibit 1A would you say that is an affidavit that was
17 sworn in the presence of Doris Madden?

18 THE WITNESS: Uh-huh.

19 MR. MILLER: You'll have to answer yes or
20 no, please.

21 THE WITNESS: Yes, sir.

22 MR. MILLER: The sir is not necessary.
23 She, Miss Madden that is, signed her complete name in
24 attesting to that affidavit, did she not?

25 THE WITNESS: Yes, sir.

1 MR. MILLER: In the case of Donna Schalk,
2 however, she did not, did she?

3 THE WITNESS: No.

4 MR. MILLER: Do you know why her
5 signature was aborted in the case of Donna Schalk?

6 THE WITNESS: No, sir, I don't.

7 MR. MILLER: Thank you. That is all I
8 had. I have no objection to the introduction of the
9 exhibits.

10 THE COURT: They'll be admitted. It's
11 Petitioner's 1A through E I believe.

12 MR. RUCKER: Yes, sir.

13 MR. MILLER: And also ask for the
14 admission of Contestee's 1A.

15 THE COURT: Any objection?

16 MR. RUCKER: No, Your Honor.

17 THE COURT: It will be admitted.

18 MR. RUCKER: I have no further questions
19 of this witness at this time. She is subject to recall,
20 Your Honor.

21 THE COURT: You can step down and take it
22 easy for awhile and don't leave the courthouse.

23 THE WITNESS: Can I go downstairs and
24 back to work?

25 THE COURT: Yes, by all means.

1 MR. RUCKER: I would like to call to the
2 stand Donna Schalk.

3 DONNA SCHALK,
4 of lawful age, having been first duly sworn on her oath to
5 state the truth, and nothing but the truth, testifies as
6 follows:

7 DIRECT EXAMINATION

8 MR. RUCKER:

9 Q. Donna, would you state your full name and address.

10 A. Donna Louise Schalk, 906 South A, Ark City.

11 Q. And, Miss Schalk, did you present yourself to vote
12 on November 8th, 1994?

13 A. Yes.

14 Q. All right. What is your current marital status?

15 A. Single.

16 Q. All right. What was -- what was your former name,
17 ma'am?

18 A. Lloyd, L-L-O-Y-D.

19 Q. Okay. When you presented yourself, ma'am, to the
20 election board, what, if anything, occurred?

21 A. I went in to vote and they said that since I hadn't
22 changed my divorce name from Lloyd back to my maiden name,
23 Schalk, that it may not be valid.

24 Q. All right. And what, if anything, did they offer to
25 you before they offered you a challenged ballot?

1 A. Nothing, that was it.

2 Q. All right. Did you fill out an affidavit of name
3 change, ma'am?

4 A. No.

5 Q. Well --

6 A. Not at that time.

7 Q. Okay. When did you fill out the affidavit of name
8 change?

9 A. Okay. I'm sorry. I forget. I did that. Okay.

10 Q. That's all right. Did you fill out an affidavit of
11 name change at the polls, ma'am?

12 A. Yes.

13 Q. All right. And is that your signature?

14 A. Yes.

15 Q. All right. Did you fill this out, ma'am?

16 A. Yes.

17 Q. All right. And did who, if anyone, attest to your
18 signature? Was it one of the individuals working there at
19 the polls?

20 A. Yes.

21 Q. All right. And that is -- that is your name and
22 that is your writing?

23 A. Yes.

24 Q. All right.

25 MR. RUCKER: I have nothing further, Your

1 Honor. We would move -- excuse me, have you got
2 questions?

3 MR. MILLER: Yes.

4 THE COURT: You may inquire.

5 CROSS-EXAMINATION

6 MR. MILLER:

7 Q. Miss Schalk, I take it you were once married?

8 A. Yes.

9 Q. Your name at that time was Lloyd?

10 A. Yes.

11 Q. Last name. When were you divorced?

12 A. October 20th last year.

13 Q. 1993?

14 A. Yes.

15 Q. And where was that at?

16 A. In Ark City.

17 Q. In Cowley -- was it a Cowley County proceeding?

18 A. Yes.

19 Q. Was your named changed to Schalk as a result of
20 those legal proceedings?

21 A. At that time, yes.

22 Q. I spoke with you some time ago. You remember that
23 conversation over the telephone?

24 A. About two and a half weeks ago.

25 Q. All right. Do you recall you were indicating to me

1 that you had filled out some documents, I believe was it at
2 Dillons?

3 A. Yes.

4 Q. Would you tell the Court when you did that.

5 A. After I voted.

6 MR. RUCKER: Your Honor, I'm going to
7 object to relevance as to what the relevance of the
8 questioning is.

9 THE COURT: What's this about?

10 MR. MILLER: I'm trying to -- I'm trying
11 to answer the mystery of where that affidavit came from.
12 That wasn't available at the time the ballots were initially
13 reviewed. There has been testimony by a previous witness
14 that they didn't have it initially. It was found later and
15 I have -- it disappeared, but I have some suspicion that it
16 may have originated at a different location.

17 THE COURT: You may inquire then.

18 MR. MILLER:

19 Q. Again, do you recall going to Dillons shortly after
20 the election? Was it Dillons?

21 A. Yes. Right after I voted, I went to Dillons. They
22 said I had to wait until the next day to come back to fill
23 out this white paper so that's when I did it.

24 Q. So you went down to Dillons a day after the
25 election?

1 A. Yes.

2 Q. You filled out some documents there?

3 A. Just this white paper. That's -- she did it
4 herself. She just asked me the questions and --

5 THE COURT: For the record, which exhibit
6 number is that?

7 MR. MILLER: I think she's referring to
8 1D, Your Honor.

9 THE WITNESS: This paper here
10 (indicating).

11 THE COURT: Okay. Does it say on it 1D?

12 MR. MILLER: It's marked Petitioner's
13 Exhibit 1D on the back.

14 THE COURT: Thank you.

15 MR. MILLER:

16 Q. Are you sure that's the document? It's signed by
17 Donna Lloyd and it's dated 1-16-92.

18 A. Well, they messed up then.

19 Q. Well, but you signed it Donna Lloyd?

20 A. Uh-huh.

21 Q. If I could help you, I think this is a document you
22 signed a couple years ago when you were Donna Lloyd.

23 A. Yeah, because I went in the next day and filled out
24 another one, filled out one of these (indicating).

25 Q. You believe you filled out a white card?

1 A. It was the same thing and she asked me those
2 questions.

3 Q. Is it possible it could have been this
4 salmon-colored card?

5 A. No, no.

6 MR. MILLER: That is all I have, Your
7 Honor.

8 MR. RUCKER: We would move, Your Honor,
9 to count the ballot, open the challenged envelope and add
10 it to the total.

11 MR. MILLER: I'd object at this point
12 that there is no -- has not been established that there is
13 any sufficient affidavit that accompanies this ballot per
14 the statute cited previously, K.S.A. 25-2316c.

15 MR. RUCKER: Your Honor, may I respond?

16 THE COURT: You may.

17 MR. MILLER: Subsection --

18 MR. RUCKER: Your Honor --

19 MR. MILLER: Subsection A, excuse me,
20 counsel. Subsection A.

21 MR. RUCKER: Your Honor, at this early
22 juncture if we're going to begin to make argument that the
23 fault of an election worker in not filling out her entire
24 name, Doris Madden, is going -- invalidates the vote of an
25 individual who is a qualified elector in the State of

1 Kansas, who but for no mistake of her own presents herself
2 to the polls, filled out an appropriate affidavit of name
3 change at the appropriate precinct -- if counsel's argument
4 at this stage is that because Miss Madden wrote her first
5 name, Doris, D-O-R-I-S, and began writing her last name,
6 M-A, that we are trying to -- going to disenfranchise this
7 voter, this is truly going to be a long proceeding.

8 If that's counsel's position, I'm asking for
9 clarification, Your Honor. We're asking that the
10 challenge -- we are asking that the effect of this vote be
11 brought before the Court and that the intentions of this
12 voter which I believe is what we're all after, that the
13 intentions of this voter, in fact, be effectuated, that
14 this individual not be disenfranchised through no fault of
15 her own and quite frankly substantial compliance on the
16 part of the election board officer.

17 MR. MILLER: Actually, Your Honor, I
18 didn't make any argument. I simply objected to the
19 admission and I cited the statute and that is all I
20 intended to do, but I would like to add at this juncture it
21 raises a point unrelated to the actual admission of the
22 document. It relates to the procedure of opening the
23 ballot.

24 And if I may indulge -- if the Court would
25 indulge me, once before on a similar proceeding with

1 similar circumstances where challenged ballots became the
2 subject of individual testimony, the Court did, in fact,
3 before the proceeding was concluded find leave to open
4 challenged envelopes. They were done not as a part of the
5 formal proceeding.

6 The Court did not make it a part of the public
7 record as to how the ballot was cast so as to protect the
8 privacy of the voter. The Court did, however, make it
9 known to the parties and ordered their keeping the contents
10 of the ballot confidential so that in a subsequent review
11 of the Court's action if someone else differed with the
12 Court's ultimate ruling, the ballot was still segregated
13 and it could still be treated as having its individual
14 impact on the election. I would --

15 THE COURT: I understand what you are
16 saying.

17 MR. MILLER: I found that to be an
18 acceptable procedure and with counsel's consent, I would
19 suggest we follow the same here.

20 MR. RUCKER: I have -- I have no
21 difficulty with that, Your Honor.

22 THE COURT: That's fine. With respect to
23 the ballot, it has all been admitted into evidence and I'll
24 reserve ruling upon whether or not it should be included.
25 I don't think the only question is the legal sufficiency

1 and I intend to announce my ruling on that, so you can
2 proceed with your next witness.

3 MR. RUCKER: May the witness step down,
4 Your Honor?

5 THE COURT: Yes. Unless there is any
6 reason you can't be excused, you are free to go.

7 THE WITNESS: Thank you.

8 MR. RUCKER: We have no further questions
9 of this witness.

10 MR. MILLER: Your Honor, excuse me. I
11 probably -- before you rule on that, I need to make -- for
12 the record, we're inquiring right now as to whether or not
13 as a consequence of that divorce proceeding the name was,
14 in fact, legally changed. I would ask the Court to reserve
15 its ruling until the Court can take judicial notice of the
16 fact not what her testimony was but what the records of
17 Cowley County Court truly reflect.

18 THE COURT: I haven't ruled on it yet.

19 MR. RUCKER: We would argue, Your Honor,
20 that it makes no difference.

21 THE COURT: I understand. Call your next
22 witness.

23 MR. RUCKER: Yes, Your Honor. Walter
24 Simmons.

25 WALTER EUGENE SIMMONS,

1 of lawful age, having been first duly sworn on his oath to
2 state the truth, and nothing but the truth, testifies as
3 follows:

4 MR. RUCKER: Your Honor, again, I'm
5 personally of the opinion that the foundation for the
6 calling of this witness is elemental for the taking of this
7 person's testimony, so in an attempt to call this witness
8 to let him go, I honestly believe that he's going to have
9 to stay until after Barbara Warren's testimony anyway or be
10 subject to recall and I just --

11 THE COURT: I would prefer that he be
12 subject to recall. What I'm attempting to do here,
13 counsel, so these witnesses -- their testimony is probably
14 going to be brief at best.

15 MR. RUCKER: Yes.

16 THE COURT: Where the testimony of the
17 election officials is probably going to be extensive.

18 MR. RUCKER: Yes, Your Honor.

19 THE COURT: I know it's topsy-turvy, but
20 this is not a court of law. This is a court of contest so
21 I think that's the procedure we can follow in this
22 particular circumstance, and I know that ordinarily you'd
23 be laying a foundation before his testimony would be
24 admissible but let's proceed this way.

25 MR. RUCKER: Yes, sir.

DIRECT EXAMINATION

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MR. RUCKER:

Q. Mr. Simmons, where do you currently live?

A. 115 South C Street in Ark City, Kansas.

Q. And how long have you lived there, sir?

A. Since February of '94.

Q. All right. You moved to 115 South C Street in February of 1994. Did you participate in the November election?

A. Yes, I did.

Q. All right. Mr. Simmons --

MR. MILLER: Your Honor -- excuse me, counsel. For the record, Your Honor, it keeps coming up, and just for the record, I don't expect counsel to clearly define which election that is but we'll stipulate, both sides I think need to -- we need to stipulate when we refer to the election, it's always the November election, 79th State Representative race unless we otherwise specify so we can be speaking with privity.

MR. RUCKER: I don't have an objection to that, Your Honor.

MR. RUCKER:

Q. You cast a ballot, is that correct, sir?

A. Yes.

Q. Prior to October 1994 that you indicated you moved

1 to 115 South C, where did you live before that, sir?

2 A. 117 East Jefferson.

3 Q. Could it be 217?

4 A. I mean 217 East Jefferson.

5 Q. 217 East Jefferson. When did you move in there,
6 sir?

7 A. The spring of '92.

8 Q. Spring of '92?

9 A. Yeah.

10 Q. All right. And before that, sir, where did you
11 live?

12 A. 1110 North First.

13 Q. All right, sir. And approximately, if you can,
14 would you tell the Court when you moved in there.

15 A. Probably '91.

16 Q. All right. And any particular month that you can
17 recall?

18 A. August.

19 Q. August of '91. All right. And before that, sir,
20 where did you live?

21 A. 303 North Ninth.

22 Q. All right. And sir, did you register to vote at 303
23 North Ninth?

24 A. Yes, I did.

25 Q. Did you subsequently reregister to vote at any of

1 the other addresses that you have mentioned to the Court?

2 A. No, I didn't.

3 Q. All right. You participated in the 79th Legislative
4 District, is that not -- district contest between
5 Mr. Shriver and Mr. Jones, did you not?

6 A. Yes, I did.

7 Q. And you indicated to me in an interview that I
8 conducted with you last night how you cast your ballot in
9 that election, did you not?

10 A. Yes, I did.

11 Q. All right.

12 MR. RUCKER: Your Honor, at this
13 particular point in time this is a different situation than
14 the one that we just encountered where the ballot is inside
15 a challenged ballot envelope. I would ask the Court to
16 take judicial notice of 23-23- -- pardon me, 25-3701 which
17 indicates that unless an individual moves within 30 days
18 from the date of the election that they are not qualified
19 to vote. This individual's testimony has indicated that he
20 moved in February, far outside of the 30-day limit and not
21 only that he has moved --

22 MR. MILLER: Well, Your Honor, before we
23 get too much into argument, can I at least have a chance to
24 cross-examine?

25 THE COURT: Let him finish. Then I'll

1 let you cross-examine.

2 MR. RUCKER: That he has moved one, two,
3 three, three times since the point of his registration at
4 303 North Ninth. Which I believe, Mr. Simmons, if I might
5 ask one question.

6 MR. RUCKER:

7 Q. Mr. Simmons, did you reside at 303 North Ninth in
8 1988, sir?

9 A. Yes, I did.

10 MR. RUCKER: I have no further questions
11 at this time.

12 CROSS-EXAMINATION

13 MR. MILLER:

14 Q. 303 North Ninth, do you recall living there?

15 A. Yes.

16 Q. Did you live with anyone at that address?

17 A. Yes.

18 Q. Who did you live with?

19 A. My aunt.

20 Q. Your aunt?

21 A. Right.

22 Q. Does your aunt still live at that address?

23 A. No, she don't.

24 Q. Who lives at that the address, if you know?

25 A. I don't know. She sold the house.

1 Q. Did you fill out an affidavit when you voted that
2 related to your residence or do you recall?

3 A. Well, I filled out a form at the city building in
4 Ark City to register to vote, yes.

5 Q. When you voted?

6 A. Oh, when I voted?

7 Q. Yes.

8 A. Well, when I went to the polls where I voted, I told
9 them I didn't know where I was supposed to vote and I asked
10 them was I registered to vote there and they looked it up.
11 They couldn't find it so I signed papers and some kind of
12 sheet and then they let me vote there.

13 Q. What did you do at the city building?

14 A. Well, when I first registered to vote, that's when I
15 first arrived in Ark City, I registered to vote at the city
16 building.

17 Q. Is it fair to say that since you had a permanent
18 residence at 303 North Ninth that you've really had no
19 permanent residence since that time?

20 A. Yes, I had a permanent residence.

21 Q. At 303 North Ninth?

22 A. Yes.

23 Q. Would it not be fair to say that since that time
24 you've had no permanent residence?

25 A. Oh, yes, I have a permanent residence.

1 Q. Okay.

2 MR. MILLER: That is all I have, Your
3 Honor.

4 MR. RUCKER: Your Honor, I cited 3701,
5 25-3701 which is former precinct of residence. It is also
6 23-2316c, Subsection B, specifically when an individual
7 moves to another residence, they must reregister.

8 THE COURT: Is the same precinct all of
9 these addresses?

10 MR. RUCKER: No, Your Honor.

11 THE COURT: 115 South C Street --

12 MR. RUCKER: No, Your Honor.

13 THE COURT: -- is a different precinct
14 from 216 East Jefferson?

15 MR. RUCKER: I'll proffer for the Court
16 that 303 North Ninth, which is where Walter Simmons is
17 registered to vote, is in 4B as in boy.

18 THE COURT: All right.

19 MR. RUCKER: And that regardless of the
20 other moves which would have required reregistration, he
21 moved to 115 South C which is in precinct 2A as in apple.
22 The move having taken place in February?

23 THE WITNESS: Yeah.

24 THE COURT: Okay. So 303 North Ninth
25 Street is in precinct 4B as in boy?

1 MR. RUCKER: Yes, Your Honor.

2 THE COURT: And 115 South C Street in Ark
3 City is in precinct 2A?

4 MR. RUCKER: Yes, Your Honor.

5 THE COURT: Is that correct, counsel?

6 MR. MILLER: We're not going to
7 stipulate. I don't know. I want to hear that from the
8 election officer.

9 THE COURT: Okay. This is the thing that
10 we run into.

11 MR. RUCKER: Yes, Your Honor.

12 MR. MILLER: And I apologize. If I
13 verified information, I can stipulate but at this moment I
14 don't know. It's not that I don't trust counsel, I just
15 don't trust him.

16 THE COURT: Mr. Simmons, you don't
17 know -- where it was that you voted, do you know the
18 precinct?

19 THE WITNESS: No, I don't.

20 THE COURT: Okay.

21 THE WITNESS: Well, when I -- when I
22 arrived at the poll, I asked one of the pollsters was I
23 registered to vote there and he said he didn't know, and I
24 told him that's where I normally vote, is where I vote at
25 and he said he couldn't find it so they just had me sign

1 papers and I voted.

2 THE COURT: Okay.

3 MR. RUCKER: Your Honor, I have no
4 response. The issue is that -- if we can move into
5 argument phase while this witness is still in the room, the
6 issue, Your Honor, here is that any individual who moves
7 must reregister under 25-2316c, Subsection B as in boy,
8 first sentence.

9 There is also another argument. It too bears
10 upon the situation, 25-3701. This particular individual
11 does not fit under either category for his vote to be cast
12 and counted, Your Honor. Therein lies the sum and
13 substance of our argument on this particular ballot. The
14 appropriate foundation will, in fact, be laid and our
15 proffer I think will be verified by Miss Warren.

16 MR. MILLER: As long as he remains
17 subject to recall and advises me where he can be found,
18 again, we can establish -- we can sort out the precincts in
19 his absence. I don't know that he needs to be here. He
20 doesn't know what precinct he's in in any event so that
21 testimony -- his testimony is critical to that issue.

22 THE COURT: No.

23 MR. RUCKER: The problem, Your Honor, if,
24 in fact -- we all cited in chambers the Western Kansas
25 county case which allows the Court on appropriate evidence

1 that an individual's vote has been inappropriately cast to
2 inquire or to query the individual --

3 THE COURT: Well, it hadn't even been
4 established that this vote is counted, has been counted.

5 MR. RUCKER: That is correct.

6 MR. MILLER: Your Honor, I have no
7 objection to counsel asking him at this time so we get it
8 on the record -- the witness doesn't have to be recalled --
9 who he voted for if he knows in this race and we can get
10 him out of here. He no longer have has any privilege. If
11 I understand what's going on here correctly, he divulged to
12 Mr. Rucker how he voted. We can go ahead, we can answer
13 the that question regardless of the Court's ultimate ruling
14 on that, the validity.

15 THE COURT: Because there is a question
16 on where these precincts are and there is questionable
17 facts, do you object to that procedure? That way the
18 testimony can be preserved.

19 MR. RUCKER: I believe that if the
20 Court -- it's within the domain of the Court to request --
21 ask the question of the voter. I do not buy the argument
22 that he has waived his privilege by divulging it willingly
23 to me, Your Honor. I am not going to be called, I do not
24 believe, as a witness in this case. I cannot provide
25 testimony. I don't believe he did waive his privilege but

1 I believe that it's appropriate at any time for the Court
2 to ask or query a witness when it is deemed appropriate.

3 MR. MILLER: Well, he sure can be called
4 as a witness, Your Honor. He asked the question. He
5 gathered the information. His testimony may be critical as
6 to the voracity of the witness.

7 THE COURT: Well, that issue's not --

8 MR. MILLER: Right.

9 THE COURT: The question is he's not his
10 attorney. That's the only thing I can --

11 MR. MILLER: I think this takes care of
12 that privilege. Once he divulges the vote, it's like any
13 other privilege once he discloses the information, and my
14 understanding is he has disclosed it to Mr. Rucker. That's
15 what he testified to.

16 THE COURT: Well, you want to ask?

17 MR. RUCKER: Your Honor, yes, as long as
18 it is understood that I do not stipulate to Mr. Miller's
19 perspective.

20 MR. MILLER: I still understand that.

21 MR. RUCKER: Yes, Your Honor.

22 THE COURT: You may inquire.

23 REDIRECT EXAMINATION

24 MR. RUCKER:

25 Q. Mr. Simmons, after all of this semantic wrangling,

1 you indicated how it is -- pardon me, I'm not going to ask
2 the question that way. How did you cast your vote,
3 Mr. Simmons, in the 79th District race between Mr. Shriver
4 and Mr. Jones?

5 A. Democratic.

6 Q. Okay. If I were to indicate to you that Mr. Shriver
7 was the democrat, would you indicate that you voted for
8 Mr. Shriver?

9 A. Yes.

10 MR. RUCKER: No further questions of this
11 witness.

12 THE COURT: You may inquire.

13 RECROSS-EXAMINATION

14 MR. MILLER:

15 Q. Mr. Simmons, you don't remember marking the ballot
16 for Mr. Shriver, do you?

17 A. I remember voting democratic. I voted straight
18 Democratic.

19 Q. Right. Listen to my question though, please. You
20 do not remember specifically though, do you, marking the
21 ballot for Mr. Shriver now, do you?

22 A. Yes.

23 Q. You do remember that?

24 A. Yes, I do.

25 Q. Why is it that when counsel asked you which of the

1 two candidates you voted for and he gave you the names, you
2 said you voted Democratic rather than named Mr. Shriver?

3 A. Well, I don't really -- rather when I vote, I
4 usually vote straight Democratic and I usually mark the
5 first oval, but I forgot to do that and went all down the
6 ballot.

7 Q. When you say straight democratic but I forgot to do
8 that and I went all down, who was Democratic and
9 Republican?

10 A. I voted --

11 Q. Right. Your recollection of the ballot was that it
12 had a place to vote either straight Democrat or straight
13 Republican. You remember seeing that, don't you?

14 A. Yeah.

15 Q. You didn't mark either one of those, did you?

16 A. No, I just went down through the ballot.

17 Q. You picked each candidate?

18 A. Right.

19 Q. But is it your testimony that you usually voted the
20 oval I guess that says Democrat?

21 A. Yes, straight Democrat.

22 Q. And you usually look at both the Democrat and the
23 Republican party at the top and you choose which of the
24 two?

25 A. Uh-huh.

1 Q. That's how you remember the ballot being laid out?

2 A. Yeah.

3 MR. MILLER: Thank you.

4 FURTHER REDIRECT EXAMINATION

5 MR. RUCKER:

6 Q. Mr. Simmons, did you skip any races on your ballot?

7 Did you fail to vote in any of the contests on your ballot?

8 A. I don't think so.

9 Q. And your testimony is that you actually remember
10 casting a vote for Mr. Shriver?

11 MR. MILLER: Your Honor, I would object
12 to that as leading and he is not titled to ask leading
13 questions.

14 THE COURT: Rephrase.

15 MR. RUCKER:

16 Q. Who did you vote for, Mr. Shriver or Mr. Jones?

17 A. Mr. Shriver.

18 MR. RUCKER: No further questions, Your
19 Honor.

20 THE COURT: You may stand down. Can this
21 witness be excused?

22 MR. RUCKER: Subject to recall, Your
23 Honor.

24 THE COURT: Subject to recall.

25 MR. MILLER: Well, that's fine with me

1 but I don't know where I can find him.

2 MR. RUCKER: He works at the State
3 Hospital, Your Honor, but he has been very, very cordial in
4 his participation.

5 MR. MILLER: I'm sure he is. I just
6 don't know where that's at.

7 THE COURT: Leave your phone number with
8 the attorneys.

9 MR. MILLER: He knows us so I know he's
10 going to cooperate.

11 THE COURT: Well, get his phone number on
12 his way out then. Call your next witness.

13 MR. RUCKER: Yes, Your Honor. Curtis
14 Richards.

15 CURTIS RICHARDS,
16 of lawful age, having been first duly sworn on his oath to
17 state the truth, and nothing but the truth, testifies as
18 follows:

19 DIRECT EXAMINATION

20 MR. RUCKER:

21 Q. Mr. Richards, would you state to the Court for
22 benefit of the Court and counsel your address.

23 A. 315 East Pine in Arkansas City.

24 Q. Sir, how long have you lived at that address?

25 A. Since June of '94.

1 Q. All right. And where did you reside before that
2 time, sir?

3 A. 1207 North D in Arkansas City.

4 Q. To your knowledge, Mr. Richards, are those two
5 addresses in the same precinct?

6 A. I found out that they are not, yes.

7 Q. All right. And how long did you live at your former
8 address, sir, the 1207 North D?

9 A. Approximately two years.

10 THE COURT: How long?

11 THE WITNESS: Two years.

12 MR. RUCKER: Approximately two years.

13 MR. RUCKER:

14 Q. All right. Were you registered to vote, sir, at
15 1207 North D?

16 A. Yes, I was.

17 Q. Did you present yourself to vote at the November
18 election?

19 A. Yes, I did.

20 Q. All right. And what occurred, sir, when you
21 presented yourself to vote?

22 A. Well, as my wife and I had discussed voting that
23 evening at home, I mentioned to her that we had moved and I
24 didn't know if our change of address would have a bearing
25 on our eligibility to vote so she made a phone call and we

1 called the poll that we knew of in our area.

2 The ladies that were running the poll that
3 evening weren't absolutely sure what we should do either
4 but said come on down, cast your ballot and we'll keep them
5 separate and make note of the address discrepancy and put
6 them in an envelope and term them -- terming them possibly
7 a contested ballot, or I don't know if that's the proper
8 term but -- and so that's what we did. We went and cast
9 out ballots. They held them separate from the other
10 ballots and made note of our address change.

11 Q. You are indicating that you did not reregister then
12 at 315 East Pine?

13 A. That is correct.

14 Q. All right. And that move took place I believe your
15 testimony was June of '94?

16 A. That's right.

17 Q. All right.

18 MR. RUCKER: No further questions at this
19 time, Your Honor.

20 MR. MILLER: I don't have any questions
21 of this witness.

22 MR. RUCKER:

23 Q. Mr. Richards, did you cast a vote?

24 MR. MILLER: I thought you were done.

25 MR. RUCKER: We have to reserve this for

1 the last question.

2 MR. MILLER: But I didn't think you did.

3 THE COURT: I'm going to allow him to
4 proceed.

5 MR. RUCKER: Your Honor, for --

6 THE COURT: Did you have some arguments
7 that you want to make?

8 MR. MILLER: I do. If counsel has
9 further questions, I wish he would make it clear to me that
10 he reserves the right to ask them.

11 MR. RUCKER: I did last time.

12 THE COURT: I understand you did.
13 Proceed.

14 MR. RUCKER:

15 Q. Mr. Richards, you cast a vote in the 79th election
16 race between Mr. Shriver and Mr. Jones?

17 A. Yes, I did.

18 Q. And how did you cast your vote?

19 A. I voted for Mr. Shriver.

20 Q. Yes, sir.

21 MR. RUCKER: No further questions.

22 CROSS-EXAMINATION

23 MR. MILLER:

24 Q. Mr. Richards, in the race for Governor, did you vote
25 for Mr. Graves or Mr. Slattery?

1 MR. RUCKER: I would object, Your Honor,
2 to relevance. I believe in the sanctity of the election
3 ballot and I believe Mr. Miller does, too, and I believe
4 this is only a judicial proceeding and this contest of
5 election is not of this ballot. That should, in fact, be
6 reviewed by this Court. The privacy of this ballot is his
7 under the privilege.

8 MR. MILLER: Under that ruling, he's
9 entitled to that privilege.

10 THE COURT: Let me stop you then. This
11 is an election contest. The parties are now seeking to
12 cross-examine you and test your memory and various other
13 things. Except for the question which the Court has
14 permitted concerning the House of Representatives 79th
15 District vote which you have disclosed, you have a
16 privilege not to disclose how you voted for anyone in any
17 other race.

18 If you wish to exercise that privilege, you may
19 do so or if you wish to waive that privilege, you may do
20 so. If you wish to exercise that privilege, simply tell me
21 that you do not wish to disclose that. Do you have any
22 questions?

23 THE WITNESS: No. I don't mind answering
24 the question.

25 THE COURT: You may proceed.

1 MR. MILLER: Thank you.

2 MR. MILLER:

3 Q. Mr. Richards, do you recall my last question?

4 A. Yes, I do, and I voted for Mr. Graves.

5 Q. In the race for United States Representative, did
6 you vote for Pat Roberts or his opponent, the Democrat?

7 MR. RUCKER: Objection, Your Honor.
8 We're going to have to object because of the nature of the
9 question. The --

10 MR. MILLER: If he wants to do that, I
11 would like to do that in chambers, Your Honor, and not in
12 the presence of the witness.

13 THE COURT: If he has an objection, let's
14 hear his objection. What's your objection?

15 MR. RUCKER: Well, Your Honor, Pat
16 Roberts was not a candidate in that race. Cowley County
17 was not in that race. It is analogous, Your Honor, to
18 having a lineup and asking the individual witness whether
19 or not he can identify the perpetrator and the perpetrator
20 not being in the lineup.

21 MR. WITTEMAN: Sitting at counsel's
22 table --

23 THE COURT: Assumes facts not noted in
24 evidence. Is there some legal objection you have? What's
25 the basis for your objection, it's unfair?

1 MR. RUCKER: Well, the basis for the
2 objection is certainly not facts in evidence and it's also
3 irrelevant given the fact that this particular candidate
4 did not participate in this particular election, did not
5 appear on the ballot.

6 THE COURT: I'll sustain that form of the
7 objection and that is it is irrelevant who was in the First
8 Congressional -- United States Congressional race.

9 MR. MILLER: It relates -- the question
10 was asked. It relates to credibility of the witness, Your
11 Honor.

12 THE COURT: Correct. I understand your
13 reason for asking it, but I've sustained the objection.
14 Proceed.

15 MR. MILLER: Thank you, Your Honor.

16 MR. MILLER:

17 Q. Mr. Richards, do you remember who the candidates
18 were for secretary of State in this last election?

19 A. No, sir, I do not.

20 Q. Do you remember who the candidates were for State
21 Treasurer?

22 A. No, sir, I do not.

23 Q. Do you remember who the candidates were for
24 Insurance Commissioner?

25 A. Not by name.

1 Q. Do you remember who the candidates were for State
2 Representative?

3 A. No, sir, I do not.

4 Q. District Judge?

5 A. No.

6 MR. MILLER: Thank you, Your Honor.

7 REDIRECT EXAMINATION

8 MR. RUCKER:

9 Q. Mr. Richards, did you have a conversation with your
10 wife -- who by the way, Your Honor, is subpoenaed and
11 subject to cross-examination -- on the night previous to
12 the election?

13 A. Night previous to the election?

14 Q. Yes, the night before the election you indicated in
15 my direct testimony that you had, in fact, gone so far as
16 to contact poll workers in your --

17 A. Okay. I understood that was the day --

18 MR. MILLER: Your Honor, Your Honor,
19 before he answers, that's leading as bad as it gets and I
20 would object to the form of the question. He was putting
21 words in the witness's mouth.

22 THE COURT: In an effort to refresh his
23 recollection, reask your question because I'm not sure the
24 witness understood you.

25 THE WITNESS: The part I'm unclear on,

1 Judge, is that I understood the day of the election was the
2 day I cast my ballot.

3 THE COURT: Uh-huh.

4 MR. RUCKER: Yes, sir.

5 THE COURT: He wanted to know when you
6 called these people though.

7 THE WITNESS: Right before we went, like
8 15 minutes before I went to the poll.

9 MR. RUCKER:

10 Q. All right. Did you have then a conversation with
11 your wife regarding who you were going to cast your ballot
12 for the night before the election, sir?

13 A. We had discussed, you know, our political favorites
14 several times during the campaign as we watched the
15 television ads and things like that, the campaign ads.

16 Q. Who was your political favorite in the State
17 Representative's race?

18 A. I don't know how to answer that question without
19 elaborating a little bit, and I know I just -- just be
20 really direct. I have recently -- my wife and I have
21 recently become politically active again and I am still
22 politically ignorant. I try to gather what I can by
23 watching the campaign ads on television.

24 Some things -- and there were certain offices
25 that I recognize as being offices that I am interested in

1 and I recognize names of candidates that I'm interested in,
2 but I'm not politically intelligent enough to tell you on
3 down the line as to who I voted for, what office and who
4 even was running for those particular offices unless they
5 are ones I was particularly interested in.

6 Q. On your ballot there were names, were there not,
7 under the offices?

8 A. Sure.

9 Q. All right. And do you recall in the race for the
10 79th District what the names were under that particular
11 contest?

12 A. Are we -- I suppose not. Like I say, I'm a little
13 confused by nomenclature.

14 Q. Sure. That's all right. When you saw the name on
15 the ballot, do you recall seeing the name Shriver and do
16 you recall seeing the name Jones on the ballot?

17 A. Yes, yes, sir.

18 Q. All right. Who did you cast your ballot for, sir,
19 Mr. Jones or Mr. Shriver?

20 A. I cast it for Mr. Shriver.

21 Q. All right. Thank you, sir.

22 MR. RUCKER: No further questions, Your
23 Honor.

24 MR. MILLER: No questions.

25 THE COURT: Can this witness be

1 excused?

2 MR. RUCKER: Subject to recall, Your
3 Honor.

4 MR. MILLER: He can be excused completely
5 on my part.

6 THE COURT: Okay. You may stand down.
7 You are free to go. If they need to recall you, they'll
8 give you a call but you can leave the courthouse if you
9 want.

10 THE WITNESS: All right.

11 THE COURT: Call your next witness.

12 MR. RUCKER: Yes, sir, Your Honor.
13 Donita Richards.

14 DONITA RICHARDS,
15 of lawful age, having been first duly sworn on her oath to
16 state the truth, and nothing but the truth, testifies as
17 follows:

18 DIRECT EXAMINATION

19 MR. RUCKER:

20 Q. If you would, state your full name and your address
21 for the Court, please.

22 A. Donita Jane Richards, 315 East Pine, Arkansas City,
23 Kansas.

24 Q. Thank you, Miss Richards. Are you married, ma'am?

25 A. Yes.

1 Q. Who is it you're married to?

2 A. Curtis Dean Richards.

3 Q. All right. He is here in the courtroom today, or
4 pardon me --

5 A. He was, was.

6 Q. And how long have you been married to Mr. Richards?

7 A. Fifteen years.

8 Q. All right. And have you resided with him in the
9 same residence with him the entirety of your marriage, the
10 15 years?

11 A. Well, no.

12 Q. All right. You've moved several times?

13 A. Yes.

14 Q. All right. Where do you currently reside, ma'am?

15 A. 315 East Pine.

16 MR. MILLER: Your Honor, maybe we can
17 help. We stipulate that posed questions with regard to the
18 residency, the answers would be the same of this witness.

19 MR. RUCKER: If the Court desires then, I
20 would ask the appropriate question as to how she voted.

21 THE COURT: Just so I'm sure, your prior
22 address was 1207 North D in Ark City?

23 THE WITNESS: Yes, sir.

24 THE COURT: You were a resident there for
25 two years?

1 THE WITNESS: Yes, sir.

2 THE COURT: Proceed.

3 MR. RUCKER:

4 Q. Did you cast a ballot, Donita, in the race between
5 Mr. Jones and Mr. Shriver?

6 A. Yes, sir.

7 Q. How did you cast your ballot, ma'am?

8 A. For Joe Shriver.

9 Q. Okay. You're absolutely certain of that?

10 MR. MILLER: Object, Your Honor, as
11 leading.

12 A. I'm positive.

13 MR. MILLER: Your Honor, I'd ask the
14 witness --

15 THE COURT: Yes, there wasn't any
16 question there. She answered the question. It was asked
17 and answered anyway. You may inquire.

18 MR. MILLER: Thank you, Your Honor.

19 CROSS-EXAMINATION

20 MR. MILLER:

21 Q. Mrs. Richards, do you remember how you voted for
22 governor?

23 A. For Governor? If you tell me who they were, I'll
24 tell you who I voted for.

25 Q. Okay. You don't remember who ran for Governor?

1 A. Well, vaguely.

2 Q. I'm not trying to embarrass you. They may sound
3 like I'm trying to embarrass you but these are important
4 questions.

5 A. I know but --

6 THE COURT: I need to advise her of her
7 privilege as well.

8 MR. MILLER: A little late.

9 THE COURT: Mrs. Richards, you have a
10 right not to divulge for whom you voted in any other race
11 besides this one that the Court is here concerned about.
12 And if you wish to exercise that privilege, you may do so
13 by saying I decline to answer and signify to me that you
14 wish to exercise that privilege or you may answer the
15 questions if you want to, but that's entirely up to you.
16 You cannot be compelled to divulge how you voted for any
17 other race than the one that you've already testified
18 about.

19 THE WITNESS: Okay.

20 THE COURT: Okay. Now proceed, counsel.

21 MR. MILLER:

22 Q. Miss Richards, again my question related to the
23 candidates for Governor. Do you recall who the candidates
24 for Governor were?

25 A. No.

1 Q. That's fine. Did you vote on the race for Governor?

2 A. Yes.

3 Q. Were there races on that ballot that you didn't vote
4 on?

5 A. Were there what?

6 Q. Were there any races on the ballot -- there is
7 several races on the ballot. Were there any that you
8 didn't mark at all?

9 A. I believe I marked all of them.

10 Q. Do you remember who you voted for for State
11 Representative?

12 A. I don't -- do I need --

13 MR. RUCKER: Asked and answered, Your
14 Honor.

15 THE COURT: That's the one we're here
16 for.

17 A. I voted for Joe Shriver. Okay. He's got a lot of
18 integrity. We heard a lot of good things about how honest
19 he was, how kind he was and we voted for him. That's why I
20 voted for him. I don't know him personally. We just got
21 into this political thing, but we just wanted our God-given
22 right to vote. We're sorry we have.

23 MR. MILLER:

24 Q. Well, and I apologize for that and I apologize --

25 A. Because I don't remember who all ran.

1 Q. That's fine, and again, my apology that you are drug
2 into this. None of us have any choice about it, something
3 that has to be done. We're trying to make it as painless
4 as possible for everyone and we appreciate your being here
5 and please don't let it impact your future choices in
6 voting.

7 THE COURT: Do you have any questions,
8 counsel?

9 MR. MILLER: I'm trying to get through
10 it.

11 MR. MILLER:

12 Q. Did you have a discussion with anyone prior to
13 coming to court today about how you voted in the November
14 election?

15 A. My husband and I discussed it between the two of us
16 last night.

17 Q. How did it happen that you were discussing it last
18 night?

19 A. Because we'd been subpoenaed to court.

20 Q. Did anyone talk to you prior to being subpoenaed
21 about how you cast your vote?

22 A. No, sir.

23 Q. After you were subpoenaed, did you talk to anyone
24 prior to coming to court today as to how you had voted
25 other than your husband?

1 A. No, sir.

2 Q. I want you to think about that. Did you talk to any
3 attorneys prior to coming to court?

4 A. I don't know any attorneys.

5 Q. Excuse me?

6 A. I don't know any attorneys.

7 Q. Okay. Can you explain to me why one of the
8 attorneys would have approached me indicating to me
9 this morning that I was not going to care for your
10 testimony?

11 A. I'm sorry. I do not.

12 Q. Okay. Thank you.

13 REDIRECT EXAMINATION

14 MR. RUCKER:

15 Q. Miss Richards?

16 A. Yes, sir.

17 Q. Who subpoenaed you, ma'am?

18 A. I guess it was you. I don't know. I stayed in the
19 house most of the time.

20 Q. Okay. So you may have met me last night, is that
21 accurate?

22 A. Yes. But I didn't know you were an attorney. Are
23 you an attorney?

24 Q. Yes, ma'am.

25 A. Okay.

1 Q. I try not to act like one.

2 A. Okay.

3 Q. You are certain who you voted for, are you
4 not?

5 A. I'm positive.

6 MR. MILLER: Your Honor, that's --

7 THE COURT: Sure. That's unnecessary.

8 MR. RUCKER: No further questions. No
9 further questions.

10 THE COURT: Any other questions?

11 MR. MILLER: No, Your Honor.

12 THE COURT: You may stand down. You are
13 excused. I already excused your husband. He may have left
14 without you.

15 THE WITNESS: Probably has. Thank you.

16 THE COURT: Call your next witness.

17 MR. RUCKER: Yes, Your Honor. Ruby
18 Schalk.

19 RUBY SCHALK,
20 of lawful age, having been first duly sworn on her oath to
21 state the truth, and nothing but the truth, testifies as
22 follows:

23 MR. RUCKER: Before we begin, Your Honor,
24 Donita's subject to recall, is she not?

25 THE COURT: (Affirmative head nod.)

DIRECT EXAMINATION

1
2 MR. RUCKER:

3 Q. Miss Schalk, if you would, state your name and
4 address for the benefit of the Court and counsel.

5 A. Ruby Schalk, 305 East Windsor Road in Arkansas City.

6 Q. Yes, ma'am. And how long have you resided at that
7 address, ma'am?

8 A. I'm on my third year.

9 Q. Are you registered to vote at that address?

10 A. I thought I was.

11 Q. Well, after you moved to that address, ma'am, did
12 you register to vote?

13 A. Yes, I did.

14 Q. All right. And do you know approximately when that
15 was?

16 A. It was right after I moved but I can't give you the
17 date.

18 Q. Yes, ma'am. If I were to indicate to you that it
19 was 12-31-91, would that surprise you?

20 MR. MILLER: Your Honor, if he was to
21 indicate that to her, it would be a leading question.

22 MR. RUCKER: When did you -- I'll strike
23 and rephrase.

24 MR. RUCKER:

25 Q. When did you move, ma'am, to the Windsor Road

1 address?

2 A. In September of '92.

3 Q. All right. Where did you live before that time?

4 A. At 1420 South C Street.

5 Q. Okay. 1400 block anyway?

6 A. Yes.

7 Q. All right. Do you recall the circumstances
8 surrounding your registering to vote?

9 A. I went to the water department and I registered at
10 the water department. They gave me a yellow slip. I took
11 that to the presidential voting when I voted presidential
12 and I gave them the slip where I registered, I mean where I
13 voted, and they said they would send that in and everything
14 would be all right. I assumed it was.

15 Q. Yes, ma'am.

16 A. So then I voted this last vote and then I assumed it
17 was still all right. Nothing was said.

18 Q. Yes, ma'am. All right. You are indicating that you
19 moved in or around September of 1991?

20 A. -'2, '92.

21 Q. She said '92, September of '92.

22 A. And I registered, reregistered after that with a
23 yellow -- she gave me a yellow register slip.

24 Q. All right. All right. Do you specifically recall
25 where you were living though at the time that you cast --

1 pardon me, the time that you registered to vote?

2 A. At my present address.

3 Q. All right. And from the time of your present
4 address up until today's date you have not moved, is that
5 accurate?

6 A. That's right. I have not.

7 Q. When you present -- did you present yourself to vote
8 in the November election this year?

9 A. Yes.

10 Q. All right. And when you presented yourself to vote,
11 if you would, tell the Court what occurred.

12 A. I still was not on the books but they let me fill
13 out -- they took my -- I meant my deal, my paper and they
14 said they would send it in and write a note so that they
15 could get that straightened out, that I should have been on
16 that book.

17 Q. All right. And did you fill out the appropriate
18 paperwork that you were asked to fill out by the -- by the
19 Court -- pardon me, by the election board workers?

20 A. They didn't have me fill out any papers this last
21 time. All I filled -- all I did was my vote and they took
22 and put it in an envelope.

23 Q. All right. What, if anything, did you subsequently
24 find out was wrong with your voter registration?

25 A. I didn't know it was wrong until I was called

1 recently and they said it still had my old address on it.

2 Q. All right.

3 A. And I don't know what happened to the one that I had
4 before that I had since then.

5 Q. All right. But you do recall registering to vote?

6 A. Yes, I did.

7 Q. And again, I want to make certain that we get as
8 clear a picture as possible. Where did you register to
9 vote, ma'am?

10 A. At the water department in Arkansas City.

11 Q. All right. And you are indicating that was sometime
12 after you moved?

13 A. After I moved to my present address, yes, sir.

14 Q. All right. And that you have exercised your
15 franchise in every general election since that time?

16 A. Right.

17 Q. Do you remember where in the city offices of
18 Arkansas City that you registered to vote?

19 A. I registered at the water department which is there
20 in the city building in Arkansas City, that office.

21 Q. Okay. You indicated that someone contacted you.
22 Who contacted you about your vote this time around, ma'am?

23 A. I can't remember his name.

24 Q. Okay. All right. What, if any, phone calls did you
25 receive from the Cowley County clerk's office?

1 A. She -- yes, she told me that she would send me a new
2 registration paper card to fill out and send it back in,
3 and I got it Friday. I filled it out and sent it back in
4 that same day.

5 Q. Okay.

6 A. To reregister she said that's what I needed to do.

7 Q. Okay. And did she tell you why it is that she
8 needed to do that?

9 A. Because the other one still had my old address.

10 Q. Okay. All right. Did she have any other objections
11 besides the old address?

12 A. No, that was it.

13 THE COURT: Is this in a different ward
14 or precinct, the move?

15 MR. RUCKER: I believe that it would be.

16 THE WITNESS: Yes, sir. I moved from the
17 south end of town to the north end of town.

18 MR. RUCKER: I believe that it would be.

19 THE COURT: Was her vote counted or
20 challenged and not counted or --

21 MR. RUCKER: This particular -- again,
22 the foundation would show that in this particular instance
23 she did not -- it was challenged but it was not counted.

24 THE WITNESS: That's what I was told, it
25 wasn't counted.

1 THE COURT: Challenged and not counted.
2 Thank you.

3 MR. RUCKER: I can reserve my question,
4 Your Honor, but the argument -- of course, we'll reserve
5 argument but I'll either reserve the final question --

6 MR. MILLER: He doesn't have to.

7 THE COURT: I don't think we need to. We
8 got the ballot.

9 MR. MILLER: It's in the envelope. It's
10 preserved.

11 THE COURT: That's the reason for my
12 question. If we got the ballot, I don't think we need to
13 ask.

14 MR. RUCKER: Yes, sir, you are correct.

15 MR. MILLER: I don't think I have any
16 questions, Your Honor.

17 THE COURT: You are excused. You may
18 step down.

19 MR. RUCKER: Your Honor, I would like
20 this witness to be subject to recall.

21 THE COURT: That means they may call you
22 up and call you back to the courthouse, but you are done as
23 far as we are concerned today.

24 MR. RUCKER: Correct.

25 THE WITNESS: It's all right for me to go

1 home then?

2 THE COURT: Yes.

3 MR. RUCKER: Russell Wayne Keefe.

4 RUSSELL WAYNE KEEFE,
5 of lawful age, having been first duly sworn on his oath to
6 state the truth, and nothing but the truth, testifies as
7 follows:

8 DIRECT EXAMINATION

9 MR. RUCKER:

10 Q. Mr. Keefe, would you state your full name for the
11 Court.

12 A. Russell Wayne Keefe.

13 Q. Mr. Keefe, where do you reside, sir?

14 A. 911 North C Street.

15 Q. All right. And how long --

16 THE COURT: What town is that?

17 A. That's Arkansas City.

18 Q. And how long have you lived there?

19 A. I've lived there since July of '93.

20 Q. July of '93. And where did you live before that
21 time?

22 A. I believe it was 610 North Eighth.

23 Q. And that was your prior residence before you moved
24 into your current address?

25 A. Yes. I'm not sure about the address but I think

1 that was it.

2 Q. All right. And did you vote in the general
3 election?

4 A. Yes.

5 Q. All right. And did you cast a ballot, sir, in the
6 79th District?

7 A. Yes.

8 Q. For whom, sir, did you cast your vote?

9 A. For Mr. Shriver.

10 MR. RUCKER: No further questions at this
11 time.

12 CROSS-EXAMINATION

13 MR. MILLER:

14 Q. Mr. Keefe, do you know who the other candidate was
15 for the 79th District State Representative?

16 A. No -- Jones.

17 Q. Do you know which of the two is Republican and which
18 is Democrat?

19 A. Yeah, Jones is Republican.

20 Q. Do you remember who you voted for for Governor?

21 A. Yeah, I voted --

22 THE COURT: Just a second. He only asked
23 you if you remember for whom you voted. He didn't ask you
24 how you voted.

25 THE WITNESS: Yeah.

1 MR. MILLER: Then I'm going to, Your
2 Honor.

3 THE COURT: Well, I need to tell you that
4 you have a privilege not to disclose for whom you voted in
5 any other race.

6 THE WITNESS: Uh-huh.

7 THE COURT: You can testify about what
8 you testified here concerning this particular race because
9 this is a contested election, but you have an absolute
10 privilege not to disclose how you voted in any other race,
11 and if you wish to exercise that privilege, you may do so
12 by telling me I decline to answer and letting me know, or
13 you can waive that privilege and answer the question if you
14 so desire. It's all up to you. Okay. Proceed.

15 THE WITNESS: I voted for the Republican
16 candidate.

17 MR. RUCKER: Your Honor, I would ask --

18 THE COURT: Well, there wasn't a
19 question.

20 MR. RUCKER: Correct.

21 THE COURT: Wait till he asks the
22 question.

23 THE WITNESS: I'm sorry.

24 MR. MILLER:

25 Q. My question is: Who did you vote for for Governor?

1 MR. RUCKER: Objection, Your Honor,
2 relevance.

3 THE COURT: I take it this is for testing
4 his memory?

5 MR. MILLER: Yes, Your Honor.

6 THE COURT: I'll overrule.

7 A. I voted for the Republican. As far as the memory, I
8 cannot recall his name. That's pretty sad but --

9 MR. MILLER:

10 Q. Do you remember the candidates for congress?

11 A. Yeah, Glickman and Tiahrt.

12 Q. Do you remember who the candidates were for
13 Insurance Commissioner?

14 A. No.

15 Q. This is worse than school, isn't it?

16 A. Yeah, it is. That race I didn't really care about
17 so I just voted Republican so --

18 Q. Did you -- do you remember who you voted for for
19 Secretary of State?

20 A. Secretary of State, the same, yeah.

21 Q. Treasurer?

22 A. Same deal, yeah.

23 Q. How is it you remember how you voted in the State --
24 let me finish my question -- for State Representative?

25 A. For this race?

1 Q. State Representative. Do you know which race that
2 is?

3 A. Yeah, it is -- I remember it because I know the
4 Shrivvers, and that's one of the reasons I went to vote.

5 Q. You know Mr. Shriver to be a man of integrity?

6 A. Uh-huh.

7 MR. MILLER: That is all, Your Honor.

8 THE COURT: You may inquire.

9 MR. RUCKER: No further questions, Your
10 Honor. I -- well, I want to make absolutely certain that
11 we made it clear.

12 REDIRECT EXAMINATION

13 MR. RUCKER:

14 Q. You did not reregister -- or pardon me. What, if
15 any, registration did you perform to become a duly
16 elected -- pardon me, good night. What, if any, voter
17 registration activities did you participate in at your new
18 address, 911 North C Street in Arkansas City, Kansas?

19 A. None.

20 MR. RUCKER: All right. No further
21 questions.

22 THE COURT: You may stand down. They may
23 want to recall you at some later time, but you are free to
24 leave the courthouse now as long as you leave a phone
25 number with them or something like that.

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MR. RUCKER: Your Honor --

THE COURT: Before you do that, counsel approach the bench.

(An off-the-record discussion was here had.)

FILOMENA GARCIA,

of lawful age, having been first duly sworn on her oath to state the truth, and nothing but the truth, testifies as follows:

DIRECT EXAMINATION

MR. RUCKER:

Q. Miss Garcia, if you would, state your current -- pardon me, your full name and your current address.

A. My full name is Filomena Garcia and it's 1424 South C Street.

Q. Miss Garcia, how long have you lived at that address?

A. Since 1956.

THE COURT: Is that Ark City?

THE WITNESS: Yes, sir.

MR. RUCKER: Arkansas City.

(An off-the-record discussion was here had.)

MR. RUCKER:

Q. Miss Garcia, I want to make certain that I've understood your response. You lived at 1422 South C Street since 1956?

1 A. Yes.

2 Q. Okay.

3 THE COURT: I got 1424.

4 MR. MILLER: That's the problem, Your
5 Honor. He did say 1422 and that's the whole problem.

6 MR. RUCKER: Well, that isn't the whole
7 problem, Your Honor.

8 THE COURT: Well, did she say -- did you
9 not say 1424?

10 THE WITNESS: Well, it's the same house.

11 MR. MILLER: And he just said -- it's
12 important to know that he just said when he asked the
13 question 1422.

14 THE COURT: Yeah, I heard him and I
15 wanted to make sure that I heard her correctly. Proceed.

16 MR. RUCKER: That's correct.

17 MR. RUCKER:

18 Q. Miss Garcia, do you recall participating in the
19 election of 1988?

20 A. No.

21 Q. Do you recall participating in the election of 1990?

22 A. I can't remember.

23 Q. Yes, ma'am. Does that mean you may have
24 participated but you simply don't know?

25 A. I can't remember none of that.

1 Q. Okay. All right. Do you recall participating in
2 the 1992 election?

3 A. Can't remember.

4 Q. Yes, ma'am. And this past -- this past election,
5 ma'am, just a month ago, did you participate in the 1994
6 election?

7 A. Did I vote?

8 Q. Yes, ma'am.

9 A. Yes.

10 Q. Okay. And did you participate specifically in the
11 race between Mr. Shriver and Mr. Jones?

12 A. Mr. Shriver.

13 Q. Yes. You recall that race?

14 A. (Affirmative head nod.)

15 Q. For whom did you vote, ma'am?

16 A. Mr. Shriver.

17 Q. All right. When you went to the polls, Miss Garcia,
18 did you -- do you recall going to the polls that day,
19 ma'am?

20 A. Yes.

21 Q. Okay. Can you tell the Court what happened when you
22 went to the polls?

23 A. Well, they said I wasn't registered.

24 Q. Yes, ma'am. Did they indicate -- what, if any,
25 reason did they give you for not being registered?

1 A. That I didn't have the same address, and I've lived
2 there since '56.

3 Q. Yes, ma'am. All right. What did they do in
4 response after they indicated that you had a problem with
5 your address? What happened next?

6 A. They were kind of being -- they didn't know whether
7 to take my vote.

8 Q. Okay.

9 A. But they -- on account of the address.

10 Q. Then what happened after that, after they had a
11 discussion amongst themselves?

12 A. They wrote some kind of -- they took my vote but
13 they put it in a brown envelope.

14 Q. Yes, ma'am. Okay. And did you sign the outside of
15 that envelope to your remembrance? If you don't remember,
16 that's all right. Ma'am, do you recall?

17 A. I don't remember.

18 Q. Yes, ma'am. All right. Did the county election
19 office ever contact you after the election was over with,
20 ma'am?

21 A. No.

22 Q. Okay. Do you recall the place that you voted?

23 A. It's the First Church of God on Eighth Street.

24 Q. Have you voted there for many years?

25 A. Yes.

1 MR. RUCKER: No further questions at this
2 time, Your Honor.

3 MR. MILLER: No questions, Your Honor.

4 THE COURT: Can this witness be excused
5 subject to recall?

6 MR. RUCKER: Subject to recall.

7 THE COURT: Okay. You may stand down.
8 You are excused. You can leave the courthouse. They may
9 call you back but they'll reach you by phone.

10 MR. RUCKER: Your Honor, I'd like to call
11 to the stand Edith Dickerson.

12 EDITH DICKERSON,
13 of lawful age, having been first duly sworn on her oath to
14 state the truth, and nothing but the truth, testifies as
15 follows:

16 DIRECT EXAMINATION

17 MR. RUCKER:

18 Q. If you would, state your full name for the Court.

19 A. Edith Jean Dickerson.

20 Q. Miss Dickerson, where are you employed?

21 A. Presbyterian Manor in Arkansas City.

22 Q. And how long have you been employed at Presbyterian
23 Manor?

24 A. About 11 years.

25 Q. Ma'am, what is your current address?

1 A. 1321 North Fourth Street.

2 Q. In Arkansas City?

3 A. Yes, sir.

4 Q. All right. Where did you live prior to living at
5 that address, ma'am?

6 A. 810 North Third.

7 Q. All right. And how long did you live at that
8 address, ma'am?

9 A. The 810?

10 Q. The 810 North Third, yes, ma'am.

11 A. About 20 some years.

12 Q. All right. And during that period of time that you
13 lived on Third Street, were you married?

14 A. Yes.

15 Q. When -- and you indicated that you moved. When did
16 you sell your home, ma'am, on Third Street?

17 A. In October. We gave possession October the 14th.

18 Q. All right.

19 THE COURT: What year?

20 THE WITNESS: This year.

21 THE COURT: Okay.

22 MR. RUCKER:

23 Q. What was the date of closing on the contract, if you
24 recall?

25 A. I think it was on the 11th.

1 Q. Why did you sell your house, ma'am?

2 A. Because of a divorce.

3 Q. All right. And as a result of the divorce decree,
4 who was given occupancy of the home?

5 A. I was.

6 Q. What was the date of the divorce?

7 A. April the 28th, 1994.

8 Q. Did you, in fact, pursuant to the divorce decree
9 retain the residence?

10 A. Yes, I did.

11 Q. And did you live there alone after the divorce was
12 final?

13 A. Yes, I did.

14 THE COURT: This is the Third Street
15 address?

16 MR. RUCKER: Yes, sir.

17 THE COURT: Okay.

18 MR. RUCKER:

19 Q. Restated it was 810 North Third Street, was it not,
20 ma'am?

21 A. That's right.

22 Q. All right. In early October -- well, pardon me, the
23 real estate -- back to the real estate contract that we
24 indicated closed on the 11th you believed and possession
25 was the 14th, did you store many of your items in that

1 residence up to the 14th?

2 A. Yes, I did.

3 Q. Were you in actual possession of that residence up
4 to and including the 14th?

5 A. Yes. I gave possession to the new buyers at about
6 5 o'clock on the 14th.

7 Q. All right. Before the closing of the contract on
8 the 11th of October, did you, in fact, acquire a rental
9 property?

10 A. Yes.

11 Q. Why did you acquire a rental property, ma'am?

12 A. I had to move, have someplace to live.

13 Q. All right. Someplace to live after possession of it
14 was taken over by the new owners?

15 MR. MILLER: Your Honor, objection as to
16 leading.

17 MR. RUCKER: Well, why --

18 THE COURT: Rephrase it.

19 MR. RUCKER:

20 Q. Why did you have to get a rental, ma'am? You
21 indicated --

22 A. Because we were selling the house and I had to have
23 someplace to live.

24 Q. Okay. Where did you -- where -- what's the address
25 of the rental?

1 A. 1324 North Fourth.

2 Q. When did you acquire this rental?

3 A. The rent started October the 1st but I didn't move
4 in that day.

5 Q. Okay. And when did you start moving in some of your
6 personal possessions?

7 A. On the 1st.

8 Q. All right. And when did you finish moving in your
9 personal possessions from the address on 810 North Third
10 Street?

11 A. Was about 13th or 14th when we gave possession, the
12 final moving of the furniture and boxes and that kind of
13 thing.

14 Q. All right. When did you first sleep overnight at
15 the rental?

16 A. I think it was October the 3rd.

17 Q. Had you discussed with others what you would do with
18 your residence at 810 North Third Street in Arkansas City,
19 Kansas if this real estate contract did not close on the
20 10th?

21 A. Well, I would have moved back into it because the
22 divorce decree stated that I would have possession of that
23 residence until such time as it was sold.

24 Q. That was, in fact, your residence until that time?

25 A. Yes.

1 Q. Now, let's jump forward if we possibly can,
2 Miss Dickerson, to the 8th day of November, 1994. You
3 recall that day, do you not?

4 A. Uh-huh.

5 Q. All right. And where did you present yourself to
6 vote?

7 A. At the voting polls at Presbyterian Manor.

8 Q. All right. And you've already indicated that you
9 also work at Presbyterian Manor, is that accurate?

10 A. Yes.

11 Q. Why did you present yourself to the polls at
12 Presbyterian Manor, ma'am?

13 A. I really went down to see if I was eligible to vote
14 because I had not changed my place of residence and I had
15 previously voted at Northwest Community Center, and I
16 wanted to know if I needed to go over there or because I
17 had changed was I -- did I have eligibility to vote and
18 they said yes, I could vote but right there so --

19 Q. Did you, in fact, cast your ballot that day?

20 A. Yes, I did.

21 Q. Between the 3rd of October and the 14th of October,
22 where did you consider your residence?

23 A. Both places.

24 Q. Okay. Well, at that time -- an honest answer. You
25 maintained -- did you continue to go back to the residence

1 at 810 North Third Street?

2 A. Oh, yes, from early morning till late at night.

3 Q. You spent a great deal of time there?

4 A. Yes.

5 Q. Did you know for a fact, ma'am, whether or not the
6 precinct at 810 North Third Street would be a different
7 voting place than the one that you reported to?

8 A. I didn't know whether it would be or not.

9 Q. Okay. All right. What, if anything, did the
10 election board workers indicate to you about 810 North
11 Third Street being another precinct at all, if anything at
12 all?

13 A. I really don't remember what they said.

14 Q. Okay. Did you vote regularly when you lived at 810
15 North Third Street in Arkansas City?

16 A. Yes.

17 Q. Where was your precinct?

18 A. Northwest Community Center was where we voted.

19 Q. Do you recall ever missing an election while at that
20 address?

21 A. No, I don't think so. I am a regular voter.

22 Q. And you participated in this election and that is
23 accurate, is it not?

24 A. Yes.

25 Q. Do you recall specifically participating in the

1 Jones/Shriver race?

2 MR. MILLER: Your Honor, that's not
3 necessary. This ballot's sealed.

4 THE COURT: She can answer if she
5 participated.

6 MR. MILLER: Yeah, but it's a waste of
7 time.

8 THE COURT: Right.

9 MR. RUCKER: Okay. Indulge me if you
10 will.

11 THE COURT: Please proceed.

12 MR. RUCKER:

13 Q. Did you?

14 A. Yes.

15 Q. All right.

16 THE COURT: I take it her vote was
17 challenged, not counted?

18 MR. RUCKER: That is correct, Your Honor.

19 THE COURT: Okay.

20 MR. RUCKER:

21 Q. I'd like to dwell a little bit on what it is the
22 board workers actually indicated to you when you presented
23 yourself to vote.

24 MR. MILLER: Well, Your Honor, I'm going
25 to object unless they are available subject to

1 cross-examination to that being hearsay.

2 MR. RUCKER: They are, Your Honor. The
3 judge's name I believe is Dorothy Bohrer, is that not
4 accurate? We need to find out in the hall if she is here.

5 MR. MILLER: What's the name?

6 MR. RUCKER: I think it's Dorothy Boor.
7 Let me check. Pardon the pronunciation, Your Honor,
8 Bohrer. I think it's spelled B-O-H-R-E-R.

9 MR. MILLER: She's the only one?

10 MR. RUCKER: She is.

11 MR. MILLER: Is she the -- did we
12 ascertain whose statements we're about on here? There is
13 several people on the board.

14 MR. RUCKER: Well, she can state what
15 occurred to her if we get into that.

16 MR. MILLER: Well, she can't state that.

17 THE COURT: Well, the question I would
18 have is what's the point?

19 MR. RUCKER: I would proffer to the Court
20 what has already actually been stated that it is the policy
21 of the Cowley County clerk's office when individuals
22 present themselves to vote even if they are voting in the
23 wrong precinct and everyone in the room knows it, the
24 judges, the poll workers, the voter, they all know they're
25 in the wrong precinct, that the policy is not to turn

1 anyone away. The policy is to have them go ahead and cast
2 their ballot, Your Honor, at the precinct that they
3 presented themselves and that's why --

4 THE COURT: That's what this is
5 representative of?

6 MR. RUCKER: It is representative on the
7 point it did, in fact, occur. We're proffering that it did
8 occur in this instance.

9 THE COURT: Do you agree that that
10 occurred in this instance?

11 MR. MILLER: No.

12 THE COURT: I don't know what difference
13 that makes.

14 MR. MILLER: I don't know what occurred.
15 I don't know what was said. I don't know who it was said
16 by, and I object until we've established that the people
17 who are going to be quoted are, in fact, available and
18 subject to cross-examination.

19 THE COURT: Well, how is that material to
20 whether or not the vote should be counted or not counted?

21 MR. RUCKER: Yes, Your Honor.

22 MR. MILLER: If it's immaterial, that's
23 fine. We don't need to have the question.

24 THE COURT: Well, that's my question.

25 MR. RUCKER: The material part of it is,

1 Your Honor, is that she knew that and actually inquired at
2 Presbyterian Manor whether or not she could actually cast a
3 vote here or whether she was supposed to go back to her
4 former precinct of residence.

5 I believe Mr. Miller is going to argue a
6 technical error occurred because she voted outside her
7 technical precinct. That is the residence she closed the
8 11th and until a new owner took possession on the 14th
9 because this particular individual's already testified that
10 if this deal fell through, you know, she considered that
11 her residence until the 14th.

12 THE COURT: The question, the polling
13 place for the Fourth Street is a different precinct than
14 for the Third Street?

15 MR. RUCKER: It is, Your Honor.

16 THE COURT: And for the Fourth Street
17 it's Presbyterian Manor?

18 MR. RUCKER: Yes, Your Honor, on Fourth
19 Street it is and on Third Street it was --

20 THE COURT: Northwest Community?

21 THE WITNESS: Northwest community.

22 MR. RUCKER: Yes, sir, Your Honor, and
23 what we would argue is that if the poll workers happen to
24 be employing a technique to enlarge the franchise to get as
25 many individuals to vote that the individual voters should

1 not be penalized.

2 THE COURT: Well, this Court doesn't have
3 any policy.

4 MR. RUCKER: Yes, Your Honor.

5 THE COURT: The stated policy of who?

6 MR. RUCKER: The stated policy of
7 Mr. Gaston, Your Honor.

8 THE COURT: All right. Well, is that --
9 well, I see that is part of the grounds that you've alleged
10 in your amended notice, isn't it?

11 MR. RUCKER: We are attempting to count
12 this vote, Your Honor, and we do not want a technical error
13 on the part of a poll worker who did some franchising of
14 this individual when she cast a ballot at 810 North Third.
15 According to her testimony, she's an active voter.

16 MR. MILLER: As long as he doesn't ask
17 what did they tell you, I have no objection to delving into
18 the area that he wishes to cover. His last question,
19 specifically what I objected to is when he said what did
20 they tell you. There is several people on the board. As I
21 understand it, we only have one that's available and
22 subject to cross-examination. Until we can identify that's
23 the individual whose testimony we're delving into, it's all
24 hearsay and I object to it.

25 THE COURT: Well, I understand that but

1 I'm also questioning the materiality of it. Let's
2 proceed. You've heard his objection to hearsay but I
3 haven't heard the question to rule on, so proceed.

4 MR. RUCKER: Perhaps, Your Honor, and
5 obviously it is within the Court's appropriate domain since
6 foundation is so essential. We would, in fact, be
7 proffering now where we would be introducing foundation as
8 to who signed the poll card, you know, who she had a
9 conversation with, so on, so forth. I know it's a hardship
10 on Miss Dickerson.

11 THE COURT: Well, we can do this. We can
12 apply the testimony subject to hearsay objection, and if
13 you don't connect it up later with the proper people, then
14 the Court very well could order to it be deleted on the
15 basis of hearsay.

16 MR. RUCKER: Yes, Your Honor.

17 THE COURT: Proceed.

18 MR. RUCKER: Yes, Your Honor.

19 MR. RUCKER:

20 Q. What did you learn from the poll workers about where
21 you should cast your ballot, ma'am?

22 A. Well, when I went in, I asked if I should go back to
23 Northwest Community Center or could I vote there.

24 Q. What was their response, ma'am?

25 A. And they said --

1 MR. MILLER: Your Honor --

2 MR. RUCKER:

3 Q. And what, if anything, did you learn?

4 MR. RUCKER: I'll rephrase.

5 MR. MILLER: Or if we could make at least
6 some attempt or at least some preliminary inquiry if she
7 could identify who it was who told her.

8 THE COURT: That could be helpful.

9 MR. RUCKER: Yes, Your Honor.

10 MR. RUCKER:

11 Q. Do you recall who indicated that to you, ma'am?

12 THE COURT: Male, female, old, young?

13 A. I think it was three of the election board
14 members --

15 THE COURT: Okay.

16 A. -- said that it would be possible for me to vote
17 there and they gave me a card to change -- to give me a
18 change of address and I filled that out, and then they gave
19 me the ballot that was in a brown envelope.

20 Q. All right. And you cast that ballot, ma'am?

21 A. I did, and beyond that, I can't tell you what they
22 said word by word.

23 Q. But at no time did they indicate to you that you
24 should present yourself at your precinct of residence at
25 the other location?

1 A. No.

2 THE COURT: You want to inquire?

3 MR. RUCKER: Your Honor, if I may
4 approach.

5 MR. RUCKER:

6 Q. I would like for you to -- I've handed you a
7 document that has not yet been marked.

8 MR. RUCKER: I would ask that it be
9 marked.

10 MR. MILLER: And could I see it before he
11 hands it to her.

12 THE COURT: Let's get it marked first.

13 MR. MILLER: Yes.

14 (Petitioner's Exhibit No. 1F was marked for
15 identification.)

16 MR. MILLER: Your Honor, we'd stipulate
17 this indeed is the proper testimony. This is a copy of the
18 real estate sale agreement for the property already
19 attested to.

20 THE COURT: The exhibit number?

21 MR. RUCKER: Would be, Your Honor, 1F.

22 THE COURT: You offer that at this time?

23 MR. RUCKER: Yes, Your Honor.

24 THE COURT: 1F will be admitted. Well,
25 technically I didn't want that as 1F. That should be 2F.

1 That would be all right. I just wanted everything with
2 this as 1 and this would be 2. Let's remark that as
3 Exhibit 2.

4 (Petitioner's Exhibit No. 1F was remarked as 2F
5 for identification.)

6 THE COURT: So your records are complete,
7 that would be Exhibit 2. Any other questions of this
8 witness?

9 MR. RUCKER: Your Honor, I would just
10 simply ask no further questions of this witness at this
11 time, Your Honor.

12 CROSS-EXAMINATION

13 MR. MILLER:

14 Q. Miss Dickerson, when you went to vote, did you
15 inform the board as to when you had moved?

16 A. I don't recall.

17 Q. Do you recall speaking to me last week indicating
18 that you first slept at -- make sure I don't get
19 confused -- 1321 North Fourth --

20 A. Yes.

21 Q. That was October 3rd?

22 A. Yes.

23 Q. And that's the only place you've slept since that
24 time?

25 A. That's right.

1 Q. When you moved in, did you at that time -- when you
2 first slept there, did you at that time consider that to be
3 your residence?

4 A. Not particularly.

5 Q. But a moment ago you said you did.

6 A. Well, both places I said.

7 Q. Well, I'm asking about 1321 North Fourth.

8 A. I slept there. I guess you'd say that was my new
9 home, but on the other hand, my other home was not moved
10 out of yet.

11 Q. You hadn't moved out yet but when you first started
12 sleeping there, you did regard 1321 North Fourth as your
13 residence?

14 MR. RUCKER: Your Honor, that is not in
15 evidence and it's certainly not her testimony.

16 MR. MILLER: It's a question, Your
17 Honor.

18 MR. MILLER:

19 Q. Is that a fair statement?

20 MR. RUCKER: It was a statement, not a
21 question, Your Honor.

22 THE COURT: Well, rephrase.

23 MR. MILLER: I would ask it be read
24 back. I think it's fine.

25 (The requested portion of the record was

1 read by the reporter.)

2 MR. RUCKER: Your Honor, I would also --

3 MR. MILLER:

4 Q. Is that a fair statement?

5 A. I think I really thought both places were my
6 residence until I gave possession of the house to the
7 buyer.

8 Q. Now, as I understand it, when you went to the polls,
9 you did inform the board workers that you had changed your
10 residence?

11 A. Yes.

12 Q. And you don't recall that you told them anything
13 about when that occurred?

14 A. No, I don't remember.

15 Q. Do you remember when you had the utilities
16 disconnected at your house that you sold?

17 A. I think they were on until the 14th.

18 Q. Let me get this straight. You don't live on C
19 Street, right?

20 A. No, I don't live on C Street.

21 MR. MILLER: Thank you.

22 REDIRECT EXAMINATION

23 MR. RUCKER:

24 Q. Miss Dickerson, what was your intention, ma'am, what
25 was your intention if, in fact, this real estate contract

1 fell through?

2 MR. MILLER: Asked and answered Your
3 Honor.

4 THE COURT: It has.

5 MR. RUCKER: All right. No further
6 questions subject to recall.

7 THE COURT: You may stand down. Do you
8 have any other questions?

9 MR. RUCKER: No.

10 THE COURT: You may stand down. You may
11 be subject to recall but they'll phone you. You can leave
12 the courthouse today.

13 THE WITNESS: Okay. Thank you.

14 MR. RUCKER: I believe that we're well --

15 THE COURT: Oh, well, it's almost time
16 for a noon recess seeing it's 12:35.

17 (An off-the-record discussion was here had.)

18 THE COURT: I think what we'll do is
19 recess until oh, 1:15 or thereabouts, and what we'll do is
20 lock up the courtroom because we have all of these election
21 materials here and I don't want them available and I don't
22 see any convenient place, so we'll reconvene in about 45,
23 40 minutes or so.

24 (A brief recess was here had from 12:37 to
25 1:35 p.m.)

1 THE COURT: We'll go back on the record
2 after the noon recess. Counsel please enter their
3 appearances.

4 MR. RUCKER: Your Honor, Eric Rucker for
5 the contestant.

6 MR. WITTEMAN: Douglas Witteman, same.

7 MR. MILLER: Victor Miller, counsel for
8 the contestee is on shaky ground but retains his
9 representation of the contestee.

10 THE COURT: Call your next witness,
11 counsel.

12 MR. RUCKER: Your Honor --

13 THE COURT: Oh, by the way, during the
14 recess I had contact with the sheriff and he will do what
15 he can to secure the presence of Moddie Graham.

16 MR. RUCKER: Thank you, Your Honor. Your
17 Honor, I would like to call to the stand Barbara Warren,
18 and
19 I'll have her come up if she is not already in the
20 hallway.

21 THE COURT: All right.

22 (An off-the-record discussion was here had.)

23 MR. RUCKER: Your Honor, she is coming.

24 THE COURT: You are still under oath.

25 THE WITNESS: Okay.

1 BARBARA WARREN,

2 having been previously duly sworn, testified further as
3 follows:

4 DIRECT EXAMINATION

5 MR. RUCKER:

6 Q. Miss Warren, in preparation and to speed this matter
7 along if we possibly can, would you be so kind as to pull
8 the 1988 general election poll books from 2C, the 1990
9 general election poll books from 2C, the 1992 general
10 election poll books from 2C, the voter registration of Miss
11 Filomena Garcia and the challenged ballot of Miss Filomena
12 Garcia.

13 A. Okay. Filomena was a do not count, wasn't she?

14 Q. Yes, ma'am.

15 MR. MILLER: No, she was counted.

16 MR. RUCKER: We're thinking she ought not
17 to be counted but she was counted. She was counted.

18 THE WITNESS: Okay.

19 (Petitioner's Exhibit Nos. 3A, 4, 5 and 6 were
20 marked for identification.)

21 MR. RUCKER: Your Honor, I'm ready to
22 inquire.

23 THE COURT: Proceed.

24 MR. RUCKER:

25 Q. Miss Warren, I'll direct your attention to the 1988

1 general election poll books. Before we inquire about that,
2 if you would for benefit of the Court, what are poll books?

3 A. Poll books are written registers of the people that
4 came in that day to the polling area to vote.

5 Q. And what is the significance of failing to vote in
6 two November general elections?

7 A. Okay. K.S.A. 23- -- well, 25-2316c, Subsection D
8 states the purging process in which if you fail to vote in
9 two consecutive November general elections, you are subject
10 to having your name removed.

11 Q. Subject to when you fail to vote?

12 A. You will have your name -- you will have your name
13 taken off the active file. Also the process is that a
14 first-class letter is to be mailed to that voter telling
15 them that the records reveal that they have not voted in
16 the last two elections, November elections and a
17 registration card is to be inserted in with the letter
18 affording them a chance to reinstate themselves as active
19 voters if they wish.

20 Q. All right. What if -- pardon me, what, if anything,
21 did the Kansas statute say with regard to a voter's
22 registration, a voter's registration card being null and
23 void upon the failure to vote in two consecutive November
24 general elections?

25 A. Well, it makes them inactive voters.

1 Q. But does it say that -- I guess what I'm saying,
2 what, if anything, does the Kansas statute say with regard
3 to failing to vote in two consecutive November elections?

4 MR. MILLER: Well, Your Honor, if he
5 would cite the statute.

6 MR. RUCKER: It's 25-2316d and that's
7 exactly what the statute says.

8 THE COURT: 25-2316c?

9 MR. RUCKER: No, Your Honor. That's what
10 she said, Your Honor, but I'm citing another statute that
11 is actually more ancient. It's 25-2316d.

12 THE COURT: And is a different statute?

13 MR. MILLER: My point is whatever the
14 statute says is what the statute says. She doesn't need to
15 tell us what it says.

16 MR. RUCKER: It does, in fact, though,
17 Your Honor, explain why they took certain actions on a
18 voter's registration card.

19 THE COURT: Well, the statute says it's
20 hereby declared to be void.

21 MR. RUCKER: Yes, Your Honor.

22 MR. MILLER: Which is where we are, Your
23 Honor.

24 MR. RUCKER: 25-23- -- pardon me, you
25 didn't address my --

1 THE COURT: 25-2316. It's not a
2 subsection, it's a statute d.

3 MR. RUCKER: Yes, Your Honor.

4 MR. RUCKER:

5 Q. Is that your understanding of the law after failing
6 to vote in two consecutive --

7 A. Yeah.

8 Q. Your registration is null and void?

9 A. Yes, that's right.

10 Q. Pursuant to that statute, when an individual fails
11 to vote in two November general elections, what actions
12 does your office take?

13 A. If they neglect to vote in two November general
14 elections?

15 Q. Yes, yes.

16 A. Consecutive elections?

17 Q. Yes.

18 A. We mail a first class letter to them nonforwardable
19 and inside is the letter stating the statute and that their
20 name will be taken off the active roll and a registration
21 card is inserted into the envelope affording them the
22 chance to reinstate themselves if they take that action.

23 Q. Yes, ma'am. Notice we're to the 1988 general
24 election poll books from 2C. Do you find the name Filomena
25 Garcia as having voted in that election?

1 MR. MILLER: Which one, I'm sorry?

2 MR. RUCKER: Pardon me, I'll rephrase.

3 MR. MILLER: No, I --

4 THE COURT: Exhibit No.?

5 MR. RUCKER: The 1988 general poll books,
6 general election poll books.

7 THE COURT: I need to know for the record
8 what exhibit number that is.

9 THE WITNESS: 4.

10 MR. RUCKER: Would you like to see that,
11 counsel?

12 MR. MILLER: Yeah. Well, no, I don't
13 need to see it. It was 4?

14 THE COURT: Exhibit No. 4.

15 A. I went through this book to see last week and looked
16 for her name and I couldn't find it, and I had another lady
17 in my office go through this same book in case I missed it
18 and she couldn't find it. I can go through it again this
19 morning -- this afternoon if you like.

20 MR. RUCKER:

21 Q. If you would, and when you say "her," who are you
22 referring to?

23 A. The lady that works next to me downstairs, Pat Owen.

24 Q. I mean "her," when you looked for "her" in the poll
25 book.

1 A. Filomena Garcia.

2 Q. Yes, ma'am. If you would.

3 A. Just a minute. No, sir. She is not in the book,
4 the '88.

5 Q. All right. As an issue of foundational importance,
6 you have the registration card before you which has been
7 marked as an exhibit. Would you indicate to the Court what
8 that exhibit has been marked, the registration card and
9 what address or addresses that registration shows.

10 A. Just the computer printout is marked, not the card.

11 Q. Not the card?

12 A. Correct, 3A.

13 Q. The 3A would be the Petitioner's Exhibit No. 3A, is
14 that what you are indicating?

15 A. Yeah.

16 Q. Because we also have a precinct called 3A.

17 A. I thought you asked for the number.

18 Q. I did and you correctly gave it, and what precinct
19 is Filomena Garcia located in?

20 A. We have it on the card as 2C.

21 Q. All right. That's the poll book that you just made
22 reference to?

23 A. Yes, sir.

24 Q. Didn't find her in the 1988?

25 A. That is correct.

1 Q. Now, there has, in fact, been some controversy about
2 whether she lives at 1422 or 1424. Would you explain for
3 the benefit of the Court what the nature of that
4 controversy was and whether it has impact into that.

5 A. I'm not sure I really understand why she has two
6 addresses on her house, but I did visit with Filomena on
7 the phone. She didn't -- I can't recall whether she told
8 me about the two addresses but I did talk to a census
9 worker and she told me that there were two.

10 MR. MILLER: Your Honor, I'm going to
11 object to that as hearsay.

12 THE WITNESS: Okay. Sorry.

13 THE COURT: It's what someone else told
14 you?

15 THE WITNESS: Sure.

16 MR. RUCKER:

17 Q. What, if any, action -- let me ask, what, if any,
18 did you take to purge -- or what action did you take which
19 would adversely affect Miss Garcia's ability to vote or
20 screw up an address, just in regard to the differences in
21 that address whether it's 1422 or 1424?

22 A. We have her in the inactive file at 1422 South C.

23 Q. But did you put her in the inactive file because of
24 her address?

25 A. No.

1 Q. All right. That is all I wanted. Okay. Now back
2 to the 1990 election poll votes from 2C. Could you
3 explain -- and would you identify for the Court what has
4 been marked as far as an exhibit.

5 A. No. 5.

6 Q. No. 5, and whether or not Miss Garcia voted in the
7 1990 general election as reflected in the book.

8 A. No, sir. She is not in the book.

9 Q. All right. That would make a second consecutive
10 November general election in which she did not cast a
11 ballot?

12 A. That is correct.

13 Q. Pursuant to her specifically now, you've indicated
14 what the policy of the office is pursuant to her missing
15 two consecutive November general elections. What action,
16 if any, was taken on Miss Garcia's voter registration?

17 A. In the -- after the 1990 election, November
18 election, we would have mailed her a letter telling her
19 that the records reveal that she has not voted in the past
20 two November elections, consecutive November elections and
21 that her name would be dropped from the active file.

22 Q. Yes, and what notation, if any, do you make on the
23 registration card to indicate that you have, in fact,
24 purged an individual from the voter registration records
25 pursuant to filing that two consecutive November general

1 election participation?

2 A. We have a double N in our office that everybody
3 knows that means not voting in two consecutive November
4 elections.

5 Q. Double N meaning November, November?

6 A. Yeah, I guess. It got started a long time ago. We
7 just kind of stuck with it.

8 Q. All right. Does that designation appear on the
9 voter registration card?

10 A. Yes, sir.

11 Q. Of Filomena Garcia?

12 A. Yes, sir. Yes, sir.

13 Q. What dates, if any?

14 A. There is no date.

15 Q. Pursuant to that NN --

16 MR. RUCKER: And I'd like to if I might
17 now show that the registration card has been identified.

18 (An off-the-record discussion was here had.)

19 (Petitioner's Exhibit Nos. 3B, 3C and 3D were
20 marked for identification.)

21 MR. RUCKER: I'm going to hand the
22 exhibit to counsel allowing counsel to take a look at what
23 has been marked as Petitioner's Exhibit 3B, which is, in
24 fact, the voter registration card that you've been
25 referring to, Miss Warren. Take a look at that particular

1 exhibit.

2 THE WITNESS: That pink note, that's
3 mine.

4 MR. RUCKER: I'm not going to offer
5 that. Counsel has had an opportunity to review 3B.

6 MR. RUCKER:

7 Q. There is, in fact, another voter registration card
8 however that has been marked 3C. Can you tell the Court
9 what that registration card is.

10 A. That's marked 2C.

11 Q. Pardon me?

12 THE COURT: Exhibit number should be 3C.

13 MR. RUCKER: Oh, it is 3C.

14 A. Okay. I thought you were reading precincts.

15 MR. RUCKER:

16 Q. That's all right. It's the second registration card
17 which has been marked 3C.

18 A. It's a duplicate registration, same address is what
19 I'm saying.

20 Q. What is the purpose of having a duplication?

21 A. Well, it looks like they registered in 1984 at 1422
22 South C and again October 8th, 1984, the same year at the
23 same address, same name.

24 Q. So there is only one active voter registration card
25 that you have recognized, that you did recognize and the

1 date of that registration is?

2 A. The new one is October 8th of '84.

3 Q. Or the last of the two --

4 A. Right.

5 Q. -- that she lodged with your office. All right.

6 A. Uh-huh, uh-huh.

7 Q. Has Miss Garcia reregistered since 1988, pardon me,
8 1984?

9 A. No, sir, not to my knowledge. We don't have her on
10 the computer anyway.

11 Q. Did you have contact with Filomena Garcia after
12 November 8th, 1994, which was election day, after that
13 date?

14 A. Yes, sir.

15 Q. What was the nature of your contact with her?

16 A. We were working up the challenged ballots and we
17 tried to call as many people as we could to find out why
18 they were challenged and so forth. Looks like my writing.
19 I talked to her myself. My note on here says address
20 changed but not moved and that's that double address --

21 Q. Yes, ma'am.

22 A. -- problem.

23 Q. No other notation?

24 A. Huh-uh, huh-uh.

25 Q. When you talk about the notation that you are

1 speaking of, where does that notation -- where is that
2 notation?

3 A. My notation?

4 Q. Yes.

5 A. It's on the challenged ballot envelope.

6 Q. All right. And that has been marked as Petitioner's
7 Exhibit No. --

8 A. 3D.

9 Q. -- 3D as in dog. All right. As a result of your
10 conversation with Filomena Garcia, was the -- was a
11 determination made by your office whether or not to count
12 the vote?

13 A. She was very adamant, very adamant that she had
14 voted.

15 Q. That was never a matter in question, you knew that
16 she had voted?

17 A. It was -- well, the prior year she said she had
18 never missed an election.

19 Q. Okay.

20 A. And it was late the day before canvassing and we
21 didn't go up and pull the poll books to check her out. She
22 was very adamant and we went with what she said about
23 having voted so we went ahead and counted her --

24 Q. Okay.

25 A. -- on the basis of her story.

1 Q. All right.

2 A. But --

3 Q. At the time that you had the opportunity to speak
4 with Miss Garcia, did she indicate anything else to you
5 during this conversation?

6 A. Who she voted for. She was very adamant.

7 Q. Who did she indicate that she had voted for?

8 A. Mr. Shriver.

9 Q. Yes, ma'am.

10 A. Uh-huh.

11 Q. Upon reflection and your understanding of Kansas
12 election procedure, what is your opinion regarding whether
13 or not Miss Garcia's vote should be cast?

14 MR. MILLER: Your Honor, I'm going to
15 object to that. That calls for a legal conclusion.

16 THE COURT: I'll sustain that. I think I
17 have to decide that.

18 MR. RUCKER: Your Honor --

19 THE COURT: Unless you are doing it to
20 lay the foundation for something that she did afterwards,
21 really it invades the province of the Court.

22 MR. RUCKER: Yes, Your Honor, and that's
23 not my intention.

24 THE COURT: All right.

25 MR. RUCKER:

1 Q. You also have in your possession, Miss Warren, the
2 1992 general election poll books from --

3 A. Yes, sir.

4 Q. -- a precinct 2C. Would you review the poll books
5 and relate to the Court what voting activity, if any, Miss
6 Garcia had in the 1992 general election.

7 A. She did vote in '92.

8 Q. All right. What sort of a vote did she cast if, in
9 fact, you know?

10 A. For whom she voted for?

11 Q. No, ma'am. What sort of -- did she cast a
12 challenged ballot is what I'm after?

13 A. It has a CH beside the name assuming that means
14 challenged ballot. She wrote challenged beside other names
15 but CH besides Filomena.

16 MR. MILLER: We need to clarify the "she"
17 in this case.

18 A. She being the supervising judge who is Doris
19 Madden.

20 MR. RUCKER: All right. Doris Madden is,
21 in fact, subpoenaed, Your Honor. I do not know whether or
22 not she is subject to cross-examination.

23 MR. RUCKER:

24 Q. Miss Warren, the poll books that you have that have,
25 in fact, been marked as exhibits as well as every other

1 poll book in the customary and regular course of business,
2 do you maintain and keep a custodial record of the -- is it
3 your custodial responsibility to maintain those records in
4 the office of the county clerk?

5 A. We keep a voter history on just the last two general
6 election votes. Is that --

7 Q. Maybe I can be a little bit less oblique. The poll
8 books -- we'll find out. The poll books that you've
9 referred to, the '88 poll books, the '90 poll books, the
10 '92 poll books that we've been referring to, is it the
11 obligation of the county election officer to maintain --

12 A. Yes.

13 Q. -- those poll books in the regular course of
14 business?

15 A. They are kept upstairs in the vault area because we
16 don't need them except in instances after an election.

17 Q. Right. But it is your obligation, is it not, to
18 maintain those as opposed to someone else in the courthouse
19 and to remain as custodian to care for those documents?

20 A. I suppose, yeah.

21 Q. All right. Are the poll books -- to the best of
22 your knowledge and belief, are the poll books the genuine
23 article?

24 A. Yes.

25 Q. Are they, in fact, what they purport to be?

1 A. Yes, sir. They are under lock and key all year
2 long.

3 Q. As far as the registration card is concerned, have
4 any other marks been made on it besides marks appropriately
5 made denoting registration and purging?

6 A. On Filomena's material here? No, everything is just
7 the way it was except for this pink note that I put there
8 for my notes.

9 Q. Is it substantially -- her registration card, is it
10 substantially in the same condition it was when you first
11 polled it --

12 A. Yes.

13 Q. -- the night that you called her and you had the
14 conversation which you referred to in your testimony?

15 A. Yes, sir.

16 Q. All right. As far as the challenged ballot is
17 concerned, you are the custodian of all challenged ballot
18 envelopes as well as the challenge -- as well as all
19 ballots for matter, is that not accurate?

20 A. Uh-huh, yes, sir.

21 Q. Has it, in fact, this particular challenged ballot,
22 been in your custodial care since November 8th, 1994?

23 A. It's been in the vault area at night under lock and
24 key so it's been under care.

25 Q. All right. As far as the voter registration record

1 is concerned which has also been marked, is that under your
2 custodial care? Is it in substantially the same condition
3 it is when you reproduce that from your voter registration
4 file?

5 A. Yes, sir.

6 Q. What is the current state -- and let me rephrase,
7 what was the state of Filomena Garcia's registration on
8 November 8th, 1994?

9 A. She was in the inactive file as of November 8th.

10 Q. All right.

11 A. She was not a valid voter in other words.

12 MR. RUCKER: Your Honor, I would ask that
13 Petitioner's Exhibits 3B, 3C, 3D and 3A be admitted.

14 MR. MILLER: I have no objection to the
15 admission of the exhibits, Your Honor.

16 THE COURT: They'll be admitted.

17 MR. RUCKER: In regard to the '88 general
18 election poll books, the '90 general election poll books
19 and the '92 general election poll books which have
20 also been marked, the '92 -- let's do it in sequential
21 order. -- general election poll books have been marked as
22 Petitioner's Exhibit No. 4.

23 The 1990 general election poll books have been
24 marked as Petitioner's Exhibit No. 5, and the 1992 general
25 election poll books have been marked as Petitioner's

1 Exhibit No. 6. I would also offer them into evidence.

2 THE COURT: Any objection?

3 MR. MILLER: I haven't seen them, Your
4 Honor.

5 THE COURT: Okay. While he's looking
6 those over, as I understand your testimony, the poll books
7 show that she didn't vote in that precinct in '88 or in '90
8 but the poll book shows that she voted in the election --

9 THE WITNESS: '92.

10 THE COURT: -- in '92.

11 THE WITNESS: A challenged ballot.

12 MR. MILLER: I have no objection to the
13 admission of the poll books. I would like a moment at some
14 point to reflect on them before closed on.

15 THE COURT: What are the exhibit numbers,
16 4, 5 and 6?

17 MR. MILLER: 4, 5 and 6, Your Honor.

18 THE COURT: 4, 5 and 6 will be admitted.

19 MR. MILLER: And that will be -- I want
20 to make sure that we're talking about apples and apples.
21 Petitioner's Exhibit 4 indicates second -- excuse me, C
22 precinct, second ward of Creswell township as does 5,
23 Petitioner's 5. Petitioner's 6 simply indicates C
24 precinct, second ward but there is no notation of
25 township.

1 THE WITNESS: There is no township in the
2 city limits. The supervising judges, some of them think
3 when they are in the city limits, they are also Creswell
4 township.

5 MR. MILLER: The supervising judge would
6 have written that on there?

7 THE WITNESS: Uh-huh. They still do.
8 When, in fact, they are in the city limits, there is no
9 township valid.

10 THE COURT: Well, I think what he's
11 trying to ascertain, are these the poll books for the same
12 precinct?

13 THE WITNESS: Yes, sir.

14 THE COURT: All right.

15 MR. RUCKER:

16 Q. Given that your testimony is that she has not moved,
17 has she always -- during the period of time that she had a
18 valid voter registration, was she also always a registered
19 elector in 2C?

20 A. To the best of my knowledge.

21 Q. All right. You've also made reference to the '88 --
22 pardon me, the 1994 poll books as you have spoken about
23 Miss Garcia's attempted voter participation in the 1994
24 election. Is this an -- is this a copy of the 1994 what
25 they now call a registration book?

1 A. Yes.

2 Q. All right. Did they change the wording of what they
3 are calling this registration book now statutorily?

4 A. By law we don't have to have those poll books as we
5 used to have to have them, two sets of them at each polling
6 area. We can now use our registration list and have them
7 sign the registration list.

8 Q. Yes, ma'am.

9 A. Or we can have the poll book, whichever we wish.
10 Joe decided to have this format this time to see if it
11 works.

12 Q. Did it?

13 A. Yeah. I think it went over real well.

14 Q. Okay.

15 (Petitioner's Exhibit No. 7 was marked for
16 identification.)

17 MR. RUCKER: I would offer the 1994
18 registration book, voter registration listing marked as
19 Petitioner's Exhibit No. 7 into evidence.

20 MR. MILLER: No. That's an improper
21 title. It's not a voter registration book. It's a poll
22 book. It's the form of poll book that they now use and was
23 used in this election. It's not a voter registration list.

24 THE COURT: Well, it's entitled voter
25 registration list.

1 MR. MILLER: No, but that's not what it
2 is.

3 MR. RUCKER: We've already clarified what
4 it is, Your Honor. What it is is a registration book. It
5 also suffices --

6 THE COURT: Well, just a second. Do you
7 object to the title that's on it?

8 MR. MILLER: Yes, because that document,
9 whatever it's called, it's the poll book that they used.

10 THE COURT: It is the modern equivalent
11 of the poll book.

12 MR. RUCKER: Yes, sir.

13 THE COURT: I understood that. I mean
14 just because it's called a voter registration list --

15 MR. MILLER: Well, I understand it
16 because he's the one that called it the voter registration
17 list. It is the poll book.

18 THE COURT: Because that's what it says
19 at the top.

20 MR. MILLER: Well, I understand. I
21 appreciate the mistake. I want to clarify the record that
22 that document as it's marked is the poll book for this
23 precinct for this election.

24 THE COURT: It is the substitute for the
25 poll book because what they do is now sign at the side of

1 of this computer sheet where before they had individual
2 listings where they had it in a poll book.

3 MR. MILLER: It is the poll -- they have
4 to have a poll book by law and this is the poll book.

5 THE COURT: This is the form that's being
6 used now in Cowley County?

7 MR. MILLER: Yes, sir.

8 THE COURT: Okay.

9 MR. MILLER: It's very significant.

10 THE COURT: Do you have an objection?

11 MR. MILLER: I don't have an objection on
12 his -- to the introduction of it as long as it's properly
13 noted it is a poll book for precinct 2C.

14 THE WITNESS: That's the form of the poll
15 book being used now, but the title of the document at the
16 top merely says voter registration list.

17 MR. MILLER: I understand that.

18 THE COURT: All right. Petitioner's
19 Exhibit 7 will be admitted.

20 MR. RUCKER: Thank you, Your Honor.

21 THE COURT: And I take it this is for
22 2C?

23 MR. RUCKER: It is, Your Honor, at least
24 I'll elicit that.

25 MR. RUCKER:

1 Q. Is that for 2C, Miss Warren?

2 A. Yes, sir.

3 Q. Miss Warren, one final question, as you look at the
4 1994 registration book, poll book that is now in your hand
5 marked as Petitioner's Exhibit No. 7, what is the
6 designation next to Filomena Garcia as far as what type of
7 vote she passed or what type of a ballot she cast, not
8 vote?

9 A. She was not on the list because she was not an
10 active voter.

11 Q. Now, if you were not on the list, would you still be
12 given the opportunity to cast a challenged ballot?

13 A. Yes, sir.

14 Q. Was that not the exact same situation that the poll
15 workers faced in 1992?

16 A. Yes, sir.

17 Q. She wasn't on that list either?

18 A. Correct.

19 Q. She was issued a challenged ballot?

20 A. Uh-huh.

21 Q. In 1992?

22 A. Right.

23 Q. That was your testimony?

24 A. Right, uh-huh, uh-huh.

25 Q. I believe that this has been asked and answered but

1 I'm going to query. One final question, Miss Garcia has
2 never reregistered as a voter?

3 MR. MILLER: Object as asked and
4 answered.

5 THE COURT: It has been.

6 MR. RUCKER: Thank you. I have no
7 further questions of the witness at this time, Your Honor.

8 CROSS-EXAMINATION

9 MR. MILLER:

10 Q. Counsel has stated earlier, and I don't know if you
11 were present or not, but he stated that it's the policy in
12 Cowley County that if you vote in the wrong precinct, your
13 vote still counts?

14 A. If you vote in the wrong precinct, the county
15 election officer has instructed the supervising judges to
16 challenge their ballot, and if they are a valid voter, that
17 challenged ballot will be counted.

18 Q. And so if in the 1988 or 1990 election Miss Garcia
19 had voted but in a different precinct, her name would be
20 found in a different poll book, wouldn't it?

21 A. If she voted in another precinct, possibly, yes.

22 Q. Why was she on inactive status?

23 A. Because she was purged.

24 Q. She was purged?

25 A. For not having voted.

1 Q. As I understand it, when people are purged, they are
2 not on the inactive file, they don't appear at all.

3 A. They are on the inactive file.

4 Q. Is there a notation on the file that this name has
5 been purged?

6 A. No.

7 Q. Once people's names are purged, they are required to
8 reregister?

9 A. Yes, sir.

10 Q. Now, as to the reason she was challenged in 1992,
11 you are speculating, are you not --

12 A. Uh-huh.

13 Q. -- as to the reason?

14 A. Yes, sir.

15 Q. Do you know when she was placed in the inactive
16 file?

17 A. No, sir. I don't have a date on that file.

18 Q. Will you now?

19 A. I was just going to say that. Then I thought maybe
20 I better not. Well --

21 Q. I'm looking at what I think is a copy of her
22 challenged ballot for 1994.

23 A. Okay.

24 Q. What I see on there is some notation that indicates
25 2B then as well. Is that right in the same vicinity as 2C?

1 A. Okay. Yes, sir, 2B and 2C wards and precincts voted
2 at the same polling place, so in the very beginning when we
3 started processing this challenged ballot information, we
4 went through and marked where that judge -- what precinct
5 that judge was from so that's why the 2B and 2C are there.

6 Q. Has that occurred for a number of elections that
7 they vote jointly at that same location?

8 A. I think for the last couple of three years they have
9 voted together, yes.

10 Q. It's possible her name is on one of those other poll
11 books for those elections from -- I've gotten confused, but
12 whether it's 2B or 2C, it's the other one?

13 A. Doris Madden is very, very, very good. I would
14 imagine she could have maybe mistaken it but she's very
15 good at her work.

16 Q. She always signs everything?

17 A. Yeah.

18 MR. MILLER: Reserve the right to recall,
19 but that is all at this point, Your Honor.

20 REDIRECT EXAMINATION

21 MR. RUCKER:

22 Q. Would it make any difference where a voter voted in
23 Cowley County, Kansas if they failed to vote in two
24 November general elections?

25 A. No, sir, because they would not be a valid voter.

1 Q. All right. And they'd be treated the same
2 regardless of where they voted?

3 A. Yes, sir.

4 Q. And it is once again the established policy of the
5 Cowley County election office, is it not, that regardless
6 of where you are actually registered if you show up at the
7 wrong polling place on election day, you are not going to
8 be turned from the polls. Did I understand that correctly?

9 A. That's correct.

10 Q. All right.

11 MR. RUCKER: No further questions.

12 THE COURT: You may stand down. Call
13 your next witness.

14 MR. RUCKER: Well, Your Honor, I would
15 like to keep Miss Warren on the stand if I possibly could,
16 just simply change topics. I'll check the hall to see if
17 any of our recalcitrant witnesses have shown.

18 MR. MILLER: Is it out of order to ask
19 for definitions?

20 MR. RUCKER: Your Honor, we are going to
21 switch gears. With the Court's permission, Moddie Graham
22 to the stand.

23 THE COURT: Very well, please step down.

24 MR. MILLER: I do need a chance to
25 reflect on those last poll books.

1 THE COURT: I have them up here.

2 MR. MILLER: Okay.

3 MODDIE G. GRAHAM,
4 of lawful age, having been first duly sworn on her oath to
5 state the truth, and nothing but the truth, testifies as
6 follows:

7 THE COURT: Proceed counsel.

8 MR. RUCKER: Thank you, Your Honor.

9 DIRECT EXAMINATION

10 MR. RUCKER:

11 Q. Would you give your full name to the Court.

12 A. Moddie G. Graham.

13 Q. Moddie is spelled M-O-D-D-I-E?

14 A. Right.

15 Q. Ma'am, where do you currently live?

16 A. 307 South First.

17 MR. MILLER: I'm sorry, Your Honor. I
18 didn't --

19 THE COURT: 307 South First?

20 THE WITNESS: That's right.

21 MR. RUCKER:

22 Q. And how long have you resided there, ma'am?

23 A. I don't exactly know but it's been between two and a
24 half and three years.

25 Q. Moddie, to your knowledge, have you ever registered

1 to vote while living at that address?

2 A. No, I haven't.

3 Q. Yes, ma'am. And where did you live before you
4 resided at 307 South First in Arkansas City, Kansas?

5 A. I lived at 316 North Fifth Street. That's where I
6 registered to vote at.

7 Q. Yes, ma'am. And ma'am, did you participate in the
8 1994 general election?

9 A. Yes.

10 Q. Okay. And did you cast a ballot in the 79th house
11 district between Mr. Shriver and Mr. Jones?

12 A. Yes.

13 Q. And how did you cast that ballot?

14 A. I don't know. I don't remember. I didn't --
15 because my sister was sick and she said well, you go vote
16 and when I got there, I said well, I don't know who to vote
17 for because I hadn't read up on them, so I said well, I'll
18 just vote for the one that is the lesser of two evils.

19 Q. Yes, ma'am. And you said -- do you recall having a
20 conversation with me where you said you voted for blank
21 because he was the lesser of two evils?

22 A. Right.

23 Q. Who was it that you voted for because --

24 A. I don't remember. If you stand me on a stack of
25 bibles, I don't remember. I just jotted it down and forgot

1 it.

2 Q. Do you recall telling me who you voted for?

3 A. That's right.

4 Q. Okay. And?

5 A. It was either -- I thought I was voting for
6 Shriver. I don't know. I might have voted for Jones, but
7 I said the ballot would tell them who I voted for.

8 Q. Yes, ma'am. Do you remember telling me emphatically
9 one or the other?

10 A. That's right.

11 MR. MILLER: Well, Your Honor, I would
12 object. That's leading.

13 THE COURT: Was she -- was her vote
14 challenged?

15 MR. RUCKER: Her vote was counted. Was
16 challenged, Your Honor, but was, in fact, counted.

17 THE COURT: Was counted?

18 MR. RUCKER: Yes, sir.

19 MR. MILLER: I believe he's asked the
20 question several times. He's not getting the answer he
21 wants but that still doesn't allow him to ask leading
22 questions on direct.

23 THE COURT: Sustained.

24 MR. RUCKER:

25 Q. Do you recall other things that we talked about on

1 the telephone, Moddie?

2 A. Well, yes, little bit. It was kind of pleasant.

3 Q. Yes, ma'am.

4 A. You didn't go into details about what it was all
5 about.

6 Q. Yes, ma'am. You are correct. We talked about a
7 variety of things in your personal life?

8 A. That's right, and I told you I was taking care of my
9 sister at that time.

10 Q. Yes, ma'am.

11 A. And I was at my home for only a short while.

12 Q. Yes, ma'am. That's exactly right.

13 MR. MILLER: Well, Your Honor, this is
14 important testimony. I would ask that the Court ask
15 counsel not to make remarks about the witness's testimony.

16 THE COURT: Please refrain from
17 commenting. Proceed.

18 MR. RUCKER:

19 Q. Do you recall anything else about the conversation,
20 Moddie?

21 A. The only thing I asked you about when we got almost
22 through with the conversation was that I hope this will get
23 over soon and I won't have to be bothered.

24 Q. Okay. Do you recall what, if any, response I might
25 have made?

1 A. And you said well, I hope so, too.

2 Q. Okay. Do you recall what precinct -- where you went
3 to cast your ballot, Moddie?

4 A. Yes, I do. I went to Central Christian Church and
5 they say we don't have you here. You have to go to the
6 college and that's where I went. I voted at the college.

7 THE COURT: What college is that,
8 counselor?

9 THE WITNESS: That's Cowley County.

10 THE COURT: Cowley County Community
11 College?

12 THE WITNESS: That's right.

13 THE COURT: Okay.

14 MR. RUCKER:

15 Q. Moddie, are you affilitated with a political party?

16 MR. MILLER: Your Honor, I would object
17 as to being irrelevant.

18 THE COURT: You may inquire.

19 MR. RUCKER: Thank you, Your Honor.

20 A. Can I answer that?

21 MR. RUCKER:

22 Q. Yes, ma'am.

23 A. Democrat.

24 Q. Okay. And how long have you been affiliated with
25 the Democrat party?

1 A. Ever since I was in California, the age of 22.

2 Q. Okay. And how old are you now, ma'am?

3 A. 78.

4 Q. Moddie, do you recall voting for any Republican
5 candidates at all during the 1994 general election?

6 A. No, I don't. I don't recall that. I didn't vote
7 for the governor that was Republican. I remember that.

8 Q. Yes, ma'am. Did you --

9 THE COURT: Well, before you go any
10 further, let me tell the witness, Miss Graham, other than
11 this election that we're here about that's concerning Jones
12 and Shriver, you have a privilege not to disclose for whom
13 you voted in any other race other than this contest that
14 I'm here about today. So you don't have to answer if you
15 don't want to.

16 THE WITNESS: Okay.

17 THE COURT: If you want to exercise that
18 privilege, you merely tell me that, but if you want to
19 waive that privilege, you can go ahead and answer the
20 question.

21 THE WITNESS: I don't have to say who I
22 voted for?

23 THE COURT: Just in this you have to tell
24 us who you voted for in this particular case because of the
25 facts and circumstances. You don't have to answer these

1 questions about any other race that may have been on this
2 ballot. Okay?

3 THE WITNESS: Okay.

4 THE COURT: All right. Proceed.

5 MR. RUCKER:

6 Q. Do you recall voting for any Republican candidates
7 at all, ma'am?

8 MR. MILLER: Well, let's make sure she is
9 either waiving or exercising the privilege.

10 THE COURT: Do you understand that you've
11 got a privilege not to answer that?

12 THE WITNESS: I'll waive that.

13 THE COURT: Okay. That means you can go
14 ahead and answer the question then if you want to it or if
15 you want to exercise your privilege, just tell me.

16 THE WITNESS: I'm not going to exercise
17 the privilege on that because I don't remember.

18 THE COURT: Okay.

19 MR. RUCKER: I have no further questions
20 at this time, Your Honor.

21 THE COURT: All right. You may inquire.

22 MR. MILLER: No, thank you, Your Honor.

23 THE COURT: Ma'am, you may step down.
24 You are free to go.

25 MR. RUCKER: This witness, too, I'm

1 asking be subject to recall.

2 THE COURT: Well, I don't know.

3 MR. MILLER: If we need to lay a
4 foundation from this witness, let's take time to do it and
5 then let's make sure we're done with her so we don't have
6 to -- I think in this instance, we don't want to go through
7 all this. They've got the opportunity to ask her -- right
8 now to ask her anything they want.

9 THE COURT: Is there anything else you
10 want?

11 MR. RUCKER: Yes, Your Honor. I am going
12 to ask then that if we are going to indulge counsel for the
13 contestant and also for the witness, too, that this witness
14 be considered a hostile witness and that I be able to
15 cross-examine her.

16 MR. MILLER: Well, it's too late for
17 that.

18 THE COURT: It's not too late.

19 MR. RUCKER: She's subject to recall.

20 THE COURT: It's not too late. You can
21 call her back but what questions do you want to ask her?

22 MR. RUCKER: Well, Your Honor, I want to
23 ask if she recalls specifically telling me that she voted
24 for Shriver.

25 THE COURT: Ask her to get back on the

1 witness stand and ask her that. We'll see if there was an
2 objection to that. He's going to ask the question and I
3 imagine there is going to be an objection so don't answer
4 the question until I've had a chance to rule on the
5 objection. Proceed, counsel.

6 MR. RUCKER:

7 Q. Do you recall me specifically asking you, ma'am, who
8 you cast a ballot for in this election?

9 A. And I specifically stated --

10 Q. Do you know, ma'am? That was a yes or no. We'll
11 get to that in just a few moments, but do you recall me
12 specifically asking you that question?

13 A. Yes, I do.

14 Q. And do you recall telling me that you voted for
15 Mr. Shriver?

16 A. Yes, because that's the name that stuck in my mind,
17 Shriver.

18 Q. Yes, ma'am. Was -- and did you, in fact, cast a
19 vote for Mr. Shriver?

20 A. I don't know. I don't remember. I wish I had my
21 ballot.

22 Q. Was there a reason that you emphatically told --

23 A. I told you -- let me explain it to you --

24 Q. Yes, ma'am.

25 A. -- just like I explained to my sister when she told

1 me to go vote.

2 Q. Go ahead.

3 A. I said that some of these people I haven't even read
4 about. I know what's happening and if I vote, I'm just
5 going to vote, but I didn't think that I would be called up
6 for this discussion and I just went on through and got
7 through.

8 Q. But you recall indicating to me without any
9 prompting on my part, I didn't indicate --

10 A. Well, that's what I said because that's the one that
11 stuck with me, Shriver.

12 Q. Yes, ma'am. And you indicated to me that you voted
13 for him, is that not accurate?

14 A. Yes. I wish I had my ballot.

15 Q. But you did indicate that to me?

16 A. Yes, I did. I indicated it to you.

17 Q. Yes, ma'am. Thank you.

18 THE COURT: Well, let me ask this: When
19 you talked to him, you weren't under oath?

20 THE WITNESS: I sure wasn't.

21 THE COURT: And today you are under --

22 THE WITNESS: I know.

23 THE COURT: Okay. Proceed.

24 CROSS-EXAMINATION

25 MR. MILLER:

1 Q. When you talked to Mr. Rucker, who is this gentleman
2 right here, Miss Graham, was that over the telephone?

3 A. That was over the telephone. I didn't ever see him
4 in person until today.

5 Q. Were you guessing --

6 A. I was guessing.

7 Q. Let me finish. Were you guessing as to the answer
8 to his question?

9 A. I was guessing because I don't remember I said. I
10 still wish I had my ballot when I told him.

11 Q. Are there occasions when you vote that you don't
12 vote for either candidate?

13 A. That's right.

14 Q. Is it possible that you didn't vote for either
15 candidate in this case?

16 A. It could have been possible but I don't remember.

17 Q. Did you tell your -- was it your sister you told you
18 didn't know very much about some of these candidates?

19 A. That's right.

20 Q. Thank you.

21 A. You can't ask her. She's deceased.

22 MR. MILLER: Thank, Your Honor.

23 THE COURT: Anything further? All
24 right. You may step down now. I think they are done.

25 THE WITNESS: Okay.

1 THE COURT: Thank you. Call your next
2 witness.

3 MR. WITTEMAN: Your Honor, if I could
4 bring a matter to the Court's attention. We've issued a
5 subpoena for Miss Jacqueline Muhlheim. She requires --
6 who's in an Ark City nursing home. She's in a wheelchair
7 and requires special assistance to get here to the court
8 today.

9 What I'm asking the Court, I'm not really sure
10 other than just to advise the Court that we have a problem
11 getting a necessary witness to the proceeding here today.

12 MR. MILLER: Well, as I indicated
13 earlier, I think it was off the record, Your Honor, I have
14 no objection to counsel taking an affidavit to
15 Mrs. Muhlheim or if he wants to take her deposition outside
16 the courtroom, I'll stipulate to her testimony. I don't
17 believe her testimony is relevant to the issues I believe
18 that are going to be addressed with regard to her vote, but
19 as it relates to the taking of her testimony, should the
20 Court deem it admissible, I'll stipulate as to the content.

21 THE COURT: Do you want to take a
22 deposition? That might be cheaper than hiring an ambulance
23 and bringing her here by ambulance.

24 MR. WITTEMAN: Yeah, it would. I believe
25 that they have the facilities necessary at the nursing home

1 and proper vehicles with which to transport Miss Muhlheim
2 but I don't know that for certain.

3 THE COURT: Well, you might check into
4 that.

5 MR. WITTEMAN: I'll do that, Your Honor.

6 MR. RUCKER: I would ask, Your Honor,
7 that Miss Warren be recalled.

8 THE COURT: Did we let her go
9 downstairs?

10 MR. RUCKER: Yes.

11 THE COURT: Well, let me take a short
12 recess. If you have a number of exhibits that she's going
13 to have to dig out, why don't you have her dig those out
14 while at recess. That way we won't have to sit here and
15 wait while she does that. Let the record reflect that
16 counsel is wanting to see Petitioner's Exhibits 4, 5 and
17 6. Court will be in recess, oh, for about -- until about
18 ten till. I've got 2:30 so we'll be at recess until that
19 time.

20 (A brief recess was here had from 2:30 to 2:55 p.m.)

21 THE COURT: Call your next witness.

22 MR. RUCKER: Yes, Your Honor. Barbara
23 Warren.

24 THE COURT: You are still under oath.

25 THE WITNESS: Okay.

1 BARBARA WARREN,

2 having been previously duly sworn, testified further as
3 follows:

4 DIRECT EXAMINATION

5 MR. RUCKER:

6 Q. Miss Warren, as it relates to the ballot of Moddie
7 Graham, do you have the material there that you'll need?

8 A. Uh-huh.

9 Q. All right. Miss Warren --

10 MR. RUCKER: Well, I might just simply
11 ask, to speed this thing along, for a stipulation on the
12 part of Mr. Miller, whether he will, in fact, stipulate to
13 the fact that she was an illegal vote cast.

14 MR. MILLER: No.

15 THE COURT: All right.

16 MR. RUCKER:

17 Q. Miss Warren, do you have a copy of the 1992 general
18 election poll books from precinct 4A?

19 A. 1992?

20 Q. Yes.

21 A. Yes, sir. You want me to pull it?

22 Q. Yes.

23 MR. MILLER: I'll stipulate as to all the
24 facts surrounding her casting her ballot that has already
25 been attested to. I just won't stipulate to the leading

1 conclusion. I think the facts supporting the arguments,
2 one or the other, are already in evidence. If there are
3 facts I'm overlooking, I'll attempt to try to cooperate.
4 She testified as to where she voted, where she lived, where
5 she used to live. I'm just trying to be helpful. If there
6 is more that we need, then fine.

7 MR. RUCKER: Is there more that we need
8 to establish that she was a legal vote cast when her
9 testimony was that she was registered to vote in her prior
10 residence that she hasn't lived in for two and a half to
11 three years?

12 MR. MILLER: I'd like to stipulate but I
13 think I can stipulate to those that relate to Mrs. Graham's
14 vote.

15 MR. RUCKER: Then I guess I am forced to
16 proceed, Your Honor.

17 THE COURT: Proceed.

18 MR. RUCKER: Your Honor, thank you.

19 MR. RUCKER:

20 Q. As it relates to Miss Graham's vote, is she
21 currently a registered elector?

22 A. Currently, no.

23 Q. Why is that, ma'am?

24 A. She is an inactive voter. We had her registered on
25 the inactive file at 614 North Fifth. The card does not

1 tell why we put her there. There is no notation.

2 Q. All right. And yet she was on the inactive file and
3 she's been on the inactive file, was on the inactive file
4 November 8, 1994?

5 A. Yes, sir.

6 Q. All right. Miss Warren, did Miss Moddie Graham cast
7 a challenged ballot in the 1994 election?

8 A. Yes, sir.

9 Q. If she was on the inactive status, ma'am, was her --
10 was she challenged? Was she in the challenged votes or was
11 she in the challenged, not voted category?

12 MR. MILLER: You mean challenged
13 counted?

14 Q. Pardon me, challenged counted or challenged not
15 counted?

16 A. Looks like the person that helped us with this
17 challenged ballot put count there.

18 Q. Put counted?

19 A. Put count there. Since I didn't do it, I can just
20 tell you maybe what her thoughts were on it.

21 Q. Well, is she in the courthouse today?

22 A. Yes, sir.

23 Q. Is she subject to cross-examination? Should we
24 subpoena her?

25 A. She's downstairs in the county clerk's office.

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MR. MILLER: Who is she?

THE WITNESS: Carmelita.

MR. RUCKER: Yes, I think perhaps, maybe perhaps since Carmelita handled this vote and it was in the active file and this one was counted, I think perhaps Carmelita should come up and tell us why this was counted since it is clearly in error.

THE COURT: Is there anything else you want to ask of this witness?

MR. RUCKER:

Q. I think perhaps in this regard you indicated she was on inactive status. You have not indicated whether she was in the inactive roll. Do you have any knowledge as to why?

A. There is no notation on the card to tell me why.

Q. Yes, ma'am.

MR. RUCKER: In regard to the 1992 general election poll books that we referred to earlier, I would ask that those be marked, Your Honor.

MR. MILLER: Which ones?

MR. RUCKER: The 1992 general election poll book. The only poll book we're talking about.

THE COURT: For precinct 4A?

MR. RUCKER: Yes, Your Honor.

(Petitioner's Exhibit Nos. 8 and 9A thru 9D were marked for identification.)

1 MR. RUCKER:

2 Q. I would ask that you look at what has been marked as
3 Plaintiff's Exhibit No. 8 which is the 1992 general
4 election poll books and indicate for the Court if Moddie
5 Graham cast a ballot in the 1992 general election and in
6 precinct 4A.

7 MR. MILLER: We would stipulate she did,
8 Your Honor. We would stipulate that she did.

9 THE COURT: Do you accept that
10 stipulation, counsel?

11 MR. RUCKER: No.

12 THE COURT: All right. Proceed.

13 MR. MILLER: I'm sorry, Your Honor. When
14 I stipulated, I lost complete track of my year. I was
15 thinking this was '92.

16 A. Moddie Graham did vote -- Moddie Graham did vote in
17 the '92 general election.

18 MR. RUCKER:

19 Q. In precinct 4A, ma'am?

20 A. Yes, sir.

21 Q. Is 614 North Fifth in Arkansas City, Kansas in
22 precinct 4A?

23 A. Yes, sir.

24 Q. All right.

25 THE COURT: Is 307 South First Street in

1 Arkansas City, Kansas in 4A?

2 THE WITNESS: 307 South First is in 3A so
3 she moved out of the precinct.

4 MR. RUCKER:

5 Q. I would ask for you to look at the challenged ballot
6 that has now been marked Petitioner's Exhibit No. 9C, and
7 what is the notation on the challenged ballot as to the
8 reason of challenge?

9 A. The supervising judge wrote on it not in book,
10 moved.

11 Q. All right. What book would that be talking about,
12 ma'am?

13 A. She would be referring to the registration slash
14 poll book.

15 Q. Yes. In what precinct, ma'am?

16 A. Okay. This judge is from 3A.

17 Q. All right. And is, in fact, her new residence of
18 307 South First in 3A?

19 MR. MILLER: We so stipulate.

20 A. 307 --

21 MR. RUCKER: All right. If there is a
22 stipulation, we don't have a problem.

23 MR. RUCKER:

24 Q. So your testimony is that in 1994 she did cast a
25 ballot in 4A which was her former precinct of residence?

1 A. 1992?

2 Q. That is correct, and in 1992 have you -- in 1994
3 we've already had indication from --

4 MR. RUCKER: Well, in 1994 we have a
5 stipulation, do we not, Mr. Miller --

6 MR. MILLER: Yes.

7 MR. RUCKER: -- that she cast a ballot
8 in 3A?

9 MR. RUCKER:

10 Q. Now, was she ever a registered elector in 3A, ever a
11 registered elector being was she ever registered to vote?

12 A. No, sir.

13 MR. MILLER: I would ask for foundation
14 on that, if she's worked in the clerk's office forever.

15 MR. RUCKER: Well, that's fine. I'll
16 provide I'm trying to speed the process up, too, Your
17 Honor. The fact of the matter is you've got a voter
18 registration card which has been appropriately marked and
19 identified as Petitioner's Exhibit No. 9A.

20 MR. RUCKER:

21 Q. And what is the date of that registration?

22 A. The 8th month, 27th day of '92.

23 Q. All right.

24 A. August.

25 Q. What is the address that appears on that voter

1 registration card?

2 A. 614 North Fifth.

3 Q. Have you ever had since that day of registration --
4 which is again for the Court, when was the date of
5 registration?

6 A. August of '92.

7 Q. Have you since August of 1992 had another voter
8 registration card submitted to your office from Moddie G.
9 Graham from 307 South First or from any other address?

10 A. No, sir.

11 MR. RUCKER: Then I do not have any other
12 questions other than that. I'm handing the exhibits that
13 have been marked in the Moddie Graham matter to
14 Mr. Miller.

15 MR. MILLER: I would have no objection,
16 Your Honor, to Exhibits 9A through 9D.

17 THE COURT: They'll be admitted.

18 MR. MILLER: Excuse me, I think we left 8
19 on my desk.

20 THE COURT: You left the poll book. Did
21 you offer that, too?

22 MR. MILLER: I would have no objection.

23 MR. RUCKER: I would offer that, Your
24 Honor, as Petitioner's Exhibit No. 8. I think Mr. Miller
25 offered or actually indicated that he had no objection.

1 THE COURT: No objection, counsel?

2 MR. MILLER: No, Your Honor.

3 THE COURT: All right. It will be
4 admitted.

5 MR. RUCKER: I have no further questions
6 of the witness at this time, Your Honor.

7 CROSS-EXAMINATION

8 MR. MILLER:

9 Q. Barbara, I'm still -- excuse me, Miss Warren. I'm
10 still trying to learn about this inactive file. We had
11 previous testimony that you could look at the inactive file
12 and you could tell that the reason someone was on the
13 inactive file was because their vote had been purged. Do
14 you recall that testimony?

15 A. Not by looking at the file, by looking at the card I
16 can.

17 Q. Looking at the inactive file or looking at the
18 computer records that show they are on inactive, if I
19 understand it correctly, there is a variety of reasons they
20 may be placed on the inactive?

21 A. Right.

22 Q. There is no specific record indicating at what time
23 and if someone's name is purged?

24 A. As of right -- as of last week, we do not have a
25 date when a record was put on the inactive file. We do

1 now.

2 Q. Well, but that's only -- that's only as to them
3 being on the inactive file?

4 A. When they were put there.

5 Q. I don't really care about what you are doing now.
6 I'm talking prior to the election in question, there is no
7 way of looking at the inactive -- well, there is no way of
8 looking at any record in the clerk's office and being able
9 to determine that the voter was, in fact, purged and when
10 that occurred?

11 A. By looking at the computer record?

12 Q. Any record. You keep a record of when you purge
13 votes?

14 A. We purge after each general election, November
15 general election.

16 Q. Yes.

17 A. And those cards are marked with a double N and they
18 are put into the inactive file.

19 Q. Okay. That's how you keep your record?

20 A. The notation is made on the card, not on the
21 computer.

22 Q. What does the N stand for again?

23 A. The double N is just in our office is a notation
24 that we all understand as being purged. Double N means
25 they neglected to vote in the two November general

1 elections.

2 Q. Okay. Thank you.

3 MR. MILLER: Thank you, Your Honor.

4 THE COURT: Any other questions?

5 MR. RUCKER: Well, just a point of
6 clarification.

7 REDIRECT EXAMINATION

8 MR. RUCKER:

9 Q. There is more than one type of purge, is there not?
10 As a matter of fact, there are arguably three types of
11 purges. There are those, in fact, when you fail to vote in
12 one November election, you may be subject to purge?

13 A. Yes, sir.

14 Q. And there are those when you fail to vote in a
15 presidential election and those are what we are called
16 shall be subject to, is there not?

17 A. Yes, sir.

18 Q. There is the third type of purge when you fail to
19 vote in two consecutive November elections, is that not
20 accurate?

21 A. Yes, sir.

22 MR. RUCKER: No, I have no further
23 questions of this witness.

24 THE COURT: You may step down. I suppose
25 they might want you to hang around the courthouse some

1 more.

2 MR. RUCKER: We'll ask that Carmelita
3 Clarkson --

4 THE COURT: Counsel approach the bench.
5 (An off-the-record discussion was here had.)

6 CARMELITA CLARKSON,
7 of lawful age, having been first duly sworn on her oath to
8 state the truth, and nothing but the truth, testifies as
9 follows:

10 DIRECT EXAMINATION

11 MR. RUCKER:

12 Q. Miss Clarkson, if you would, state your full name
13 for the Court.

14 A. Carmelita Clarkson.

15 Q. Your position, ma'am?

16 A. I'm deputy county clerk.

17 Q. Yes, ma'am. And as part of your responsibilities as
18 deputy county clerk for Cowley County, Kansas, did you
19 participate in the determination of whether or not to count
20 absentee ballots between the 8th of November and November
21 11th, the date of the county board of canvass?

22 A. Yes, sir.

23 Q. And ma'am, did you have occasion to specifically
24 deal with the challenged ballot of Moddie G. Graham?

25 A. Yes.

1 Q. Okay. Ma'am, I'm going to hand you the ballot of
2 Moddie G. Graham which has already been marked and admitted
3 into evidence before the Court.

4 MR. MILLER: I don't think he has her
5 ballot.

6 MR. RUCKER: The challenged ballot
7 envelope.

8 THE COURT: There you go.

9 MR. MILLER: If you had her ballot, you
10 could have told me how she voted.

11 MR. RUCKER: Not if it was sealed.

12 MR. RUCKER:

13 Q. I'd hand you now, ma'am, the challenged ballot
14 envelope which is marked as Petitioner's Exhibit 9C, and I
15 would ask for you to identify that challenged ballot for
16 me, ma'am.

17 MR. MILLER: Challenged ballot envelope?

18 Q. Challenged ballot envelope.

19 A. It's Moddie G. Graham and it says it was not in the
20 book, that she had moved.

21 Q. Yes, ma'am. Was this vote subsequently counted,
22 ma'am?

23 A. Yes, sir.

24 Q. What was the justification for that?

25 A. Well, there is an affidavit attached, former

1 precinct resident.

2 Q. Yes, ma'am. How does that bear upon this situation,
3 ma'am?

4 A. She is now residing at 307 South First. Her card
5 says she was at 614 North Fifth. We show that she was on
6 an inactive, the inactive file.

7 Q. Yes, ma'am. And because she was on an inactive file
8 status, what does that mean to you?

9 A. Well, it doesn't --

10 Q. Registration was, in fact, an inactive status?

11 A. Right.

12 Q. On the 8th of November, is that not accurate?

13 A. That's right.

14 Q. Okay. What does that mean to you, ma'am?

15 A. It means she was taken off for some reason. The
16 card did not say for what reason. And I was the one that
17 said it was counted. I called a Carrie Bowman. I have her
18 telephone number down here, and I am not real sure at that
19 point what she told me. I think she told me at that time
20 that she was still living at 614 North Fifth.

21 Q. But you have no written indication of that?

22 A. No, sir, I don't.

23 Q. And is there not an address on the card and did you
24 not indicate to the Court that you actually have an
25 affidavit of change of residence?

1 A. Right.

2 Q. Would that give you the most current address?

3 A. It says moved from my residence from 614 North
4 Fifth, yes, sir.

5 Q. Okay. To what address, ma'am?

6 A. It does not say to what address.

7 Q. Okay. So if Miss Bowman did give you that
8 information, it would have been erroneous according to the
9 affidavit?

10 A. Right.

11 Q. I'll return to my question then. Under what
12 circumstances, ma'am, would that vote have been counted as
13 a legal vote?

14 A. Well, I don't think it should have been. I think
15 that was my error that I counted that.

16 Q. Okay. Yes, ma'am.

17 MR. RUCKER: I have no further questions
18 of this witness.

19 MR. MILLER: No questions, Your Honor.

20 THE COURT: You may stand down and leave
21 the exhibit back. Call your next witness.

22 MR. RUCKER: Barbara Warren.

23 THE COURT: Counsel, on your stipulation
24 that you entered previously in this case for the precincts
25 3 South, 6A, 1B, 2A, 2C, 2D, Liberty, Beach, Grant and

1 THE COURT: Counsel approach the bench.

2 (An off-the-record discussion was here had.)

3 DORIS MADDEN,

4 of lawful age, having been first duly sworn on her oath to
5 state the truth, and nothing but the truth, testifies as
6 follows:

7 DIRECT EXAMINATION

8 MR. WITTEMAN:

9 Q. Miss Madden, thank you for being here today. I know
10 it's been long. Miss Madden, I'm sure -- well, let's get
11 started. For the record, would you state your name and
12 address, ma'am.

13 A. Doris Madden, 1319 South B, Ark City, Kansas.

14 Q. All right. Miss Madden, I don't believe we've been
15 introduced, but I'm the attorney here representing
16 Mr. Jones in regard to -- I'm sure you are aware of the
17 matter we're here on, the election matter today.

18 Mrs. Madden, in regard to the election that
19 occurred November 8 of 1994, were you charged with any duty
20 in that election?

21 A. I was supervising judge.

22 Q. Which precinct was that, ma'am?

23 A. 2C and 2B.

24 Q. I'm curious about 2C and 2B. Was that two separate
25 polling places?

1 Spring Creek, did you establish totals for the contestant
2 and the contestee?

3 MR. MILLER: No, Your Honor. We sent
4 that to you.

5 THE COURT: You sent me that, yes.

6 MR. WITTEMAN: I think I faxed it.

7 THE COURT: Somebody faxed it.

8 MR. WITTEMAN: Because you were curious.
9 You were going to draw your order and exclude that, which
10 didn't get done.

11 MR. MILLER: I never totaled it, no.

12 THE COURT: Well, I did and you might
13 double-check my arithmetic.

14 MR. MILLER: May I borrow it?

15 THE COURT: Sure.

16 MR. RUCKER: Barbara, there has been a
17 request made by opposing counsel and we would join in that
18 request that you remain up here because we are going to
19 have you up and down so often that it would be of benefit
20 to the Court.

21 However, Your Honor, given that we have called
22 her back from a recess, we are going to have to ask you to
23 pull the registration card for Russell Keefe for '92, the
24 1992 poll book for 4A, 1994 poll book for 4A and the
25 challenged ballot for Mr. Richard Keefe.

1 A. That's two precincts. One is a small precinct, the
2 other a larger one.

3 Q. Okay. Did you physically work at both of those
4 precincts on election day or did you primarily work at one?

5 A. No, I worked the election.

6 Q. Okay.

7 THE COURT: One polling place, two
8 precincts, is that right?

9 A. Yes. See, it's all together.

10 Q. All right. Very good. Now, at that precinct, and
11 help me and I apologize, what two precincts were polled
12 together?

13 A. 2B and 2C.

14 Q. All right. Those are both 79 District precincts, 79
15 legislative precincts?

16 A. Yes.

17 Q. Miss Madden, I'll hand you what's been previously
18 marked and admitted into evidence as Petitioner's
19 Exhibits 1D, 1B, 1A and 1E. I'd like to first draw your
20 attention to Petitioner's Exhibit 1A. If you could,
21 identify that for us, ma'am.

22 A. Yes, but I don't know the person. I did let them
23 vote and challenged their ballot.

24 Q. All right. Is that, in fact, a challenged ballot?

25 A. Yes.

1 Q. That came from one of your precincts?

2 A. Uh-huh.

3 Q. I notice a signature on the bottom of that
4 challenged ballot envelope. Are either of those signatures
5 yours?

6 A. Yes, the Doris Madden.

7 Q. There is also a place there to note reasons of
8 challenge. Is that your handwriting or is that someone
9 else's?

10 A. No, I imagine that is Jan's handwriting.

11 Q. Okay. And Jan would be?

12 A. Jan Spangler.

13 Q. Okay. Well, I'd like to ask you, Miss Madden, what
14 in regard to challenged ballots it is if a voter shows up
15 at one your polling precincts and you don't find them in
16 the registration list or the poll registration book you
17 have there, what are your instructions on how to deal with
18 that?

19 A. We never turn a person away that comes to vote. If
20 they aren't in our book, we let them vote, have them sign
21 and put it in the challenged ballots.

22 Q. All right. Would that be true if, in fact, you were
23 aware that a voter, let's say, came from a different
24 precinct such as 1C and showed up here?

25 A. We would. We used to vote down at Union Hall, and

1 the girls that worked there said it was easier for them to
2 go ahead and vote with us right there than to go to their
3 own precinct so we would let them but we would put it in a
4 challenged envelope.

5 Q. That's consistent with your instructions from
6 Mr. Gaston?

7 A. Yes.

8 Q. Very well. I'd like to draw your attention if I
9 could, ma'am, to what's been marked as Petitioner's
10 Exhibit 1B, and if you could, identify that for the record,
11 please.

12 A. Yes. This is the girl that said she had divorced
13 and had changed her name.

14 Q. All right. I'd like to draw your attention
15 specifically on that exhibit to the affidavit change of
16 name marked as 1B. Is your signature contained thereon?

17 A. Well, I didn't get all my first name. We must have
18 been busy.

19 Q. All right. Of the letters that you see there on
20 that registration card, is that, in fact, your writing?

21 A. Yes, uh-huh. I just didn't finish it out.
22 Evidently something else came up and took my attention at
23 that time.

24 Q. All right. Given what you see there and the letters
25 that were filled out in your signature, do you have any

1 problem whatsoever identifying that that is your writing?

2 A. No, that is my writing.

3 Q. Okay. Well, I'd like to ask and I know it's been
4 awhile ago and I'm sure you were very busy that night, do
5 you have any idea why you didn't finish writing out your
6 full name on that card?

7 A. I imagine that we had something else come up that
8 the girls either needed a question answered or I had, you
9 know, something came up that took my attention in doing
10 some other ones so probably another girl had -- see, where
11 there's two precincts, we're handing out ballots for two.
12 We're handing out ballots for 2B and 2C.

13 Well, if the girl on 2B has a question that
14 interrupts me as to what I'm doing so that I have to stop
15 and answer her question while I'm trying to take care of 2C
16 --

17 Q. Okay. Probably fair to say you could have used
18 another hand around there that night?

19 A. Also with two precincts you are busy.

20 Q. Well, let me ask this: Based on your knowledge and
21 what you do remember that evening and what you see on that
22 card, was it at all your intention to not sign that card?

23 A. Oh, no. I've got the M-A. I just didn't get the
24 D-D-E-N.

25 Q. All right.

1 A. So I started it but evidently I was interrupted and
2 didn't notice I hadn't signed the tail end of my name.

3 Q. All right. Very well. I want to take a minute and
4 confer with my other counsel.

5 (A sotto voce discussion between Mr. Witteman
6 and Mr. Rucker was here had.)

7 MR. WITTEMAN:

8 Q. Miss Madden, I apologize for the time I've taken
9 away from your day.

10 A. That's all right.

11 Q. And the few minutes while I've left you on the
12 stand.

13 MR. WITTEMAN: I think at this point I
14 have no further questions, Your Honor.

15 THE COURT: You may inquire.

16 MR. MILLER: No questions, Your Honor.

17 THE COURT: Miss Madden, I have one
18 question. If you would, hand me the exhibit or hand it to
19 the court reporter. You remember this lady, Donna Schalk,
20 signing this?

21 THE WITNESS: I do.

22 THE COURT: In your presence?

23 THE WITNESS: Because her folks used to
24 live there and so I remember her from the name. It's not
25 that I personally know her.

1 THE COURT: Okay. And the salmon-colored
2 card is Petitioner's Exhibit 1B. Thank you very much.
3 That's all I need. Can this witness be excused?

4 MR. MILLER: Yes, Your Honor.

5 MR. WITTEMAN: I believe so.

6 THE COURT: You may stand down. You are
7 excused. Next?

8 MR. RUCKER: Your Honor, we can continue
9 to --

10 THE COURT: Okay. Do we have -- has she
11 pulled all of the exhibits for --

12 MR. RUCKER: -- Mr. Keefe.

13 THE COURT: -- Mr. Keefe? How about for
14 Curtis Richards and Donita Richards? Okay. Mr. Bumgarner
15 you have, however.

16 MR. RUCKER: Your Honor, what I was doing
17 while she was testifying was trying to determine whether or
18 not we needed her testimony, Miss Madden's testimony for
19 anyone else and I determined that we did not.

20 THE COURT: You want to take a short
21 recess then so you can pull the records for Curtis
22 Richards, Donita Richards, Ruby Schalk?

23 MR. RUCKER: Correct. Edith Dickerson.

24 THE COURT: Edith Dickerson, and who
25 else? Mr. Keefe she's already pulled.

1 MR. RUCKER: Right, Curtis and Donita
2 Richards I believe were mentioned. Walter Simmons.

3 THE COURT: We'll take a short recess.
4 You can have her pull them and put them in different
5 stacks. We'll go through all of them at one time. Court
6 will be in recess for about 10 minutes.

7 (A brief recess was here had from 3:35 to 4:00 p.m.)

8 (Petitioner's Exhibit Nos. 10A - 10D, 11, 12,
9 13, 14, 15A - 15E, 16, 17, 18, 19A - 19C, 20A - 20H, 21,
10 22A - 22D, 23A - 23D, 24 and 25 were marked for
11 identification.)

12 MR. RUCKER: May I approach?

13 THE COURT: Yes. Before we get started,
14 I understand there is a record you want to make for the
15 rest of the witnesses you got subpoenaed for the day?

16 MR. MILLER: Yes, Your Honor. I have,
17 Your Honor, under subpoena Mr. Ray L. Vick, and that's
18 spelled V-I-C-K. Mr. Vick has business to conduct out of
19 town and I want to accommodate him. He has agreed to at
20 the time he's called -- he has a 1-800 page number. We can
21 get him 24 hours a day anywhere in the world, and he's
22 agreed at the time we need him once he has an opportunity
23 to situate himself at a telephone to conduct his testimony
24 over the telephone at the time we need him, and I would ask
25 that he be released subject to the Court's instruction that

1 he maintain that arrangement.

2 THE COURT: Mr. Vick, you are hereby
3 released with that admonition and enjoy your trip, and I
4 hope you are within phone range when we need you. It will
5 probably be on Thursday though.

6 MR. VICK: All right. Thank you.

7 THE COURT: Thank you. You are free to
8 go. This is not Miss Warren.

9 MR. RUCKER: No, sir. We thought we
10 would take care of Miss Dickerson first. We had some
11 outstanding issues on those particular articles, Your
12 Honor, if that's in order.

13 THE COURT: Just have you identify this
14 witness for the record.

15 MR. RUCKER: Yes. If you would state
16 your name, ma'am. Could we have her sworn, please?

17 DOROTHY L. BOHRER,
18 of lawful age, having been first duly sworn on her oath to
19 state the truth, and nothing but the truth, testifies as
20 follows:

21 DIRECT EXAMINATION

22 MR. RUCKER:

23 Q. Ma'am, if you would, state your name again for the
24 record.

25 A. Dorothy L. Bohrer.

1 Q. Miss Bohrer, are any of the individuals that served
2 with you at the polling place on November 8th out in the
3 hall?

4 A. No.

5 Q. All right. Miss Bohrer, if you would, state your
6 address.

7 A. 1320 North Fourth, Arkansas City, Kansas, 67005.

8 Q. And ma'am, have you ever served as an election judge
9 or clerk in a general -- at the general election in 1994?

10 A. Did I?

11 Q. Did you, ma'am?

12 A. Yes.

13 Q. It was an awkward question, but yes, thank you very
14 much. And what precinct, ma'am, did you --

15 A. 4D.

16 Q. Did you serve at 4D? All right. And where is that,
17 ma'am?

18 A. At the Presbyterian Manor, Arkansas City.

19 Q. During your working hours as an elections judge on
20 November the 8th, 1994 at 4D, did you encounter Judith --
21 pardon me, Edith J. Dickerson?

22 A. Yes, I did.

23 Q. Would you explain to the Court under what
24 circumstances you had contact with Miss Dickerson.

25 A. She came in, wanted to vote, her name was not in the

1 book so I challenged her ballot.

2 Q. Did she indicate why it is that she presented
3 herself to Presbyterian Manor?

4 A. Because she was at work and she wanted to go ahead
5 and continue working but she wanted to vote while she was
6 there and she wouldn't have had time to have done it after
7 work.

8 Q. Okay. All right. And your response, ma'am, was
9 what?

10 A. That I would challenge her vote.

11 Q. All right. And allow her to vote?

12 A. To vote.

13 Q. Correct. And why did you follow that sort of a
14 procedure, ma'am?

15 A. Because that was the instructions given to us by Joe
16 Gaston.

17 Q. Okay. And specifically, if you could, relate to the
18 Court what those instructions were, ma'am.

19 A. To allow anyone to vote that came in that wanted to
20 vote and to allow no one to leave unless they voted.

21 Q. All right. So you --

22 A. If they wanted to vote.

23 Q. You bet.

24 (An off-the-record discussion was here had.)

25 MR. RUCKER:

1 Q. Ma'am, I would hand you now what has been marked as
2 Petitioner's Exhibit No. 15D, as in dog, and ask for you to
3 identify it for the Court.

4 A. This was the challenged vote No. 12 that Edith
5 Dickerson signed herself. This is her signature. This is
6 my signature here with Terri Lee Stamper as a witness and
7 this is her address. She lives right across the street
8 from me (indicating throughout).

9 Q. All right, ma'am. And I notice this is in a white
10 envelope.

11 A. Because we did not have anymore yellow envelopes so
12 we borrowed some from the Presbyterian Manor.

13 Q. You just made do with what you had?

14 A. He said improvise and that's what we did.

15 Q. When you say "he," you mean?

16 A. Mr. Gaston.

17 Q. Gaston. All right. You indicated that's an old
18 address on this challenged ballot. Would you mind reading
19 that into the record?

20 A. 810 North Third Street was her old address and her
21 new address was 1321 North Fourth Street.

22 Q. Okay. And again, this was on the date of election
23 which would have been --

24 A. Yes.

25 Q. -- November 8th, is that correct?

1 A. Yes.

2 Q. All right. I also note for the record that there is
3 a yellow card in this. Would you mind identifying that for
4 the record. It has been marked as Petitioner's Exhibit
5 15C.

6 A. There is where she, Edith Dickerson, affirmed that
7 she did live at 810 North Third. Then she has moved to
8 1321 North Fourth and then it was signed by her on the 8th
9 day of November '94 and Terri Lee Stamper is the -- one of
10 the election board judges on the Republican side is the way
11 she signed this.

12 Q. Did she sign that in your presence?

13 A. Yes.

14 Q. You saw her execute this document?

15 A. Yes.

16 Q. Both Edith Dickerson as well as Miss Stamper, is
17 that accurate?

18 A. Yes, she was right next to me.

19 Q. Yes, sir -- or yes, ma'am.

20 MR. RUCKER: Your Honor, I would offer
21 into evidence 15A, B, C, D and E.

22 THE COURT: Those are the items relating
23 to Edith Dickerson?

24 MR. RUCKER: Yes, Your Honor.

25 MR. MILLER: No objection, Your Honor.

1 THE COURT: They'll be admitted.

2 MR. RUCKER: I have no further questions
3 of this witness.

4 THE COURT: You may inquire.

5 MR. MILLER: Thank you, Your Honor.

6 CROSS-EXAMINATION

7 MR. MILLER:

8 Q. Tell me your name again.

9 A. Dorothy L. Bohrer.

10 Q. Bohrer. If I mispronounce that, correct me,
11 please.

12 A. I'll probably do that.

13 Q. Thank you. The yellow card that Mrs. Dickerson
14 signed that day --

15 MR. MILLER: May I approach, Your Honor?

16 THE COURT: You may.

17 A. Yes.

18 MR. MILLER:

19 Q. Are you familiar, Mrs. Bohrer, with another card
20 that talks about moving within 30 days?

21 A. Yes.

22 Q. You also had some of those cards --

23 A. Yes.

24 Q. -- at the polling place?

25 A. Uh-huh.

1 Q. Mrs. Dickerson as I understand it --

2 A. No.

3 Q. Let me finish my question. I'll surprise you
4 sometimes.

5 A. Oh.

6 Q. She didn't tell you anything that day about when she
7 had changed her residence?

8 A. No.

9 Q. Did you hear her tell that to anyone in the presence
10 of the --

11 A. No.

12 Q. -- election process?

13 A. Huh-uh.

14 Q. Okay.

15 MR. MILLER: That is all I had, Your
16 Honor.

17 THE COURT: Can this witness be excused?

18 MR. MILLER: On behalf of the contestee.

19 MR. RUCKER: Yes, sir.

20 THE COURT: You may stand down. You are
21 excused. That is, you are free to go.

22 THE WITNESS: Thank you.

23 THE COURT: Thank you. Call your next
24 witness.

25 MR. RUCKER: Your Honor, Barbara Warren.

1 THE COURT: You are still under oath.
2 Counsel, have you examined these exhibits that he has
3 marked?

4 MR. MILLER: Probably.

5 THE COURT: Is there -- well, is there
6 going to be a necessity to lay foundation for each and
7 every one of them?

8 MR. MILLER: Probably not.

9 THE COURT: Or can they be admitted by
10 stipulation?

11 MR. MILLER: If I had a minute to review,
12 I might be able to do that. What do you have there?

13 MS. WARREN: Edith Dickerson.

14 MR. MILLER: What ones do you have here?

15 MR. RUCKER: We're going to introduce all
16 of these.

17 THE COURT: Different documents for
18 different voters?

19 MR. RUCKER: Yes, Your Honor, but they
20 may be problematic.

21 THE COURT: And they are in her custody?

22 MR. RUCKER: Yes, Your Honor, and some
23 may be utilized in more than one voter's instance.

24 THE COURT: Right.

25 MR. MILLER: If counsel wants to read the

1 numbers of the exhibits that he wishes to introduce, I'll
2 follow along, and I think I'll be able to stipulate when
3 he's done.

4 THE COURT: All right. Thank you.

5 MR. RUCKER: Your Honor, we would seek
6 admission of 10A, 10B, 10C, 10D, 11, 12 and 13 and 14 as
7 they specifically relate to -- well, I'll just ask for the
8 admission.

9 THE COURT: Any objection?

10 MR. MILLER: No, Your Honor.

11 THE COURT: Those exhibits just named and
12 numbered by counsel are hereby admitted.

13 MR. RUCKER: 19A, 19B as in boy, 19C.

14 MR. MILLER: No objection.

15 THE COURT: Those will be admitted.

16 MR. RUCKER: 20A, 20B, 20C, 20D, 20E,
17 20F, 20G, 20H, 21.

18 MR. MILLER: No objection.

19 THE COURT: Those will be admitted.

20 MR. RUCKER: 22A, 22B, 22C, 22D.

21 MR. MILLER: No objection.

22 THE COURT: Those will be admitted.

23 MR. RUCKER: 23A, 23B, 23C, 23D, 24 and
24 25.

25 MR. MILLER: No objection.

1 THE COURT: Those will be admitted.

2 MR. RUCKER: Your Honor, if I might
3 inquire.

4 THE COURT: Proceed.

5 BARBARA WARREN,
6 having been previously duly sworn, testified further as
7 follows:

8 DIRECT EXAMINATION

9 MR. RUCKER:

10 Q. Specifically as it relates to Edith Dickerson, you
11 have had the opportunity, ma'am, to review the poll books
12 from 1990, 1992, 1994, the poll books are for residence as
13 it existed within a 30-day time period of the November 8th
14 election which would be 810 North Third in Arkansas City,
15 Kansas, have you not?

16 A. Yes.

17 Q. And do you have her challenged ballot?

18 A. I do.

19 Q. And it has been admitted. We'll just retrieve it
20 here if we can.

21 A. If I could look at it if you are going to be talking
22 about it. Okay.

23 Q. And what precinct of residence was she a resident --
24 pardon me, what precinct of residence is 810 North Third?

25 A. That's 4c.

1 Q. Okay. And in reviewing the poll books of 4C in '90,
2 '92, '94, pardon me '90 and '92, did she vote in those
3 elections?

4 A. I can't remember. There is no notation here. I
5 know she voted in '94 or tried to.

6 MR. MILLER: Your Honor, I might inquire
7 as to the relevance.

8 MR. RUCKER: I'm attempting to determine
9 if she did have a valid voter registration card on file and
10 part because she's already testified that she was a
11 long-time resident at that address. I believe the Court
12 remembers that testimony given that she was a long-time
13 resident of that address. Perhaps we can attack it in
14 another way.

15 MR. RUCKER:

16 Q. What is the voter registration date on her
17 registration card, ma'am?

18 A. On her registration card is August 9th, 1974.

19 Q. All right. And that's an active registration even
20 up to and including the date of today's --

21 A. Yes, sir.

22 Q. -- of today's hearing, is it not?

23 A. Yes, sir.

24 Q. What does that indicate to you as far as her voting
25 pattern?

1 A. That she has been active.

2 Q. All right. And at no time does it appear that she
3 was in the inactive file?

4 A. There is nothing to tell me that she has been --
5 she's been on the active file I would surmise since '74
6 when she registered.

7 Q. At that address?

8 A. At that address in that precinct.

9 Q. All right. And currently you have her still as a
10 properly registered elector?

11 A. Yes, sir.

12 Q. All right.

13 MR. RUCKER: I have no further questions
14 of this witness at this time.

15 THE COURT: I need those exhibits back.

16 MR. RUCKER: And these, too, Your Honor,
17 have been admitted.

18 THE COURT: 16, 17 and 18 all pertain to
19 Edith Dickerson, is that correct?

20 MR. RUCKER: Yes, Your Honor, and again
21 Your Honor, as I've indicated to the Court before, some of
22 the poll books will, in fact, be utilized in a cross
23 reference sort of way.

24 THE COURT: All right. Very well. Thank
25 you.

1 MR. RUCKER:

2 Q. Miss Warren, as it relates to Russell Wayne Keefe,
3 K-E-E-F-E, you have before you what has been admitted into
4 evidence as Petitioner's Exhibits 10A and 10B. I'd like
5 for you to indicate to the Court what that is.

6 A. 10A's his registration card.

7 Q. What is on the face of that registration card,
8 ma'am, what address is reflected there?

9 A. 610 North Eighth.

10 Q. All right. And you also have, I can view from here,
11 a challenged ballot in that regard?

12 A. Uh-huh.

13 Q. What has that been marked Petitioner's Exhibit?

14 A. 10C.

15 Q. All right. And from the face of the challenged
16 ballot, ma'am, does it give reference as to why that
17 particular ballot was challenged?

18 A. Yes, the judge has put on the face of the envelope
19 not in book, Russell Keefe, 911 North C, lived there a year
20 and a half.

21 Q. Do you have any other accompanying affidavits or any
22 other documentation which would have allowed that
23 challenged ballot to be cast?

24 A. There are no affidavits that could be found at all.

25 Q. All right. And ma'am, was that challenged ballot

1 counted or uncounted?

2 A. It was counted.

3 Q. And what would be the reason for that particular
4 ballot to have been counted given the notation that he had
5 moved a year and a half before the date of the election?

6 A. Okay. Okay. This active registration card at 610
7 North Eighth says that he registered in December of '92.
8 This is December of '94. Since he's lived here for a year
9 and a half --

10 Q. Lived where, ma'am, for a year and a half?

11 A. 911 North C.

12 Q. Which is the other address, is it not?

13 A. Which is the other address.

14 Q. Yes, ma'am. That's why I queried you about what it
15 is on the voter registration card. He is registered at
16 what address?

17 A. 610 North Eighth.

18 Q. He's currently residing where, ma'am, according to
19 the evidence that you have?

20 A. Well, the envelope says 911 North C.

21 Q. It also indicates how long he has lived at that
22 address?

23 A. Year and a half.

24 Q. Yes, ma'am.

25 THE COURT: What precincts are those?

1 Excuse me, counsel.

2 THE WITNESS: Okay. 610 North Eighth is
3 4A.

4 THE COURT: All right.

5 THE WITNESS: 911 North C is 1B, B as in
6 boy.

7 MR. RUCKER:

8 Q. Again, Ms. Warren, I'm not trying to be pesky.

9 A. That's all right.

10 Q. I'm just trying to understand why it is that
11 particular ballot was counted.

12 A. There is no handwriting on that envelope to tell me
13 who processed it so --

14 THE COURT: If you can't say, you can't
15 say.

16 A. I can't say who processed it so I don't know.

17 Q. Thank you.

18 A. I can give you an assumption.

19 Q. I'm handing you before you now, Barbara, what has
20 been marked Petitioner's Exhibits 20A, 20B, 20C and 20D.
21 Could you identify those documents for the Court.

22 A. 20B's Donita Richards' registration card. 20D is
23 her printout.

24 Q. For the sake of the record, perhaps maybe it would
25 be best to just identify them in order.

1 A. Okay.

2 Q. 20, let's say. What is 20A?

3 A. 20A's her -- it's the tab on the registration card.

4 Q. All right. What is 20B, ma'am?

5 A. 20B is the registration card itself.

6 Q. Okay. What is 20C?

7 A. 20C's the challenged ballot envelope.

8 Q. 20D?

9 A. 20D is the screen print from the computer.

10 Q. And the screen print from the computer contains what
11 sort of information?

12 A. That Donita Richards is an active voter at 1207
13 North D in 1C precinct.

14 Q. That she is an active voter at that address, ma'am?

15 A. She is an active voter, uh-huh.

16 Q. And how is it that she is an active voter at that
17 address?

18 A. Well, she's got a valid registration.

19 Q. Okay.

20 A. I mean it's --

21 Q. The registration card that has, in fact, been
22 identified as Petitioner's Exhibit 20B, what address is
23 reflected there?

24 A. 1207 North D.

25 Q. All right. So, in fact, at that address she is, in

1 fact, on the roll, is she not?

2 A. Correct.

3 THE COURT: What precinct is that?

4 THE WITNESS: 1C.

5 MR. RUCKER:

6 Q. And yet I direct your attention to the challenged
7 ballot envelope which is marked as Petitioner's Exhibit
8 No. 20C and what -- where did she present herself to vote?
9 It's on the face of the challenged ballot.

10 A. At 1B, 1B as in boy.

11 Q. Would you indicate to the Court what precinct 315
12 East Pine is in?

13 A. Uh-huh. I imagine that's in 1B.

14 Q. I proffer that it is.

15 A. 315 East -- that's 1B as in boy.

16 Q. All right. On the challenged ballot envelope does
17 it indicate where their current residence is?

18 A. The judge has put "not in book, presented card,
19 Donita Richards, 315 East Pine, formerly 1207 North D."

20 Q. Correct.

21 MR. RUCKER: And Your Honor, we elicited
22 testimony earlier in the day about how long ago it was that
23 they had moved.

24 MR. RUCKER:

25 Q. Is there any other -- are there any other notations

1 on the challenged ballot envelope?

2 A. No, sir.

3 Q. It indicates on the challenged ballot envelope a
4 reference to filled out appropriate card or words to that
5 effect. What was the language that you used again, or
6 affidavits?

7 A. There are no affidavits attached.

8 Q. Right.

9 A. It says -- oh, "not in book, presented card." Is
10 that what you are talking about?

11 Q. Correct, and what does presented card, what would
12 normally be the card that would be presented?

13 A. Well, the voters -- there are two different cards
14 that it could be. There is a perforation on the end of
15 this card that it could be the perforated end of the card
16 which is just simply a receipt for having registered to
17 vote. The other card that she could be talking about could
18 be the actual voter registration card that we mail out to
19 each newly registered person, so I don't know which card
20 she's talking about.

21 Q. But you have no current registration even up to and
22 including the date of today's hearing from 315 East Pine?

23 A. I don't know if she has reregistered since the
24 election.

25 Q. To your knowledge?

1 A. To my knowledge, no.

2 Q. Certainly on the day of election they were not
3 registered to vote at 315 East Pine?

4 A. That is correct.

5 Q. If I indicate to you that an individual had moved
6 from one address to another crossing precinct lines in June
7 of 1994 --

8 A. In June?

9 Q. -- would you have counted that ballot?

10 MR. MILLER: Your Honor, calls for
11 speculation.

12 MR. RUCKER: It --

13 MR. MILLER: And it calls for speculation
14 that leads to a legal conclusion.

15 THE COURT: Well, what she would have
16 done, is that pertinent to our purposes here?

17 MR. RUCKER: No, Your Honor. I'll
18 rephrase.

19 THE COURT: Thank you.

20 MR. RUCKER:

21 Q. As far as your reading of that particular ballot
22 and what you know about the registration, what is your --

23 MR. MILLER: Excuse me, does she have
24 just one or both?

25 MR. RUCKER: She has only Donita at the

1 current time I believe.

2 A. I'm dealing with Donita.

3 MR. RUCKER:

4 Q. Right.

5 A. You are asking me whether I would count it or not?

6 Q. That's what I was going to ask.

7 A. She's a registered voter at 1207 North D and that's
8 precinct 1C. She went to 1B and they say she's registered
9 at 1207 North D. I have no affidavits verifying anything
10 or time frame even, so really it should not be counted.

11 Q. Okay. All right. Let's move on. Curtis Richards,
12 which again I believe I've handed to you as well, and I
13 would ask you to identify for the Court 20E, 20F, 20G, 20H
14 and indicate to the Court what those documents are.

15 A. Okay. 20E is a little sticky note that's on the end
16 of the registration card. 20F is Curtis Richards'
17 registration card. 20G is the challenged ballot envelope
18 and 20H is the printout from the computer.

19 Q. All right. And as far your testimony as it relates
20 to Donita Richards, are your comments essentially identical
21 as they relate to Curtis Richards?

22 A. Well, it's the same addresses, no affidavits, so it
23 looks to be the same circumstances.

24 Q. All right. I would turn your attention to what has
25 been marked at Petitioner's Exhibits 22A, 22B, 22C and 22D

1 and ask for you to identify those for the Court.

2 A. 22A's Walter Simmons' registration card. 22B's his
3 affidavit of change of residence within the precinct.
4 22C's the challenged ballot envelope and 22D is the
5 inactive computer printout.

6 Q. All right. And what is the date of registration on
7 that card?

8 A. April 8th of 1988.

9 Q. At what address was he registered at registering as
10 an elector?

11 A. 303 North Ninth.

12 Q. All right. I would ask for you now to identify 22B
13 and tell the Court what that is specifically.

14 A. 22B is the affidavit of change of residence within
15 the precinct.

16 Q. Within the precinct?

17 A. Uh-huh.

18 Q. All right. And you've indicated that he was
19 registered at what address?

20 A. At 303 North Ninth.

21 Q. What precinct was that, ma'am?

22 A. 4B as in boy.

23 Q. All right. And on that written precinct affidavit,
24 where does he indicate that he moved to, ma'am?

25 A. He moved to 115 South C.

1 Q. And what precinct is 115 South C?

2 A. That's 2A.

3 Q. It's not the same precinct?

4 A. No.

5 Q. All right. On the challenged ballot itself, ma'am,
6 which is Petitioner's Exhibit 22C, what is the notation on
7 the challenged ballot indicating a reason that the ballot
8 was challenged?

9 A. Okay. The judge has written wrong precinct, moved
10 and did not reregister.

11 Q. Was this ballot a challenged ballot that was counted
12 or a challenged ballot that was uncounted?

13 A. It's again crossed out. Let me look here. Okay.
14 It was counted.

15 Q. All right. If we could digress for a moment, Curtis
16 and Donita Richards, they were a challenged ballot that was
17 counted or a challenged ballot that was uncounted?

18 A. Richards, they were counted.

19 Q. Correct. As far as your rememberance, Russell Wayne
20 Keefe, a challenged ballot that was counted or a challenged
21 ballot that was uncounted?

22 A. It was counted.

23 Q. What is the justification given the information at
24 hand for counting Walter Simmons' ballot?

25 MR. MILLER: Counsel --

1 A. Okay. On my list it says -- now this was the list
2 that went to the board of canvassers, that the board of
3 canvassers got and this list was passed out at the
4 canvassing time and it says moved, dash, have affidavit.

5 MR. MILLER: So regardless of how long an
6 individual moved from one place or the other or in this
7 case if, in fact, they even moved four times, if they
8 filled out the affidavit that was prima facie evidence that
9 they should be counted?

10 A. This says he changed precincts.

11 Q. Yes, ma'am.

12 A. And this affidavit is the wrong affidavit for that
13 gentleman.

14 Q. Is there any sort of indication to you on the actual
15 challenged ballot who indicated that that ballot should be
16 counted?

17 MR. MILLER: Excuse me, Your Honor. Can
18 we -- I think we need to clarify for the record when we
19 throw out this word counted whether something was counted
20 or not counted. We didn't clarify. That's counted by the
21 county board of canvassers when we use that term.

22 THE COURT: Is that correct, is that what
23 you intended?

24 THE WITNESS: Yes, sir. Yes, sir.

25 THE COURT: All right.

1 MR. RUCKER:

2 Q. Subsequently made a part of the total vote?

3 A. Right, right.

4 Q. Was the same way with Curtis and Donita Richards?

5 A. Yes.

6 Q. And that was the same way with Mr. Keefe, was it
7 not?

8 A. Right, right.

9 Q. Is there a particular handwriting on that ballot
10 which would indicate the justification for counting that
11 ballot?

12 A. Yeah. Part of it says do not count, need to
13 register and do not -- and everything's been crossed out
14 except the count and then affidavit is written beside it.

15 Q. Okay. Are you able to identify the handwriting?

16 A. It looks like Carmelita's red handwriting and I
17 don't know the other one. That could be mine.

18 Q. All right.

19 A. I don't know.

20 Q. As it relates specifically to Curtis and Donita,
21 given the testimony that they have elicited from you, what
22 was the justification for counting those particular
23 ballots, ma'am, given the information that was known at the
24 time?

25 A. Okay. On the list that was given to the board of

1 counting canvassers it was written down that they went to
2 the wrong polls.

3 Q. When you say "they," who are you referring to now,
4 ma'am?

5 A. The Richards, Donita and Curtis.

6 Q. Both?

7 A. Both of them. They went to the wrong polls which
8 they did but really they -- they were not -- they needed to
9 reregister because there is no affidavit here.

10 Q. Yes, ma'am. And possibly the move was not within 30
11 days?

12 A. Correct, correct.

13 Q. All right. And as far as Mr. Keefe is concerned,
14 ma'am?

15 A. That's over there, I think.

16 Q. I think that was before you.

17 THE COURT: It's over here.

18 MR. RUCKER: Thank you.

19 MR. RUCKER:

20 Q. Again, given the testimony that was elicited
21 regarding Mr. Keefe, what was the justification for that
22 vote being counted by the board?

23 A. Okay. On the list it says went to wrong poll which
24 he did but he moved -- but he moved so -- and there is no
25 affidavit so you really cannot, really should not count

1 this. That would be my recommendation.

2 Q. Yes, ma'am. Okay. And as it relates to Walter
3 Simmons, ma'am? Now we've come full circle.

4 A. I'll take your word for that.

5 Q. The justification for that vote being counted given
6 the information that you had at your disposal, or pardon
7 me, not you, but the office of county clerk?

8 A. Well, he's moved. The wrong affidavit was given to
9 him. He's moved out of the precinct and we don't know
10 whether he's moved in that 30-day time frame which is
11 pertinent to moving out of the precinct.

12 Q. Yes, ma'am. And it was a different precinct as
13 well?

14 A. Yes, sir.

15 Q. Again, and I think in virtually every single one of
16 these cases, the Richards, both Donita and Curtis,
17 Mr. Keefe, Mr. Simmons, all of the individuals were voting
18 in different precincts than, in fact, the area they were
19 registered in, is that not also accurate?

20 A. Yes.

21 MR. RUCKER: I have no further questions
22 of this witness at this time, Your Honor.

23 THE COURT: What about these over here
24 that have been admitted?

25 MR. RUCKER: Your Honor, that is

1 upcoming. Cocounsel will handle that.

2 THE COURT: Okay.

3 MR. MILLER: None at this time, Your
4 Honor. Reserve the right to recall on these issues.

5 THE COURT: Okay. Can she go downstairs,
6 that's the big question, or do you want her to remain up
7 here?

8 MR. RUCKER: The contestant would like
9 for her to remain.

10 THE COURT: Okay. Have a seat someplace
11 else.

12 MR. MILLER: Can she just stay here? I
13 don't think her testimony is going to be diluted by the
14 other witnesses.

15 MR. RUCKER: I don't have any objection
16 to that if cocounsel doesn't.

17 THE COURT: You can just wait there.
18 Call your next witness.

19 MR. WITTEMAN: I'd like to call Hal
20 Bumgarner to the stand.

21 HAL BUMGARNER,
22 of lawful age, having been first duly sworn on his oath to
23 state the truth, and nothing but the truth, testifies as
24 follows:

25 DIRECT EXAMINATION

1 MR. WITTEMAN:

2 Q. Mr. Bumgarner, I'm Doug Witteman. I'm the attorney
3 for Danny Jones. I don't believe we've met before today,
4 have we?

5 A. Not before today, no.

6 Q. Okay. Why don't -- for the record, go ahead and
7 state your name and your current address.

8 A. Hal Bumgarner. My address is Rural Route 2, Ark
9 City, Kansas.

10 Q. Okay. You got a specific box number?

11 A. Oh, Box No. 532.

12 Q. Okay. Mr. Bumgarner, I'm going to hand you what's
13 been previously marked for identification purposes as
14 Petitioner's Exhibits 23A, 23B and 23C. I'd like to direct
15 your attention first of all to 23A. Can you identify what
16 what that document is.

17 A. This right here?

18 Q. Yeah, the one on top.

19 A. This whole white sheet? Just registration
20 certificate.

21 Q. Okay.

22 MR. WITTEMAN: If I can approach the
23 witness, Your Honor.

24 Q. Is that your signature on that registration --

25 A. Yes, it is.

1 Q. -- certificate? And did you notice the note? What
2 date is on that?

3 A. 10-19-92.

4 Q. All right. Do you have any personal knowledge or
5 any reason to believe that you, in fact, did not register
6 on 10-19-92 pursuant to that card?

7 A. No.

8 Q. Does that seem right with you?

9 A. Yeah, I believe so.

10 Q. Have you, to your knowledge, have you ever
11 registered since 10-19-92 as reflected on this card?

12 A. No.

13 Q. I notice on the card that it indicates that your
14 address is Route 2, Box 1068, and I think you've indicated
15 that your current address is Route 2, Box 532?

16 A. Right.

17 Q. What's the difference?

18 A. About two miles.

19 Q. Okay. So there is an actual difference, it's not
20 just some change of box numbers?

21 A. No.

22 Q. Okay. Well, let's talk about your address as
23 indicated, Route 2, Box 1068. Is that a frame house or
24 what type of residence?

25 A. That was a rental house that me and some friends

1 lived in on Green Farm Road right across the street from
2 Lions Park is where it is.

3 Q. Who were these friends?

4 A. Just friends from high school and college. Do you
5 want their names?

6 Q. Specifically their names.

7 A. J.B. Elliott and Lucas McDermott.

8 Q. Last name McDermott?

9 A. Yes.

10 Q. All right. Then as it's consistent at least with
11 your recollection that, in fact, on 10-19-92 when you
12 registered, you were living with a couple of friends at the
13 house --

14 A. Right.

15 Q. -- at Box 1068? Okay. Well, let's talk about where
16 you are living now. Say it's about two miles away. What
17 is -- what kind of residence is that? What kind of
18 structure?

19 A. It's a trailer house that I own.

20 Q. Okay. How long have you owned that trailer house?

21 A. My dad gave it to me in I think '90 or '89, '90 I
22 believe.

23 Q. Okay. When did you move to that trailer house?

24 A. I had moved to Ark City -- me and my ex-wife
25 separated and I moved directly into it and stayed there for

1 probably four or five months and then into the other house
2 with my friends.

3 Q. Okay. And it's probably my fault the way I asked
4 the question, and let me make sure if I'm right and tell me
5 if I'm wrong. You moved into the trailer house when your
6 dad gave it to you in '89 or '90, then lived there for a
7 few months and then moved into the house?

8 MR. MILLER: No, no.

9 Q. Okay. Why don't you tell me.

10 MR. MILLER: I'm trying to place an
11 objection, be more minute in the question.

12 MR. RUCKER:

13 Q. Let's start over. You got in the trailer house in
14 '89 or '90?

15 A. I think '90 would be most accurate.

16 Q. You moved in then?

17 A. It was in Winfield, the trailer was. Me and my wife
18 lived in it for about a year. Then I got a job in Ark
19 City. We moved there and we were together probably perhaps
20 maybe a month, maybe not even that amount of time. Then we
21 became separated and I had the trailer house pulled to Ark
22 City at the same address where it is now and it's been
23 there ever since.

24 Q. Okay. Very well. Now, there is still a hole in my
25 understanding and I'm trying to get to it. The trailer

1 house is at the address it is now and you had it pulled
2 there, but there was a period of time that you didn't
3 occupy the trailer house while it was at this address. Is
4 that --

5 A. Pardon me?

6 Q. The trailer house is sitting where it is now sitting
7 today?

8 A. Right.

9 Q. Is there a period of time that the trailer house sat
10 there when you were living with your friends at another
11 address?

12 A. Right.

13 Q. Okay. All right. I'll -- once again I'd like to
14 approach and show you and draw your attention to
15 Petitioner's Exhibit 23B which is the second document in
16 that stack. Can you identify that?

17 A. It says challenged.

18 Q. All right. You see your signature on there
19 anywhere?

20 A. No.

21 Q. All right. It wasn't signed. Why was -- do you
22 recall -- let's go to November 8th when you voted. Do you
23 remember where it was you voted at?

24 A. The C-4 school. It's on Highway 166.

25 Q. Okay. Is that a place you voted at before?

1 A. Yes, it is.

2 Q. Always?

3 A. Always.

4 Q. When you vote?

5 A. Yes.

6 Q. All right. Well, what happened when you presented
7 yourself to vote that night or day?

8 A. Well, I went in there to vote and told them the name
9 and they didn't have me on the sheet, and she said well,
10 are you registered to vote and I said yes. She said well,
11 I'll challenge your ballot and I voted.

12 Q. Okay.

13 A. Then I left.

14 Q. Did you give them any information as to why you
15 wondered why you weren't on the sheet?

16 A. No, I don't recall talking, really talking to her
17 about it.

18 Q. Okay. I want to pin it down a bit and I've asked
19 around the question. The more I think about it I don't
20 think I ever got there. When did you move to your present
21 location?

22 A. Oh, it's been quite some time ago. It would have to
23 be towards the tail end of '92 because we lost our lease to
24 our house directly following that year and we all just
25 split up and moved.

1 Q. Directly following '92?

2 A. Right, or our lease, our lease ended January 1st, I
3 believe '93, so we were all out of the house before that.

4 Q. All right. Do you recall whether you moved out in
5 December of '92 or --

6 A. I really -- well, it had to have been in December of
7 '92.

8 Q. Okay. So far as we can tell in December of '92 you
9 moved from the address wherein you registered to vote for a
10 different address?

11 A. Right.

12 Q. Okay. Since you've lived where you are at, never
13 went in to reregister?

14 A. I don't believe so.

15 Q. Okay. Well, let's -- let's talk a little bit. I'm
16 curious. Where do you work at, Mr. Bumgarner?

17 A. I work at the fire department in Ark City.

18 Q. What do you do there?

19 A. I'm a paramedic and a fireman.

20 Q. How long have you worked there?

21 A. Four years now. I think right at almost four years.

22 Q. Okay.

23 A. About right.

24 Q. What other firemen, paramedics work with you?

25 MR. MILLER: Object as to relevance.

1 MR. WITTEMAN: It's going to be clear,
2 Your Honor.

3 THE COURT: Well, can you enlighten me
4 now? I mean, if there is 80 fire fighters, are you wanting
5 them all listed?

6 MR. WITTEMAN: No, no. There is very
7 few.

8 MR. MILLER: Just ask --

9 MR. WITTEMAN: It won't be long.

10 MR. MILLER: Just ask him what you want
11 to know.

12 MR. WITTEMAN:

13 Q. Do you work with Mr. Shriver there?

14 A. Yes, I do.

15 Q. How long have you worked with Mr. Shriver?

16 A. I believe I've been on his shift for a year and a
17 half or maybe two years.

18 Q. Okay. What kind of -- what kind of -- is there any
19 difference between the type of work that you do as
20 paramedic and what Mr. Shriver does? Is he a paramedic as
21 far as job description?

22 MR. MILLER: Object as to relevance, Your
23 Honor.

24 THE COURT: Well, --

25 MR. WITTEMAN: Give me some leeway.

1 THE COURT: It might, may be pertinent.
2 You may ask the question. You may answer it.

3 A. Could we just say the question again, please?

4 MR. WITTEMAN:

5 Q. Is there anything about the type of duties that
6 Mr. Shriver does and the duties that you have, anything
7 different about them or anything similar?

8 A. They are sort of -- lieutenant -- Joe's a lieutenant
9 and I'm not, so he's an officer. Other than that, he
10 really doesn't work the runs with any of the other
11 paramedics. He's strictly -- he just rolls the fire
12 trucks.

13 Q. Do you work for Mr. Shriver?

14 A. No, I don't work for Joe.

15 Q. He doesn't have any supervisory capacity even
16 part-time?

17 A. Well, he is the officer on duty but I'm employed by
18 the Ark City Fire Department. There is a captain and also
19 there is a fire chief, EMS director, fire marshall. There
20 is a big chain of command just like a military.

21 Q. I understand. Is Mr Shriver in any sense in a
22 supervisory capacity over you?

23 A. I suppose so, yes.

24 Q. Okay. Well, we've heard a lot of testimony today
25 about folks' opinions they might have about Mr. Shriver,

1 the different witnesses we've heard from. Have you gained
2 any opinions about Mr. Shriver during the time you worked
3 with him?

4 A. Well, I suppose. He's just another person that I
5 work with. I mean, we're not friends. I really don't even
6 know where his house is, but he's an honest person. I can
7 give that to him. He always does what he says he'll do.

8 Q. Were you aware that Mr. Shriver was, in fact,
9 running for the 79th District?

10 A. Oh, yes.

11 Q. Sure. The nature of your answer makes me want to
12 ask how so when you say oh, yes.

13 A. Well, everybody is pretty worked up about it at the
14 department. Seemed like he was not there quite often and
15 it kind of got on some people's nerves.

16 Q. Okay. On your nerves?

17 A. A little.

18 Q. Okay. Did you -- did you ever participate in
19 Mr. Shriver's campaign in any way?

20 A. I did have a bumper sticker of his on my car.

21 Q. Okay. Ever make any contributions to his campaign?

22 A. No.

23 Q. Okay. There is a difference. Very well. How long
24 have you had that bumper sticker on the car?

25 A. I don't know how long it was on there. I took it

1 off the election day I believe.

2 Q. Okay. Why did you have the bumper sticker on
3 there? Was it because Mr. Shriver was supervisor or did
4 you support his campaign?

5 A. Well, I didn't really support his campaign. I guess
6 he had them there. He handed them out and pretty much
7 everybody put them on.

8 Q. Okay. Any time prior to the election on November
9 8th and specifically, specifically keeping in mind the
10 matter we're here on today, Mr. Jones and Mr. Shriver, did
11 you ever tell anyone how you were going to vote?

12 A. No, I don't believe I ever did.

13 Q. Okay. That reminds me, have you ever met Mr. Jones
14 or know him?

15 A. No, I never met him.

16 Q. Okay. Since the election, have you ever told anyone
17 how you voted?

18 A. No, I don't believe I have.

19 Q. No one? Okay.

20 MR. WITTEMAN: One moment, please.

21 (An off-the-record discussion was here had.)

22 THE COURT: Mr. Bumgarner, would you
23 stand down and wait outside for a couple of moments for me,
24 please.

25 (Witness complies.)

1 THE COURT: We're on the record. Now you
2 are wanting this in camera?

3 MR. WITTEMAN: I think it's appropriate.

4 MR. RUCKER: We're doing it for his
5 benefit, Your Honor.

6 MR. MILLER: Well, he's not a party. I'm
7 a party. If they have statements they want to make on the
8 record, I don't know of any reason that it should be in
9 closed forum.

10 THE COURT: Okay. I'm not so -- I don't
11 see any reason to have an in camera if you want to make a
12 record. If you don't want to make a record, that's fine,
13 but I prefer everything be down here on the record. You
14 wish me to admonish the witness, is that correct?

15 MR. WITTEMAN: Yes, specifically 25-2411.

16 MR. MILLER: For the record, Your Honor,
17 we object to any such admonition as being inappropriate.
18 It's irrelevant what that statute says as to whether or not
19 the person gives his testimony in the fashion that he gives
20 it. Counsel's entitled to ask him any question he wants.
21 He doesn't need to be read the law or threatened with the
22 law in order for him to give his testimony and he can live
23 with his testimony whatever it is and whatever the
24 consequences.

25 THE COURT: I agree. I don't intend to

1 admonish him concerning this.

2 MR. WITTEMAN: Very well.

3 THE COURT: Now let's have him brought
4 back in. Mr. Bumgarner, you are still under oath.

5 MR. WITTEMAN:

6 Q. Mr. Bumgarner, do you recall a telephone
7 conversation that occurred last week with a person that has
8 identified himself as Eric Rucker who's present here today
9 as an attorney?

10 A. Yeah, he called me at work.

11 Q. All right. Do you recall what the substance of that
12 conversation was?

13 A. Yeah. He asked me why -- I believe he asked me why
14 my ballot was challenged or something to that effect.

15 Q. Do you recall asking -- Mr. Rucker identifying
16 himself as a lawyer for one of the parties?

17 A. Yeah. I asked who he worked for.

18 Q. All right. What did he respond?

19 A. He said he worked for Mr. Jones.

20 Q. What was your response to that?

21 A. Told him I didn't want to comment on anything unless
22 I was summoned to court, but I did tell him that I thought
23 I voted in the wrong precinct.

24 Q. Okay. At the point he told you -- when -- if I
25 understand your testimony, at the point that you inquired

1 as to which party he represents, he was an attorney for
2 which party, he represented -- he indicated it was
3 Mr. Jones. It was at that point that you told him that you
4 didn't believe you had to say anything unless subpoenaed,
5 is that correct?

6 A. Yeah.

7 Q. Okay. Well, let's talk about specifically once
8 again the ballot you cast on November 8th of this year and
9 specifically the race for State Representative.

10 THE COURT: Counsel.

11 MR. MILLER: He's making motions.

12 THE COURT: Do you have an objection?

13 MR. MILLER: I want to make sure we don't
14 get too far down that road, yes. I would ask before he
15 answers that question that the Court afford him the statute
16 as it relates to his privilege to answer that question.

17 THE COURT: Is this challenged, not
18 counted?

19 MR. WITTEMAN: Challenged and counted.

20 THE COURT: Challenged and counted.

21 MR. WITTEMAN: I have been fairly
22 specific in my inquiry to this point.

23 THE COURT: Are you asking about this
24 particular race?

25 MR. MILLER: Right, and I want him to be

1 aware of his privilege even as it relates to this race, and
2 I object to him being required to answer the question up to
3 and including the point that it is determined he cast an
4 illegal ballot and that he's entitled to the privilege.
5 It's as I understand, the law, Your Honor, up to the point
6 it's determined that he's cast an illegal vote.

7 MR. WITTEMAN: This is no different than
8 what we've been doing all day long. It's been established
9 that he registered at one point. He moved after that
10 registration and has not made -- reregistered. The Court
11 has not made determinations all day long giving us specific
12 rulings whether it's illegal, illegal based on the fact it
13 is illegal.

14 MR. MILLER: Well, I'm not saying it's
15 illegal or not legal. I'm saying that I want him to be
16 aware of the privilege and that includes this race up to
17 the point it is determined it was an illegal ballot. Once
18 it is determined it is an illegal ballot, then no, I agree
19 he no longer bears a privilege, but that has not yet been
20 determined. What is different from this witness from the
21 others this morning is first, I did not object to the
22 others. Secondly, they had disclosed their vote to
23 someone. I've yet to hear any testimony from this witness
24 that he, in fact, did so. He still bears the privilege at
25 this moment.

1 MR. WITTEMAN: He would bear the
2 privilege solely on the basis of his argument that it
3 hasn't been disclosed and I -- perhaps, Your Honor,
4 Mr. Miller's memory is better than mine. I don't know that
5 we established on every witness we had disclosure on this,
6 that they had told anybody.

7 THE COURT: If you did not, I think he
8 did.

9 MR. WITTEMAN: After the fact.

10 THE COURT: After the fact.

11 MR. WITTEMAN: After the fact.

12 THE COURT: After the fact.

13 MR. MILLER: Well, really what we did on
14 the others is irrelevant as to what we do on this one.

15 THE COURT: I agree. I think there is a
16 technical point there that you may not be able to do that
17 until we have some other foundation first from Ms. Warren I
18 suppose.

19 MR. WITTEMAN: All right.

20 THE COURT: Otherwise, I'll simply inform
21 him that he has the privilege until I make a determination
22 of it.

23 MR. MILLER: Your Honor, he's going to
24 remain subject to recall anyway, but we can still address
25 the question he wants answered now.

1 MR. WITTEMAN: With that given, let me
2 respond to your comments. I think all of the foundation
3 necessary under law has been laid. From his own testimony,
4 he registered while he lived at one place. He has moved
5 since. The law is clear under 2316c, Subparagraph B that
6 if a person moves, they must reregister except if it's an
7 in-precinct move and is allowed the necessary card and that
8 sort of thing.

9 THE COURT: Do you wish to argue the
10 point at this time?

11 MR. MILLER: Yes, because I'm not even
12 sure myself what the facts are as to where he lived and
13 when I listened to the direct examination, but it didn't
14 answer all my questions.

15 MR. WITTEMAN: If he moves across the
16 street, same situation.

17 THE COURT: I'll reserve ruling on this
18 if you want a chance to cross-examine on that point at this
19 time.

20 MR. WITTEMAN: Be glad to give him voir
21 dire.

22 MR. MILLER: Once again, what is the
23 position of the contestant as to the illegality of this
24 voter?

25 THE COURT: That he moved, he changed his

1 residence in excess of 30 days next preceding the election
2 and did not reregister.

3 MR. MILLER: Yes.

4 THE COURT: You may examine on that
5 point.

6 MR. MILLER: Mr. Bumgarner, you are like
7 a lot of people. You move around a lot, and in your case,
8 it appears that you moved back and forth some, and so if
9 you could for me starting as best you can with October 19
10 of 1992 which is where you -- let me say this: On October
11 19, 1992 it appears you completed a voter registration card
12 indicating that your address was Route 2. I've got a poor
13 copy, but it looks like Box 1068, Arkansas City, Kansas.

14 THE WITNESS: Right.

15 MR. MILLER: Was that your residence at
16 that time?

17 THE WITNESS: If it was, it really -- we
18 were in the process of moving right in those months, but I
19 did register under that address.

20 MR. MILLER: Have you established a
21 permanent residence since the time you registered to vote
22 on October 19th, 1992?

23 THE WITNESS: Yes.

24 MR. MILLER: Where is your permanent --
25 where was your permanent residence on November the 8th,

1 1994?

2 THE WITNESS: My current address is Rural
3 Route 2, Box 532.

4 MR. MILLER: Do you know what township or
5 precinct that address is in?

6 THE WITNESS: No, I don't.

7 MR. MILLER: Was there a conversation
8 when you voted about being in West Creswell versus East
9 Creswell, and that's Creswell, C-R-E-S-W-E-L-L? Was there
10 a conversation about whether you were in East or West
11 Creswell?

12 THE WITNESS: The ladies at the voting
13 place talked to each other but they really didn't -- they
14 talked. I don't know what they -- I really don't recall
15 what they were saying, but they met amongst themselves and
16 visited and said you'll need to talk to the boss lady and
17 then they called her over there.

18 MR. MILLER: Have you voted in previous
19 elections?

20 THE WITNESS: I voted in the presidential
21 election.

22 MR. MILLER: In 1992?

23 THE WITNESS: Right.

24 MR. MILLER: Was your ballot questioned
25 at that time?

1 THE WITNESS: I don't believe so, no.

2 MR. MILLER: Did you vote at the same
3 place, the same location --

4 THE WITNESS: Yes, I did.

5 MR. MILLER: Let me finish the question.

6 THE WITNESS: I'm sorry.

7 MR. MILLER: -- in 1992 as you did in
8 1994?

9 THE WITNESS: Right.

10 MR. RUCKER: Your Honor, I would object.
11 Nonresponsive. Right is not a yes or a no.

12 MR. MILLER: He said that's right.

13 THE COURT: Do you mean correct?

14 THE WITNESS: Yes, correct.

15 MR. MILLER: That is all I have, Your
16 Honor.

17 MR. WITTEMAN:

18 Q. Just to clarify a point. You voted in the '92
19 election. That would have been November of '92. Does
20 that --

21 A. Yes.

22 Q. -- sound right? You registered in October of '92
23 and believe you told us that you moved in December of '92?

24 A. Correct.

25 Q. At the time you voted in that '92 election, you were

1 living in the residence you registered at, weren't you?

2 A. I would like to -- I was living at both places.
3 That's to be honest. I mean, we had -- I had stuff in my
4 trailer and I still had stuff in the other house but I had
5 not changed my address until then.

6 Q. Where did you receive your mail?

7 A. At the address I have now.

8 Q. Now of these -- of your friends that lived there,
9 had they moved out already?

10 A. Lucas was the first one to move. He moved -- he
11 moved out real quickly. He's probably gone before even in
12 October and J.B. moved out in December.

13 Q. Okay. And you moved out when?

14 A. Between the months of December and January.

15 Q. Okay. December '92, January '93.

16 MR. WITTEMAN: Your Honor, I think we're
17 back to the question.

18 THE COURT: Well, the question I have for
19 you before I can rule on such things, is this the same
20 precinct or is it not? Do I have any evidence on that? Do
21 I have any evidence concerning whether or not he filled out
22 a registration card at the time, if it was challenged and
23 when it was?

24 MR. WITTEMAN: Very well.

25 THE COURT: I don't have any of that, so

1 I can't make a particular ruling on this particular issue.

2 MR. WITTEMAN: I understand, Your Honor.

3 MR. WITTEMAN:

4 Q. At the time you cast your ballot here, did you fill
5 out any cards at all, any documentation at the time you
6 filed this challenged ballot?

7 A. Well, just the -- when I voted.

8 Q. Your ballot?

9 A. My ballot.

10 Q. Did you fill out a registration card of any --

11 A. At the poll?

12 Q. Yes.

13 A. No.

14 Q. Okay.

15 MR. WITTEMAN: I don't know that he can
16 establish whether it's the same precinct or not.

17 THE COURT: Okay. I think somebody asked
18 him.

19 MR. WITTEMAN: I think it's irrelevant to
20 the issue at this point.

21 THE COURT: Well, it may not because the
22 statute says, "When a registered voter changes residence,
23 such voter must reregister in order to be eligible to vote
24 except that when a registered voter changes residence from
25 a place in a precinct to another place within the same

1 precinct, if such voter is otherwise qualified to vote in
2 the voting place within the precinct in which the current
3 residence is located, such voter shall be allowed to vote
4 at any election."

5 Then it goes on, "on the condition that such
6 voter registers --

7 MR. WITTEMAN: Are we in 2316c?

8 MR. MILLER: Subsection B.

9 THE COURT: Subsection B.

10 MR. WITTEMAN: And I think given the rest
11 of the language is why --

12 THE COURT: -- at such time by completing
13 a registration card, making an oath in the form prescribed
14 by the Secretary of State and providing proof of residence
15 in accordance with rules and regulations adopted by the
16 Secretary of State therefor."

17 MR. MILLER: Your Honor --

18 THE COURT: I still don't know whether
19 it's the same precinct or not.

20 MR. MILLER: If counsel is contending
21 that it is unnecessary to fill out one, I guess I need to
22 inquire is he contending it's necessary or unnecessary to
23 fill out the affidavit in order for this voter to be
24 qualified to vote if he moved within the precinct? Are you
25 contending that the affidavit is not necessary?

1 MR. WITTEMAN: I'm not making a
2 contention. I guess I'm simply trying to clarify the
3 Court's position in that regard. Perhaps that's a question
4 best directed --

5 THE COURT: To me. It's a question of
6 fact. Is this the same precinct or is it not?

7 MR. MILLER: And I guess what I'm saying
8 is our position is that he needed -- if it is within the
9 same precinct that he needed to fill out an affidavit.

10 THE COURT: Is that not what the law
11 requires?

12 MR. MILLER: Well, I'm asking counsel.
13 I've heard him take a different position. I don't want him
14 taking one position on one voter and another position on
15 another voter.

16 MR. WITTEMAN: I don't believe I've taken
17 a position making that particular legal argument I think on
18 the basis of what this voter has told us.

19 THE COURT: Your contention is that since
20 he didn't reregister anyway, it didn't make any -- his vote
21 shouldn't have been counted because the statute says when
22 the registered voter changes residence such voter must
23 reregister in order to be eligible to vote with the
24 exception if you are still in the same precinct.

25 I understand whether it's in the same precinct,

1 but if it's not within the same precinct, he has to fill
2 out a registration.

3 MR. WITTEMAN: So what the statute seems
4 to indicate just facially the intent of it is --

5 THE COURT: An affidavit is required by
6 the Secretary of State.

7 MR. MILLER: We would concur with that,
8 Your Honor.

9 THE COURT: But I don't have the
10 affidavit and I don't know whether it's in the same
11 precinct. I can rule upon the point if I have a couple
12 more facts.

13 MR. WITTEMAN: Your Honor, my apologies.

14 THE COURT: Yes.

15 MR. WITTEMAN: Perhaps some of the facts
16 that we need to establish about the foundation Miss Warren
17 may be able to lay that.

18 THE COURT: We're looking at what you
19 requested. If you want to put her on briefly to do that,
20 then recall this gentleman, perhaps we can clear all this
21 up.

22 MR. WITTEMAN: All right. If we can do
23 that.

24 THE COURT: Do you have any questions for
25 this witness?

1 MR. MILLER: No, I don't.

2 THE COURT: You may step down for the
3 time being.

4 Yes, I think they need to call you back. I
5 assume that's who you are calling?

6 MR. WITTEMAN: Yes.

7 THE COURT: You are still under oath.

8 BARBARA WARREN,
9 having been previously duly sworn, testified further as
10 follows:

11 DIRECT EXAMINATION

12 MR. WITTEMAN:

13 Q. My apologies. Well, we've had testimony here in
14 regard to a couple addresses at least wherein Mr. Bumgarner
15 lived. Would you tell us what precinct Rural Route 2, Box
16 532 is located?

17 A. We have a precinct in West Creswell.

18 MR. MILLER: Well, Your Honor --

19 THE COURT: That's not the question.
20 That answer's not responsive to the question.

21 THE WITNESS: Well --

22 THE COURT: He asked you Rural Route 2,
23 Box 532. He asked you what precinct that residence is.

24 THE WITNESS: I would need my -- the
25 easiest way to determine what precinct he's in is if Pat

1 Owen at the back of the room or I could go downstairs and
2 get our county map that's got the precincts, the townships
3 marked on it and just have him go up to the map and say
4 right there is where I live, it would be the easiest way to
5 do it, because I can't tell you box numbers.

6 THE COURT: Is it a big map that can't be
7 brought up?

8 THE WITNESS: No. It's just about this
9 big (indicating).

10 THE COURT: Can we bring the map up
11 here?

12 THE WITNESS: They change box numbers so
13 often, I wouldn't even attempt to tell you where that's at.

14 THE COURT: Okay. For the record, when
15 do the polls, the registration lists close?

16 THE WITNESS: The courthouse?

17 THE COURT: No. When does the
18 registration close prior to an election?

19 THE WITNESS: They close -- by statute,
20 the registration closes two weeks prior to the election.
21 It's always on a Monday.

22 MR. MILLER: Based on what I reviewed
23 from the files, Your Honor, my guess is October 24th.

24 THE COURT: Okay. You so stipulate,
25 counsel?

1 MR. WITTEMAN: I'm stipulating that's my
2 understanding on this it was October 24th, not from seeing
3 some particular statute.

4 THE COURT: I think you have my
5 stipulation with my additions back there. Have you had a
6 chance to double-check?

7 MR. WITTEMAN: Numbers added up to me.

8 THE COURT: Okay. I need it back.

9 MR. WITTEMAN: With that said, I handed a
10 letter to you, Your Honor, this morning which happened to
11 be the only copy considering I mailed it at 10:45 last
12 night and we'll worry about it later.

13 MR. MILLER: Your Honor, who does he
14 think works at that time, me or you?

15 THE COURT: I was here last night, so if
16 you mailed it to me in Paola --

17 MR. WITTEMAN: I used the wrong fax
18 number obviously.

19 THE COURT: We have the map, counsel.
20 Now I take it we need Mr. Bumgarner in here, too?

21 MR. MILLER: Mark it.

22 THE COURT: Well, let's bring it up here
23 and have her identify it first.

24 THE WITNESS: Yeah, yeah. Okay. This is
25 the map.

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(Petitioner's Exhibit No. 26 was marked for identification.)

THE WITNESS: This is a map of the rural area of Cowley County.

THE COURT: What exhibit number is that?

THE REPORTER: 26.

THE COURT: 26, counsel. She has identified Petitioner's Exhibit 26 as the map. I take it, Mr. Bumgarner, I need you to come up here and show us, show this witness your present residence or where you resided.

(An off-the-record discussion was here had.)

MS. WARREN: Where is the line?

MR. MILLER: Excuse me, Your Honor. What do you mean, where is the line?

MS. WARREN: The river is the line between East and West Creswell.

MR. MILLER: The river?

THE COURT: What river?

MR. MILLER: What river?

MS. WARREN: Walnut River. It says Walnut River. Are you east or west of this river? That would tell us whether it's East or West Creswell.

MR. BUMGARNER: Here is the highway north out of Ark City, Highway 77 (indicating). I would be --

1 this is -- okay. I want to say this right --

2 MR. WITTEMAN: This is north.

3 MR. BUMGARNER: Right. Let's go north.

4 Where is Green Farm Road on here? That would help a
5 bunch.

6 MS. WARREN: It's not marked on there.

7 MR. BUMGARNER: It's not marked on
8 there. Give me some direction.

9 MS. WARREN: You are out how far east of
10 Ark City?

11 MR. BUMGARNER: The river is east of the
12 house I used to live in so I'd still be --

13 MS. WARREN: Where do you live now? Do
14 you want to know where he lives now?

15 MR. BUMGARNER: Right. That's what I'm
16 getting to, so I say right there (indicating). I would
17 live -- in both cases I would have lived on the west side
18 of the river.

19 MS. WARREN: So you lived in West
20 Creswell now as well as formerly?

21 MR. BUMGARNER: Right.

22 THE COURT: Thank you.

23 MS. WARREN: Thank you.

24 THE COURT: You can have a seat right
25 there. Based upon what he just informed you then, his

1 present residence is in what precinct?

2 MS. WARREN: He is in West Creswell
3 presently.

4 MR. WITTEMAN: His former residence?

5 MS. WARREN: Was West Creswell.

6 THE COURT: Based upon him telling you
7 that the river was east of his house?

8 MS. WARREN: Uh-huh, yes, sir.

9 THE COURT: Thank you. Proceed, counsel.

10 MR. WITTEMAN: Well, at this point --

11 MR. MILLER: You still contend it's an
12 illegal vote?

13 MR. WITTEMAN: I'm not making --
14 obviously I think he moved. That's a contention we made.

15 MR. MILLER: Well, that's not -- I need
16 to know.

17 MR. WITTEMAN: That's what you just asked
18 me.

19 MR. MILLER: I asked are you still
20 contending his vote is illegal based on this testimony?

21 MR. WITTEMAN: I believe that, in fact,
22 is a determination that the Judge has to make based on the
23 facts.

24 MR. MILLER: Well, I agree, yeah. We
25 agree with that, too, Your Honor, but I didn't know

1 whether --

2 MR. WITTEMAN: I don't think my
3 contention makes any difference. Either it is or it isn't.

4 MR. MILLER: Well, if he's contending a
5 legal vote then prior to these proceedings, I need to know
6 if he's advancing it as an illegal vote. If he's not, it's
7 immaterial to these proceedings.

8 MR. WITTEMAN: Again, the circumstance is
9 we know the facts. The law is to be applied by the Court.
10 Whether I contend it or not, the determination needs to be
11 made.

12 THE COURT: Well, the Court doesn't need
13 to make the determination if you don't contest. Do you
14 contest this vote or do you not?

15 MR. WITTEMAN: We have, yes.

16 THE COURT: All right. They contend this
17 is an illegal vote because of his change of residence.

18 MR. MILLER: Okay. We would -- we would
19 maintain our position it is not an illegal vote based on
20 the testimony thus far. May I ask, Your Honor, on what
21 basis they are contending this is an illegal vote?

22 THE COURT: I think from what he said
23 it's because he moved and didn't reregister.

24 MR. RUCKER: Your Honor, I would
25 respectfully request time to confer with counsel before we

1 proceed.

2 THE COURT: All right.

3 MR. MILLER: Well --

4 THE COURT: Do you have any other
5 witnesses that you intended to call this evening?

6 MR. RUCKER: No, Your Honor.

7 MR. WITTEMAN: Other than the possibility
8 that Mr. Bumgarner might, in fact, be a witness, but any
9 testimony that he would have would be rather short, in and
10 out, have him in at his convenience.

11 THE COURT: Are you asking for the
12 evening recess then?

13 MR. RUCKER: I think that, Your Honor, if
14 it's appropriate, I would just say that we can, in fact,
15 defer to the Court's decision, but we would be pleased to
16 come back at this juncture.

17 THE COURT: Counsel?

18 MR. MILLER: Well, we didn't start till
19 9:00. I don't know why we'd be quitting so early but I
20 would defer to the Court.

21 THE COURT: You want me to stay longer?
22 I can.

23 MR. RUCKER: I take it that's not an
24 objection. We would ask the Court for Thursday at
25 9 o'clock.

1 THE COURT: I do have -- I previously
2 told you, counsel, I've got some matters that I have to
3 attend to, but if you have other witnesses that you
4 subpoenaed that you want to testify, I'll certainly do
5 that.

6 MR. RUCKER: I appreciate the Court's
7 willingness to do that, Your Honor. The contestant is
8 respectfully requesting 9 o'clock Thursday morning.

9 THE COURT: As I understand it, you've
10 scheduled a deposition for this one lady tomorrow morning?

11 MR. WITTEMAN: We haven't got it
12 scheduled yet.

13 THE COURT: But tentatively it's going to
14 be tomorrow?

15 MR. WITTEMAN: Yes, Your Honor, that's
16 accurate.

17 MR. MILLER: Could the Court and counsel
18 indulge me as far as Thursday, Your Honor? I'm a member of
19 the Shawnee County Commission. I have a meeting at 9:00,
20 if we simply start at 9:30.

21 THE COURT: I was going to suggest 10:00
22 because it takes me -- because I won't be here tomorrow
23 night. I'll be driving down from Paola, be driving farther
24 than that.

25 MR. RUCKER: No objection, Your Honor.

1 THE COURT: So we'll reconvene this Court
2 of contest at 10:00 a.m. Thursday morning. Before we go
3 off the record, I need the county election officer here and
4 the clerk of the court so that these ballots, those that
5 have been admitted into evidence will be given to the clerk
6 of the court and those that have not will be either
7 transferred to Mr. Gaston or if the parties don't object to
8 Miss Warren so she can --

9 Mr. Gaston, if you'll come forward. Let the
10 record reflect that all ballots that have not been marked
11 and admitted into evidence and other election materials are
12 hereby returned to your custody, and I think everything
13 that's up here has been admitted and those items that are
14 on the railing of the jury box have been admitted.

15 MR. MILLER: Yes, sir.

16 THE COURT: So these need to be given to
17 me up here.

18 MR. WITTEMAN: Your Honor, I might
19 address to the Court there are some witnesses out there
20 under subpoena but given the time, we are several hours
21 away from them being appropriate.

22 THE COURT: Several hours? . I know
23 until Thursday morning that's what you meant, right?

24 MR. WITTEMAN: Well, I think it goes
25 almost in second phase of this matter in regard to some of

1 the ballots that the inspection board looked at.

2 THE COURT: All right.

3 MR. WITTEMAN: That's what I mean. We're
4 not to take -- we have some witnesses relevant to those
5 issues. We probably need for the Court to indicate to them
6 they are still under the Court's order.

7 MR. MILLER: Well, Your Honor, I'm not
8 going to ask that Mr. Jones and Mrs. Jones not be allowed
9 to go home together, but I would just request the Court to
10 underscore for Mr. Jones particularly the significance of
11 the sequestration order. His wife has been sequestered and
12 again order that they not be discussing the particulars,
13 and I trust their judgment not to do that.

14 MR. RUCKER: Your Honor, I would object.
15 A ruling was made in that regard. I would refer to
16 cocounsel.

17 MR. WITTEMAN: At some point in time I
18 would like to know the relevance of Mr. Jones' wife in
19 these proceedings and we ought to get in on this.

20 MR. MILLER: I don't know that I'm
21 required to.

22 MR. RUCKER: Then I would say, Your
23 Honor, that I object if, in fact, he is asking for a
24 sequestration between husband and wife when, in fact, they
25 have had discussions about this campaign, about individual

1 instances in this campaign which would fall under privilege
2 of marital spouse.

3 THE COURT: Well, I don't think that's
4 what you are asking. What you are asking is relating
5 testimony of witnesses here today.

6 MR. MILLER: That they not.

7 MR. RUCKER: Then we have no objection to
8 that.

9 MR. MILLER: Simply that it be made clear
10 to them that they are -- that even they are not to discuss
11 today's testimony.

12 THE COURT: Mr. Jones, don't discuss
13 today's testimony with your wife until permitted by the
14 Court to do so.

15 MR. JONES: I wouldn't think of it.

16 THE COURT: Let the record reflect that I
17 have election materials that I am turning over to the
18 custody of the clerk of the court. I've got them in order
19 and you keep them and I'll be back Thursday morning.

20 Court will be in recess and we'll see you all
21 Thursday morning.

22 (Court was hereby adjourned at 5:35 p.m. on
23 Tuesday, December 27 and reconvened at 10:00 a.m. on
24 Thursday, December 29.)

25 THE COURT: This is in the matter of the

1 election of Joe D. Shriver -- the election of State
2 Representative. It's a contest of election, Danny P.
3 Jones, contestant, versus Joe D. Shriver, contestee. This
4 matter is being heard by Stephen D. Hill on assignment by
5 the Supreme Court. Good morning, counsel.

6 MR. WITTEMAN: Good morning.

7 MR. MILLER: Your Honor, good morning.

8 THE COURT: I ask that you enter your
9 appearances.

10 MR. RUCKER: Eric Rucker for the
11 contestant.

12 MR. WITTEMAN: And Doug Witteman.

13 MR. MILLER: Contestee appears by and
14 through Vic Miller and in person, Your Honor.

15 THE COURT: Are the parties ready to
16 proceed?

17 MR. MILLER: We are, Your Honor.

18 MR. WITTEMAN: Yes, Your Honor.

19 THE COURT: Call your first witness.

20 MR. MILLER: Before we do that, if we
21 could, Your Honor, my office prepared and Mr. Witteman has
22 reviewed, and maybe you've already done this yourself,
23 that's an updated version indicating the precincts that
24 were stipulated to and those are denoted by the asterisks.
25 Then I've incorporated the reports of the board of

1 inspectors that I reviewed yesterday as well as a
2 tabulation as to where that puts us at this point.

3 THE COURT: I have done this longhand but
4 haven't checked it.

5 MR. WITTEMAN: The numbers seem
6 appropriate.

7 THE COURT: The numbers seem very
8 familiar. Let's have this marked as an exhibit and we'll
9 admit the same, counsel.

10 MR. MILLER: That will be fine, Your
11 Honor.

12 THE COURT: So it's in part of the
13 records.

14 MR. WITTEMAN: Your Honor, at this point
15 I think prior to the start of testimony we would like for
16 the record to note, because I'm not sure it was noted
17 yesterday, that, in fact, the witness that was called by
18 us, Miss Moddie Graham, had refused to appear under a
19 subpoena voluntarily and, in fact, the Court had to direct
20 the sheriff's office to bring her in.

21 THE COURT: So noted. That wasn't
22 yesterday. It was the day before yesterday.

23 MR. RUCKER: Day before yesterday.

24 (Contestee's Exhibit No. 2 was marked for
25 identification.)

1 THE COURT: Counsel, so the record is
2 complete, that stipulation concerning these totals has been
3 admitted as Contestee's Exhibit 2.

4 Contestant, call your next witness, and as I
5 understand, the lady's confined to a wheelchair so let's
6 make sure --

7 MR. MILLER: Your Honor, need for the
8 record to lodge an objection. I think it might be most
9 expeditious if I do it now. I reviewed briefly counsel's
10 memorandum contest hearing brief submitted first day of
11 these proceedings and he does comment as it relates to
12 issues raised by the ballot of Ms. Bullhime or Muhlheim.

13 MR. RUCKER: Muhlheim.

14 MR. MILLER: Mrs. Muhlheim. I would just
15 say for the record, and the Court can sort it out after the
16 evidence is received, but for the record, we would wage an
17 objection to the Court considering any evidence that is
18 offered to identify Mrs. Muhlheim's ballot or to explain
19 extraneously the intent of the ballot if it is indeed
20 identified. We believe that the law is that the intention
21 of a ballot is to be garnered from the four corners of the
22 ballot.

23 I'm working on developing the issue, but I would
24 call the Court's attention and direct the Court's
25 attention, please, to an Iowa case of Beck versus Cousins,

1 106 Northwest 2nd 58-4252, Iowa 194 reading in pertinent
2 part whether a ballot should be counted and for whom it
3 should be counted are questions the determination of which
4 depends on the voter's intention as gleaned from the ballot
5 itself.

6 So for the record I wage my objection to any
7 testimony that goes beyond that, and the Court can rule at
8 the appropriate time whether it should be considered.

9 THE COURT: Your response, counsel?

10 MR. WITTEMAN: I beg your pardon, the
11 very nature of the statute 25-3002 which, in fact,
12 indicates when ballots are appropriate or should be
13 validated. Particularly the Court has had opportunity to
14 review the brief and the changes by the legislature.

15 The key is to determine the intent of the voter.
16 There is no such holding case law in Kansas for that sort
17 of thing. Legislature made it clear if we can determine
18 the intent of the voter, that's the whole purpose.

19 THE COURT: Determining the intent of the
20 voter from the ballot?

21 MR. WITTEMAN: That in and of itself is
22 not indicated anywhere in it. It's the intent of the voter
23 that controls if we can shed some light on the intent of
24 the voter. In all honestly, we do think the ballot speaks
25 for itself. However, Miss Muhlheim will be able to

1 indicate exactly what the problems were on the intent of
2 her vote on that particular ballot.

3 THE COURT: Counsel approach the bench,
4 please.

5 (An off-the-record discussion was here had.)

6 (Petitioner's Exhibit Nos. 27 thru 32 and
7 33A - 33E were marked for identification.)

8 MR. RUCKER: Because there is a
9 possibility that you will be called as a witness, ma'am,
10 and we have a sequestration order, we'd ask just during the
11 time that Miss Muhlheim is talking you wait outside. Then
12 you can come back in.

13 MS. KOENKE: Okay.

14 (An off-the-record discussion was here had.)

15 JACQUELINE MUHLHEIM,
16 of lawful age, having been first duly sworn on her oath to
17 state the truth, and nothing but the truth, testifies as
18 follows:

19 THE COURT: Proceed with your
20 examination.

21 MR. WITTEMAN: Thank you.

22 DIRECT EXAMINATION

23 MR. WITTEMAN:

24 Q. Miss Muhlheim, my name is Doug Witteman. I'm one of
25 the attorneys for Mr. Danny Jones, and I know you are aware

1 that we're here today in regard to the election that
2 occurred in the 79th District. Miss Muhlheim, I want to
3 hand you what's been previously marked and admitted into
4 evidence as Petitioner's Exhibit RB 4. I'll hold this for
5 you if you like. You are welcome to it yourself.

6 Miss Muhlheim, by looking at that document, can
7 you identify what that is?

8 A. It's an absentee ballot.

9 Q. Now, I note that there appears to be a name, a
10 signature in several places on that ballot. Can you
11 identify that signature, Miss Muhlheim?

12 A. It's hard because I can't see small print too much.

13 Q. Okay.

14 A. And then there was nobody to help you in that
15 regard.

16 Q. All right. Very well. Is that your signature on
17 that ballot?

18 A. Yes, it is.

19 Q. All right. Now, I'd like to direct your attention
20 on the ballot itself to State Representative's race 79th
21 District. Now, there on I see a mark next to the name of
22 Mr. Danny P. Jones and also I see the signature that
23 appears to be yours underneath and a blank. Miss Muhlheim,
24 by placing your signature anywhere on that ballot, were you
25 intending to vote for yourself in the 79th District?

1 A. No.

2 Q. All right.

3 MR. MILLER: Could we admonish counsel to
4 hold his head still, please, Your Honor? I think it is
5 important.

6 THE COURT: Please.

7 MR. WITTEMAN: Very well.

8 MR. WITTEMAN:

9 Q. Miss Muhlheim, in the 79th District race in looking
10 at the ballot in front of you, who did you intend to cast
11 your vote for in the 79th District Representative race,
12 Mr. Shriver or Mr. Jones?

13 A. Mr. Shriver.

14 Q. Excuse me, Mr. Shriver or Mr. Jones?

15 A. Mr. Shriver.

16 Q. Ma'am, if you take a close look at the ballot,
17 Mr. Shriver's name appears to be on top and there is no
18 mark in the vote -- in the block next to it. Mr. Jones'
19 name is on the bottom and there appears to be a mark next
20 to his name.

21 A. My eyesight isn't too good.

22 Q. Okay. And you intended to vote for who, ma'am?

23 A. Shriver.

24 MR. MILLER: Asked and answered, Your
25 Honor.

1 MR. WITTEMAN: Very well.

2 MR. WITTEMAN:

3 Q. Are you familiar with Mr. Danny Jones? Are you
4 familiar with Danny Jones or Joe Shriver here in the
5 courtroom today?

6 A. I met both of them.

7 Q. All right. How is it that you know Mr. Shriver?

8 A. Because he came to the house.

9 Q. How is it that you know Mr. Jones?

10 A. I don't remember.

11 Q. All right. Are you a member of Mr. Jones' church,
12 do you recall?

13 A. First Baptist.

14 Q. If I represented to you that Mr. Jones was a member
15 of First Baptist Church then --

16 A. Uh-huh.

17 MR. MILLER: What was the question?

18 MR. WITTEMAN: Yes. It was if I
19 represented to her that Mr. Jones was a member of the First
20 Baptist Church, then, in fact, that would be the same
21 church.

22 MR. MILLER: And what was the answer?
23 What did you answer his question, ma'am? Do you understand
24 his question?

25 THE WITNESS: Yeah, sure.

1 MR. MILLER: Okay.

2 MR. WITTEMAN:

3 Q. All right. And your answer was then that you would
4 be a member of the same church?

5 A. Uh-huh.

6 Q. Okay. I want you to think very carefully,
7 Miss Muhlheim, as you look at the ballot with the mark next
8 to Mr. Danny Jones' name, is that not an indication that
9 you intended to vote for him on that ballot?

10 A. I don't remember for sure.

11 THE COURT: What was her answer?

12 MR. WITTEMAN: I really can't remember
13 for sure. One moment, please, Miss Muhlheim.

14 (An off-the-record discussion was here had.)

15 MR. WITTEMAN:

16 Q. Miss Muhlheim, do you recall speaking with
17 Mr. Rucker who's standing over there at counsel's table?

18 A. Yes, I do.

19 Q. All right. And do you recall Mr. Rucker asking you,
20 explaining to you there was perhaps a problem with the
21 ballot that you had signed and asking you who you intended
22 to vote for in the 79th District race?

23 A. I think so.

24 Q. Do you recall indicating to Mr. Rucker at that time
25 that you intended to vote for Danny Jones?

1 MR. MILLER: Your Honor, I object to that
2 as leading.

3 MR. WITTEMAN: No, it's not.

4 MR. WITTEMAN:

5 Q. Do you recall?

6 THE COURT: She can answer it.

7 MR. WITTEMAN:

8 Q. I'll ask the question again. Miss Muhlheim, we had
9 an objection. Do you remember at the time you spoke with
10 Mr. Rucker last week in response to his question who you
11 intended to vote for in the 79th District race telling
12 Mr. Rucker that you intended to vote for Danny Jones?

13 A. Yes, I do.

14 Q. Okay. Today in my earlier questions who you
15 intended to vote for your response was you intended to vote
16 for Mr. Shriver, and I think earlier the indication is you
17 had told Mr. Rucker you intended to vote for Mr. Jones.

18 A. Yes, right. I got confused there.

19 Q. You got confused. Well, let's clear up that
20 confusion today right now. Was it, in fact, your intention
21 to vote for Mr. Jones?

22 A. Yes.

23 Q. Or Mr. Shriver?

24 A. Yes.

25 MR. MILLER: Your Honor, object to the

1 question as asked and answered.

2 MR. WITTEMAN: Not in context.

3 MR. MILLER: Yes, it was.

4 MR. WITTEMAN: To clarify a discrepancy.

5 THE COURT: Well, all of this is subject
6 to your objection and may be disallowed by the Court --

7 MR. MILLER: That's true.

8 THE COURT: -- anyway so --

9 MR. MILLER: And I withdraw the
10 objection.

11 THE COURT: She may answer the question.

12 MR. WITTEMAN: All right. I'll ask the
13 question again.

14 THE COURT: All right.

15 MR. WITTEMAN:

16 Q. Once again, we had an objection, so I'll ask the
17 question again. Do you recall you had answered Mr. Rucker
18 last week that it was your intent to vote for Mr. Jones?

19 A. Yeah.

20 Q. Then today when I asked, you indicated no, instead
21 you intended to vote for Mr. Shriver. We need to clear
22 that up.

23 A. I got confused there. I wanted to vote for
24 Mr. Jones.

25 Q. You wanted to vote for Mr. Jones, that's your

1 testimony?

2 A. Uh-huh.

3 Q. Now, the fact that you have marked the ballot next
4 to Mr. Danny Jones' name, that's --

5 MR. MILLER: Presumption of facts not in
6 evidence, Your Honor.

7 MR. WITTEMAN:

8 Q. Did you mark this ballot, Miss Muhlheim?

9 A. Yes, I did.

10 Q. All right. And I notice there that you did mark it
11 next to Mr. Danny Jones which you've just indicated to us
12 is who you intended to vote for in the 79th District race.

13 A. Uh-huh.

14 Q. Is that mark at the time you voted this ballot on
15 November 8th, is that an indication of who, in fact, you
16 intended to vote for?

17 A. Uh-huh.

18 Q. Mr. Danny Jones?

19 A. Uh-huh.

20 Q. All right. Earlier when I asked you and you
21 indicated that you intended to vote for Mr. Shriver, you
22 were confused?

23 A. I got confused.

24 Q. You got confused.

25 MR. MILLER: That's leading, Your Honor.

1 THE COURT: It is and repetitive.

2 MR. WITTEMAN: Very well.

3 MR. WITTEMAN:

4 Q. All right. Thank you. I have -- I want to hand you
5 what's been marked, Mrs. Muhlheim, as Petitioner's Exhibit
6 27 and Petitioner's Exhibit 28. I'd like to ask you here
7 on Petitioner's Exhibit 28, which is a large manila
8 envelope, is that your signature at the bottom?

9 A. Yes, it is.

10 Q. All right. And on Petitioner's Exhibit 27 which is
11 entitled application on behalf of an elector to obtain
12 permanent absentee ballot status, is that your name written
13 in right here (indicating)?

14 A. Yes.

15 Q. Okay.

16 A. I didn't write it there.

17 Q. All right. That's somebody else's writing that put
18 that in there for you?

19 A. Uh-huh.

20 Q. All right. And I'll ask you, Mrs. Muhlheim, has it
21 been your intention to, in fact, obtain and receive and
22 vote absentee ballot while you've been living where you do
23 now?

24 A. Yes.

25 Q. All right. And was it your intent to vote the

1 absentee ballot that has been voted this November 8th in
2 this election?

3 A. Yes.

4 Q. Very well. I'd like to ask you a little bit more
5 about the ballot itself which is Petitioner's Exhibit
6 RB 4. Ms. Muhlheim, did you have any assistance in marking
7 that ballot or did you mark the ballot itself?

8 A. No, that's the first time I didn't have anybody to
9 help me.

10 Q. Nobody helped you?

11 A. Huh-uh.

12 Q. You placed each of the marks on there yourself?

13 A. Yes.

14 Q. Nobody else placed any marks for you?

15 A. Yes.

16 Q. All right. Very well. And after voting that
17 ballot, did you place your signature on the absentee
18 ballot envelope which is marked as Petitioner's
19 Exhibit 28?

20 A. Yes.

21 Q. And did you put the ballot inside the envelope?

22 A. Yes, I did.

23 Q. All right.

24 MR. WITTEMAN: That is all the questions
25 I have right now.

CROSS-EXAMINATION

1
2 MR. MILLER:

3 Q. Miss Muhlheim, I'm Vic Miller. I represent
4 Representative Shriver, who I think you indicated you know
5 Mr. Shriver?

6 A. Uh-huh.

7 Q. When I look at this document which they've marked
8 Petitioner's Exhibit RB 4, let me ask you this: When you
9 marked your ballot, did you mark it in pencil or in ink?

10 A. In ink.

11 Q. When you marked it, did you mark an X or did you
12 blot out the oval that was on the ballot?

13 A. I can't remember.

14 Q. You can't remember?

15 A. Huh-uh.

16 Q. You remember you used an ink pen?

17 A. Uh-huh.

18 Q. Is that how you do all your correspondence?

19 A. Yes.

20 Q. And was anyone there when you filled this ballot
21 out?

22 A. Huh-uh.

23 Q. Thank you.

24 THE COURT: These have not been admitted,
25 have they, Petitioner's Exhibit 27 --

1 MR. WITTEMAN: I would offer those. What
2 is it, 27 and 28? I would offer those for admission.

3 MR. MILLER: No objection, Your Honor.

4 THE COURT: They'll be admitted. Any
5 other questions of this witness? May this lady be
6 excused?

7 MR. MILLER: She can by the contestee,
8 Your Honor.

9 MR. WITTEMAN: I believe so, Your Honor.

10 MR. MILLER: I would -- for the record, I
11 would withdraw my objection, Your Honor, objection relating
12 to improper testimony. I think it now has relevance.

13 THE COURT: Once it wasn't admissible.
14 Is it now admissible?

15 MR. MILLER: Based on my -- what I've
16 learned and what I've seen of my examination of that
17 ballot, I think this is critical, Your Honor. I would ask
18 the Court to please examine the ballot in light of the
19 testimony.

20 THE COURT: Do you need to call this
21 lady?

22 MR. WITTEMAN: Yes.

23 THE COURT: Can Miss Muhlheim stay
24 here?

25 MR. WITTEMAN: Perfectly okay with us.

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CATHERINE KOENKE,

of lawful age, having been first duly sworn on her oath to state the truth, and nothing but the truth, testifies as follows:

THE COURT: As I understand it, RB 4 was --

MR. WITTEMAN: I think we admitted that right off the bat.

THE COURT: It was admitted but it -- was it counted?

MR. WITTEMAN: It was counted.

MR. MILLER: Well, excuse me, what are we talking about?

THE COURT: Was RB 4 counted?

MR. MILLER: It's not in the count before the Court. It's one that the board of inspectors has pulled for a final determination.

MR. WITTEMAN: Although it was counted in the things.

MR. MILLER: Well, we can't say that. We don't --

MR. WITTEMAN: That was certified.

MR. MILLER: We don't know what was counted and what wasn't. We know what the count was.

THE COURT: But it wasn't counted by the

1 board of inspectors that I appointed?

2 MR. MILLER: Yes, sir. Did you say it
3 was not?

4 THE COURT: Was not.

5 MR. MILLER: Was not.

6 DIRECT EXAMINATION

7 MR. WITTEMAN:

8 Q. For the record, would you state your name and
9 address, please.

10 A. Cathy Koenke, Rural Route 4, Box 183, Arkansas City.

11 Q. My apologies for mispronouncing your name. Koenke?

12 A. Yes.

13 THE COURT: Could you spell that last
14 name.

15 THE WITNESS: K-O-E-N-K-E.

16 MR. WITTEMAN:

17 Q. Miss Koenke, where do you work?

18 A. Medicalodge East, health care center in Arkansas
19 City.

20 Q. Are you familiar with Miss Muhlheim who's here
21 today?

22 A. Yes.

23 Q. How so?

24 A. I got acquainted with her first -- her family moved
25 across the road from us. Then went I to work at

1 Medicalodge East about four years ago. She came shortly
2 thereafter and we've known one another for some length of
3 time.

4 Q. In your duties at the --

5 A. At the lodge.

6 Q. -- at the Medicalodge, do you assist in the passing
7 out of absentee ballots to the residents?

8 A. Yes. There is three of us generally who help, the
9 other social services person, the activity person and
10 myself.

11 Q. All right. Did you have the opportunity on
12 November 8th of this year to assist in those duties with
13 the absentee ballots?

14 A. No, I was gone at that time, and so the other social
15 service person who's on vacation now and the activity
16 person did. I do, however, understand the procedures and
17 how it was done and that's always followed.

18 Q. All right. What are those procedures, ma'am?

19 A. The ballots come in, those persons who can vote for
20 themselves are given the ballot. They go to a quiet
21 place. They mark their ballot. They bring them back to us
22 and we deliver them then to Winfield.

23 The persons who maybe have imperative sight or
24 something like that, we have a quiet room, the family
25 room. We go get them, we bring them in. In their presence

1 we open the ballot. We go down the ballot and tell them
2 who's running for what. There is always two registered
3 voters there.

4 MR. MILLER: Your Honor, this is her
5 telling people. I'd object to this all being hearsay.

6 MR. WITTEMAN: I asked her what the
7 procedure was.

8 THE WITNESS: I'm sorry.

9 THE COURT: I don't think she's
10 testifying about hearsay. She's just testifying about her
11 understanding of the procedures that they follow.

12 MR. MILLER: She's starting to say we
13 said and that's what aroused my --

14 THE WITNESS: Okay.

15 MR. MILLER: -- curiosity.

16 THE WITNESS: We tell -- by that I should
17 have said we read the choices, the position first and then
18 the people who are running for these offices to the
19 person. If they can mark it, they do so. If they cannot,
20 we mark it for them.

21 MR. WITTEMAN: All right.

22 THE COURT: Counsel, this is interesting
23 but what does it have to do with this case, because as it
24 understand it, this lady was not assisted and we've got
25 other witnesses.

1 MR. WITTEMAN: Very well, Your Honor.

2 MR. MILLER: Well, that was her
3 testimony. We don't know that yet or not, Your Honor.

4 THE COURT: All right. What's your
5 question?

6 MR. WITTEMAN:

7 Q. In this race itself, do you have any personal
8 knowledge whether, in fact, Miss Muhlheim was assisted in
9 marking this ballot in this race or whether she was not?

10 A. I know that she was not.

11 Q. All right. Very well. How is it that you know
12 that?

13 A. First of all, I have spoken to the social service
14 and activity people. Secondly, Jackie is capable of voting
15 on her own.

16 Q. All right. Now, I know that Miss Muhlheim is in a
17 wheelchair. Are you familiar with what condition --

18 A. Yes.

19 Q. And what is that, ma'am?

20 A. She has muscular dystrophy.

21 Q. All right. And I apologize. I'll ask you again,
22 what is your -- what do you do there?

23 A. What do I do there? I'm cross-trained for social
24 services activity. I do the marketing. I have an
25 attendant care program out in the community.

1 Q. All right. Based on your personal knowledge, if
2 Ms. Muhlheim would be put in a stressful situation, could
3 that create some confusion to her?

4 MR. MILLER: Object as leading.

5 THE COURT: Well, I'm not sure you have a
6 proper foundation for her to answer that.

7 MR. WITTEMAN:

8 Q. All right. How long have you known Miss Muhlheim?

9 A. Four or five years at least.

10 Q. How often do you see Miss Muhlheim?

11 A. Every day almost.

12 Q. All right.

13 A. I work five days a week. I generally work one of my
14 days off so it's very unusual for me not to see her at
15 least six days a week.

16 Q. Are there ever -- have there ever been -- in your
17 four or five years that you've known Miss Muhlheim been
18 situations where to your observation she appeared to be in
19 more stress than on a given day and if so, what reason?

20 A. No.

21 Q. All right. Do you have any knowledge in working
22 with someone that's afflicted with the disease Miss
23 Muhlheim is, have any knowledge as to whether a stressful
24 situation might be confusing for them?

25 A. There are circumstances perhaps where it might be,

1 and I'll go on to say in Jackie's case however, due to her
2 life experiences, she just does not stress.

3 Q. I'm sorry?

4 A. She does not stress.

5 Q. Okay. Very well. To the best of your knowledge,
6 has Miss Muhlheim for the four or five years you've ever
7 known her been asked to be brought in a courtroom?

8 A. No, I'm sure -- I don't think she has.

9 Q. All right. Have you had the opportunity to talk
10 with Miss Muhlheim about her coming here today?

11 A. Yes. Just to -- would you like for me to say what
12 our conversation was?

13 Q. Yes.

14 A. Just that she was going to come into court and that
15 she was going to answer your questions to the best of her
16 ability to tell you what you needed to know.

17 Q. In bringing her today, did yourself or the
18 Medicalodge make any arrangements to make this an enjoyable
19 trip for her? Was there any certain -- this might be --

20 A. We always make it an enjoyable trip one way or the
21 other when we face something that we have to do. We enjoy
22 the countryside and yes, always.

23 Q. All right. Very well.

24 MR. WITTEMAN: That's all the questions I
25 have right now.

1 THE COURT: You may inquire.

2 CROSS-EXAMINATION

3 MR. MILLER:

4 Q. Miss Koenke, how is Miss Muhlheim's sight?

5 A. Pretty good.

6 Q. Does she need reading glasses?

7 A. She wears glasses, uh-huh.

8 Q. Are those -- the glasses you reference that she
9 wears is the ones she's wearing today?

10 A. Yes, uh-huh.

11 Q. Without those glasses, she needs no other assistance
12 in being able to see?

13 A. No.

14 Q. Thank you.

15 A. No.

16 MR. WITTEMAN: That is all of this
17 witness. I have one more question for Miss Muhlheim.

18 THE COURT: You may stand down.

19 MR. WITTEMAN: Could you bring
20 Miss Muhlheim forward. I have one more question.

21 THE COURT: All right. Miss Muhlheim,
22 this attorney has one more question for you.

23 REDIRECT EXAMINATION

24 MR. WITTEMAN:

25 Q. Miss Muhlheim, on November 8th of 1994 when you

1 marked your ballot in this election, did you wear your
2 glasses?

3 A. Yes.

4 Q. All right. And did you have any problem seeing who
5 you were marking for?

6 A. I have some problem because I have poor eyesight.

7 Q. Okay. Did you have any problem seeing who you voted
8 for on the 79th District race between Shriver and
9 Mr. Jones?

10 A. No.

11 THE COURT: Well, technically that was
12 three questions.

13 MR. WITTEMAN: My apologies.

14 Ms. Muhlheim, thank you. Mr. Miller has one more
15 question.

16 RE-CROSS-EXAMINATION

17 MR. MILLER:

18 Q. Miss Muhlheim, I'm going to hand you this document.
19 Could you read on there for me who the candidates are for
20 United States Representative 4th District?

21 A. Where is it?

22 Q. Well, you take your time and you take all the time
23 you need to find it. When you find it on there, would you
24 read me who the candidates are.

25 A. (Inaudible.)

1 (An off-the-record discussion was here had.)

2 THE COURT: Let's bring her on up here
3 then because I couldn't hear her.

4 MR. MILLER:

5 Q. Now again, Miss Muhlheim, my question is, and again
6 take all the time you need, but can you read on that
7 document who the candidates are for United States
8 Representative 4th District?

9 A. Yes, Glickman. I see it but I can't pronounce it.

10 Q. Right. Did you say Glickman was one and the other
11 candidate you can't pronounce?

12 A. Yes.

13 Q. Now can you find on there who the candidates are for
14 State Representative 79th District, and take all the time
15 you need.

16 A. Is it Graves?

17 Q. Excuse me?

18 A. Graves and Frahm.

19 Q. Your testimony was Graves and Frahm?

20 A. Yes.

21 Q. Okay. Thank you.

22 MR. MILLER: That is all I have, Your
23 Honor.

24 MR. WITTEMAN: I need to follow-up
25 obviously.

FURTHER REDIRECT EXAMINATION

1
2 MR. WITTEMAN:

3 Q. Miss Muhlheim, I want you to take your time. The
4 question that Mr. Miller just asked you was can you find
5 the names for the 79th State Representative, State
6 Representative for the 79th District, and take all your
7 time that you need to find State Representative 79th
8 District and tell us who the candidates were.

9 A. Glickman and Tiahrt.

10 Q. I believe that was the previous question Mr. Miller
11 asked, and do you understand the distinction between a
12 United States Representative and a State Representative,
13 ma'am?

14 A. Yes, that one says United States.

15 Q. That one says United States that you are pointing
16 out. All right. I'll submit that a State Representative
17 would be different than a United States State
18 Representative, so take your time and look at all the
19 columns in the ballot.

20 A. State Representatives are Shriver and Jones.

21 Q. All right. Your testimony was State Representatives
22 are Shriver and Jones, and you see that there on the
23 ballot?

24 A. Yes.

25 Q. Very well.

1 MR. WITTEMAN: That is all the questions
2 I have.

3 MR. MILLER: One last question, Your
4 Honor.

5 FURTHER RECROSS-EXAMINATION

6 MR. MILLER:

7 Q. Ms. Muhlheim, you just said the candidates for State
8 Representative were Shriver and Jones?

9 A. Yes.

10 Q. Who did you intend to vote for?

11 A. Jones.

12 MR. MILLER: Thank you.

13 MR. WITTEMAN: That is all the questions
14 I have.

15 THE COURT: Can this lady be excused
16 now?

17 MR. MILLER: Yes, sir.

18 MR. WITTEMAN: Yes, Your Honor.

19 THE COURT: Both of you are excused and
20 free to go but we need to leave the exhibit. Call your
21 next witness.

22 MR. WITTEMAN: We'll bring one in and
23 name them, Your Honor.

24 THE COURT: All right.

25 MR. RUCKER: Your Honor, we call Donna

1 Swartz to the stand.

2 DONNA SWARTZ,

3 of lawful age, having been first duly sworn on her oath to
4 state the truth, and nothing but the truth, testifies as
5 follows:

6 (An off-the-record discussion was here had.)

7 MR. MILLER: The count is 17 to 9 as
8 reported by the board of inspectors. That's the count we
9 would stipulate for the ballots in the bag labeled hand
10 count.

11 MR. WITTEMAN: No issues on copy ballots
12 or green ballots?

13 MR. MILLER: (Negative head shake.)

14 MR. WITTEMAN: They're all fine with that
15 stipulation. We'll -- except with the provisio that we
16 have raised, an issue in both the notice of contest and the
17 amended notice of contest, that in previous counts the hand
18 counts were 18 to 9 and we are still curious about where
19 that one went.

20 MR. MILLER: I'm not -- I think it's
21 irrelevant at this point because we have the board of
22 inspectors' report as controlling over all other counts.

23 MR. WITTEMAN: It is a collateral issue
24 as to the appropriate counts, and if there is evidence that
25 one has been misplaced somewhere, that's the issue we are

1 raising.

2 MR. MILLER: Well, if they have evidence,
3 I'd be curious about that.

4 MR. WITTEMAN: We'll try to divulge the
5 same.

6 THE COURT: So you are accepting the
7 stipulation then that the hand count is 17 to 9, 17 for
8 whom?

9 MR. MILLER: Shriver.

10 THE COURT: And 9 for Jones?

11 MR. WITTEMAN: Now, let me check that.
12 Actually it's just the opposite.

13 MR. MILLER: Just a joke.

14 MR. WITTEMAN: Just a joke. We'll accept
15 that stipulation with the provisio I just said for the
16 Court. We need to take a look and see if this witness is
17 any longer necessary for any additional.

18 THE COURT: Stand by.

19 MR. WITTEMAN: Miss Swartz, at this time
20 let me explain what has happened. The issues that were
21 raised on some ballots that came from your precinct which
22 we felt were going to be issues raised in this matter have
23 just been stipulated to, and based on that, there is no
24 longer an issue.

25 We are going to release you and with my personal

1 apologies for having you sit here all day Tuesday and the
2 time you spent this morning. We appreciate your efforts
3 and the time you've taken out of your day, and thank you
4 very much.

5 THE COURT: You need to have her
6 testify?

7 MR. MILLER: Well, I'd say ditto on that.

8 THE COURT: Thank you very much. You may
9 stand down. You are free to go. Happy New Year.

10 MS. SWARTZ: Thanks.

11 THE COURT: Call your next witness.

12 MR. WITTEMAN: If we could have a minute,
13 I think we're going to release some other witnesses.

14 THE COURT: Oh, by all means. We'll take
15 a short recess of about 10 minutes.

16 MR. MILLER: As long as the record is
17 clear that doesn't make me a ditto head.

18 THE COURT: So noted, counsel. You know,
19 counsel, by your stipulation the admission of this, all of
20 these vote totals are in here with the exception of the
21 resolution ballots and the write-in ballots.

22 MR. MILLER: Yes.

23 THE COURT: So these are the issues we
24 have left?

25 MR. MILLER: As it relates to the counts.

1 MR. WITTEMAN: Can we stipulate --

2 MR. MILLER: All other issues relate to
3 the legalities or illegalities of the votes.

4 MR. WITTEMAN: Let me make a request for
5 another stipulation out of the -- on the written-in pile.
6 We're not going anywhere with those.

7 THE COURT: You are asking they not be
8 counted?

9 MR. WITTEMAN: Right, they not be
10 counted.

11 THE COURT: Are you asking any of those
12 be counted?

13 MR. MILLER: No, but I want them as part
14 of the record.

15 THE COURT: Oh, certainly.

16 MR. MILLER: Because I'm going to advance
17 the contents of those as it relates to the issue on a
18 ballot that's in the resolution ballot group, but no, we
19 are not taking the position that any of the -- let me --

20 THE COURT: Of the nine?

21 MR. MILLER: Let me make sure of that,
22 Your Honor.

23 THE COURT: These are all the nine --

24 MR. WITTEMAN: Six are blank, three of
25 them from the 78th District but voted for the Danny Jones

1 write-in. I'd like to review them, too.

2 THE COURT: Both parties stipulate they
3 shouldn't be counted, then we are making progress. Three
4 were from the 78th District and six were blank.

5 MR. MILLER: Three appear to be from the
6 78 District. The three that have Danny Jones written in
7 are the three in particular that appear to be ballots from
8 voters casting them in the 78 District. He's popular
9 across the state.

10 MR. WITTEMAN: Your Honor, based on some
11 of these, we'd like to hold that stipulation for the time
12 being, just lay these aside. I don't think there is
13 anything --

14 THE COURT: Well, they will be made part
15 of the record, those.

16 MR. MILLER: They've already been
17 admitted I thought.

18 THE COURT: I think they have been
19 admitted and if you want to make argument --

20 MR. WITTEMAN: They were admitted at the
21 first.

22 MR. RUCKER: They have been admitted at
23 the first.

24 MR. WITTEMAN: We got to take a look at
25 some information at this point. We just don't want to

1 stipulate to the count. We most likely will but we just
2 need to take a quick look.

3 THE COURT: Well, you argued in your
4 brief that you didn't want them counted and Mr. Miller
5 doesn't want them counted. If they don't count, they don't
6 count, do they?

7 MR. WITTEMAN: I understand, and we may
8 have one issue with one ballot we need to take a look at.

9 THE COURT: You think there may be one
10 ballot that should be counted?

11 MR. WITTEMAN: Perhaps.

12 THE COURT: Okay.

13 MR. WITTEMAN: And I say that. Perhaps I
14 don't make that argument at this point about them.

15 THE COURT: We'll take a short recess if
16 you want to release witnesses --

17 MR. WITTEMAN: Very well.

18 THE COURT: -- at this time.

19 MR. MILLER: Well, Your Honor, what about
20 that lady that needs to get to the doctor? Is she one you
21 are going to release?

22 MR. WITTEMAN: We are taking a short look
23 and we'll either release her or get her on shortly
24 thereafter.

25 MR. MILLER: Instead of a break, why

1 don't we see -- she told me she needed to be out of here be
2 11:00.

3 MR. WITTEMAN: We're pulling some
4 exhibits. We'll bring these witnesses in, get them on and
5 get them out.

6 MR. RUCKER: We'll do the one now.

7 MR. WITTEMAN: The one we'll certainly do
8 first.

9 THE COURT: Is that the lady that needs
10 to go to the doctor?

11 MR. WITTEMAN: Right.

12 THE COURT: Thank you. You want to call
13 her in now while we're getting those exhibits?

14 MR. RUCKER: Sure.

15 (An off-the-record discussion was here had.)

16 MR. RUCKER: Your Honor, we are going to
17 release Miss Athearn for her doctor's appointment at
18 11 o'clock. We would like a short recess to see if we can
19 get rid of some other witnesses.

20 THE COURT: You mean release them?

21 MR. RUCKER: Release them.

22 MR. WITTEMAN: Miss Athearn is going to
23 be back this afternoon which we feel would be a much more
24 appropriate place for her testimony to be given because
25 it's essentially rebuttal testimony.

1 THE COURT: All right.

2 MR. MILLER: Your Honor, before we break,
3 can I raise a short issue so I can focus on what I need to
4 focus on. Is the Court still allowing additional
5 amendments to the pleadings as it relates to the additional
6 illegal votes?

7 THE COURT: None have been asked.

8 MR. MILLER: But --

9 THE COURT: I didn't -- I didn't
10 contemplate any amendments --

11 MR. MILLER: Well, I'm going --

12 THE COURT: -- being made once it
13 started.

14 MR. MILLER: I'm working on some. I'm
15 going to quit that if I'm going to be foreclosed on
16 offering them. I wanted to raise that now. Your words as
17 I remember them on Tuesday was we need to draw the line
18 sometime. I think those were your words, and I didn't -- I
19 didn't take from that it has been drawn yet.

20 THE COURT: Well, we're fast approaching
21 that.

22 MR. WITTEMAN: My sense was, and perhaps
23 not, that, in fact, the line was going to be drawn at the
24 start of this day. I think that was the comments.

25 MR. MILLER: And I'll abide by that. I

1 just want to clarify.

2 THE COURT: That was my intention. I
3 thought all of the issues had been framed by now in your
4 answer to their amended notice and their amended notice.
5 That pretty well framed the issues as far as I was
6 concerned. Is there something additional that you think
7 should be brought before the Court?

8 MR. MILLER: Well, I'm still developing
9 on other voters or nonvoters as the case may be. If the
10 Court's order is that there are to be no other names added
11 at this point forward, I'll live by that as long as I know
12 the other side is held to that. We'll focus our efforts on
13 those that have been already been listed before the Court.

14 THE COURT: Well, it would apply equally
15 to both. Are there some additional people that --

16 MR. WITTEMAN: No, not at this time, Your
17 Honor.

18 MR. MILLER: One last thing. I want to
19 make it clear with all that I have the ability to raise
20 Mrs. Muhlheim's vote as an issue.

21 THE COURT: There is no ruling been made
22 on it, on that.

23 MR. MILLER: I understand, but I
24 heretofore have not listed her as one that I wanted to put
25 in issue but I'm informing the Court that I do at this

1 point.

2 THE COURT: Well, it doesn't matter.
3 It's in issue. When they brought up the issue, it's an
4 issue. It doesn't matter who brings it up.

5 MR. RUCKER: And with that, Your Honor,
6 if we could go out and try to dismiss some.

7 THE COURT: Let me take ten minutes to
8 try to take a recess. We would have been back by now.

9 MR. MILLER: We got a lot done.

10 THE COURT: All right. We'll be in
11 recess then until 11 o'clock.

12 (A brief recess was here had from 10:53 to
13 11:10 a.m.)

14 THE COURT: Counsel, call your next
15 witness.

16 MR. WITTEMAN: Your Honor, at this time
17 based on the scheduling of witnesses we have appropriated,
18 if the Court would like to go ahead and deal with the
19 resolution ballots and those issues related thereon.

20 THE COURT: All right. Do you have any
21 witnesses you want to call or do you want to argue?

22 MR. WITTEMAN: There isn't really any
23 witnesses to call on the matter.

24 MR. MILLER: Well, we've got witnesses
25 waiting. I'd rather save arguments on anything until we

1 get done with the witnesses. I'm pretty winded when it
2 comes to arguments.

3 THE COURT: There is only four ballots.

4 MR. MILLER: I'm still pretty windy. I
5 don't know why we need to do it now if we still have
6 witnesses in the hallway.

7 MR. WITTEMAN: I'd like one moment, Your
8 Honor.

9 MR. MILLER: Your Honor, do you still
10 want one?

11 THE COURT: Proceed, counsel.

12 MR. WITTEMAN: Your Honor, at this time
13 we'd like to draw the Court's attention to the exhibits
14 which I believe have been marked --

15 THE COURT: RB 1 through 4.

16 MR. WITTEMAN: -- RB 1 through 4. In
17 regard to looking at those ballots, the Court's duty at
18 this time, of course, is trying to determine the intent of
19 the voter, and I know the Court is well aware of the
20 legislative changes that were made in 1992 which took
21 out -- which based on the previous case that Mr. Miller had
22 tried that took out a lot of the confusion from those.

23 I would note that all four of those ballots that
24 the Court has before it in the certified count were, in
25 fact, counted for the, what it appears to me, benefit

1 obviously for the candidate of choice that was marked
2 thereon.

3 THE COURT: By the board of inspectors?

4 MR. WITTEMAN: By the board, not by the
5 board of inspectors, by the board that was certified by the
6 Secretary of State, the count that came out of the Cowley
7 County clerk's office. Those ballots have always been
8 counted.

9 THE COURT: All right.

10 MR. MILLER: We can't say that, Your
11 Honor. He wasn't part of the board that counted them.
12 One, it's irrelevant, but two, we can't know what they
13 counted and what they didn't count. We can only know what
14 the final count was.

15 MR. WITTEMAN: I think if we take a look
16 at what's already been stipulated this morning on the
17 count, you can see that there is four less votes taken out
18 of the resolution ballots.

19 THE COURT: Well, it really doesn't make
20 any difference, does it, because the board of inspectors
21 did not --

22 MR. WITTEMAN: That is true.

23 MR. MILLER: I want the record to go
24 beyond that and have something in there that they were
25 counted and make it a fact when it's not necessarily a

1 fact.

2 THE COURT: And basically what you are
3 asking me to do today is to determine whether or not these
4 are legal votes and should be included?

5 MR. WITTEMAN: If it's voters, sure.

6 THE COURT: Any determination that I make
7 now with respect to this election --

8 MR. WITTEMAN: And it is our position,
9 Your Honor, that all four of those ballots should be
10 counted. There are three of those ballot that indicate a
11 Jones vote and one that indicates a Shriver vote and that
12 is in, in fact, our position. They should be counted as
13 they are marked. Voters intent is clear based upon
14 arguments of contestee's counsel. Then again, we might
15 need to get into specifics with them but our position is
16 quite clear and we'll be glad to respond to any argument
17 made.

18 MR. MILLER: I can make a stipulation on
19 some of these I believe. Your Honor, there are some white
20 labels on here that were placed on there by what we call
21 the resolution board. I would ask the Court at this time
22 to remove each of those white labels. They do that so the
23 ballot will go through the optical scanner, but I think
24 it's critical to the Court's determination to be able to
25 see what is underlying the white stickers, and I would also

1 white stickers, and I would also ask, and particularly with
2 regard to RB 3, that the white sticker be preserved because
3 it's going to peel off some of the marking.

4 MR. WITTEMAN: My suggestion, Your Honor,
5 would be if we have a flashlight for the Court to view them
6 through because I think there is writing I think on any
7 given one of them. Something may be removed when that
8 sticker comes off.

9 MR. MILLER: No.

10 MR. WITTEMAN: To take a look prior to
11 the Court's removing the sticker.

12 THE COURT: Well, RB 4 has no sticker.

13 MR. WITTEMAN: I'm sorry?

14 THE COURT: RB 4 has no sticker.

15 MR. MILLER: Oh, yes. That's that other
16 bad ballot.

17 MR. WITTEMAN: Let the record reflect
18 that it is the contestant's position that is a good ballot
19 in Jones' favor.

20 THE COURT: Okay. RB 1 has a sticker on
21 it, RB 3 has a sticker on it and RB 2 has a small white
22 sticker on it.

23 MR. MILLER: And two of the three, if we
24 took the stickers off of the three, two of the three I can
25 stipulate to once I was actually able to observe what's

1 under the sticker, and that's how the voter marked it.
2 They didn't put the sticker on there.

3 MR. WITTEMAN: For the record --

4 THE COURT: Are you willing to stipulate
5 that the resolution board or the board of canvassers put
6 that on?

7 MR. MILLER: It was what we call the
8 resolution board.

9 THE COURT: In the county election
10 office?

11 MR. MILLER: They are an election board.
12 They are a counting board on election night and that's
13 when --

14 THE COURT: That resolve issues such as
15 this?

16 MR. MILLER: That's when the events would
17 have occurred.

18 MR. WITTEMAN: For the record, it's our
19 understanding that the stickers are placed on so they can
20 be run through the optical scanner for resolution.

21 THE COURT: For the record, it wasn't by
22 the voter or anyone else?

23 MR. MILLER: Stipulate some member of the
24 resolution board.

25 THE COURT: Let the record reflect that

1 the Court is trying to remove the label.

2 MR. MILLER: I think the court reporter
3 is better equipped to do that, Your Honor.

4 THE COURT: All right. RB 1 for State
5 Representative 79th District has an oval that is filled in
6 with a black mark beside Danny P. Jones, Republican,
7 Arkansas City. The white sticker was placed over the oval
8 next to Joe D. Shriver, Democrat, Arkansas City. It
9 appears to be a small dot that's in the oval next to
10 Joe D. Shriver, in the oval next to Joe D. Shriver's name.

11 MR. WITTEMAN: If I might for the record
12 say that Your Honor had to lean forward to look very
13 closely and adjust his glasses to see the small mark next
14 to the Shriver name.

15 THE COURT: I do wear bifocals, counsel.

16 MR. MILLER: I don't want to mock the
17 Court myself.

18 MR. WITTEMAN: That certainly was not my
19 intent but simply to highlight how minute that mark was.

20 THE COURT: Do you wish to make an
21 argument with respect to that?

22 MR. MILLER: No. There is one other, one
23 very similar to that with an opposite marking if we can
24 have a ruling on the two together. Actually we don't need
25 a ruling because I'll stipulate that one is for Jones and

1 one is for Shriver once we get the two side by side.

2 THE COURT: RB 2, the white sticker is
3 over the oval next to Danny P. Jones, Republican, Ark City
4 and the Court is removing that. And the oval next to Joe
5 D. Shriver's name is completely filled in with a black
6 mark, and in the oval next to Danny P. Jones' name there is
7 a line that extends through approximately three fourths of
8 the oval and Petitioner's Exhibit RB 3, the Joe D. Shriver,
9 Democrat, there is nothing in the oval next to that name,
10 and the oval next to Danny P. Jones' name it is filled in
11 completely with a black mark and the sticker is on the line
12 beneath.

13 MR. MILLER: Your Honor, would you
14 examine that sticker before you place it back on the other
15 side?

16 THE COURT: And on the bottom of the
17 sticker it looks like a black X. Now, in the oval next to
18 the blank line the oval appears to be filled in with a
19 black mark and then a large X has been placed over the
20 entire oval extending outside of the oval. And then that
21 is the appearances of the three resolution ballots with
22 respect to RB 1.

23 The contestant's position is that all three of
24 these should be counted. Mr. Miller, I ask you with
25 respect to RB 1, what is the position of the contestee?

1 MR. MILLER: The position of the
2 contestee is that RB 1 should be counted as a Jones vote so
3 long as RB 2 is also considered to be a Shriver vote. We
4 think the issues are similar. It's simply the votes cancel
5 each other out.

6 MR. WITTEMAN: Based on the way the voter
7 marked the rest of his ballot on RB 2, which would appear
8 to contain a Shriver mark, that all of those other marks
9 are consistent to indicate that would be a Shriver vote
10 consistent with the rest of the marks on the ballot and the
11 voter's intent.

12 THE COURT: It will be the ruling of the
13 Court that RB 1 is a vote for Danny P. Jones, Republican.
14 It will be the ruling of the Court that RB 2 is a vote for
15 Joe D. Shriver. Both are legally cast and should be
16 included in the vote totals.

17 With respect to RB 3, it is the position of the
18 contestant that this is a vote for Danny P. Jones that
19 should be included. What is the position of the
20 contestee?

21 MR. MILLER: We intend to offer evidence
22 on that issue when we get to our -- when the Court gets to
23 our opportunity to present evidence, Your Honor. It's
24 our --

25 THE COURT: On this ballot?

1 MR. MILLER: On that ballot, yes, sir.
2 Our position is that we do not believe the ballot should be
3 counted as it relates to the race for 79th District but
4 should remain as being counted for all other races that are
5 marked.

6 We would call the Court's attention -- it's a
7 lengthy argument. I'll preserve it until after we
8 presented our evidence, but it surrounds these statutes,
9 Your Honor, K.S.A. 25-2902, Subsection B, K.S.A. 25-2902
10 Subsection C, K.S.A. 25-3002, Subsection (b) (1) most
11 particularly the language that relates to the
12 "Determination of the voter's intention shall rest in the
13 discretion of the board canvassing in the case of a canvass
14 and in the election court in the case of an election
15 contest."

16 And K.S.A. 25-3002, Subsection B, Subsection 2,
17 Subsection big capital B, been around my five-year-old too
18 long, and particular relevant part, "Occurrences listed in
19 this subpart," which we believe is (1), "shall not
20 invalidate the whole ballot but shall invalidate that
21 portion in which the occurrence appears." Those are our
22 statutory cites we're taking our position on. We will be
23 offering evidence.

24 THE COURT: If you are going to be
25 offering evidence, I'll reserve ruling on that, on RB 3.

1 RB 4 you wish to argue that this is the resolution ballot
2 that has previously been identified by the lady this
3 morning?

4 MR. WITTEMAN: Simply pointed it should
5 be voted as marked with voter's intention. It was a Jones
6 vote.

7 THE COURT: Mr. Miller?

8 MR. MILLER: My only comment, Your Honor,
9 would be that we do not believe it should be counted at
10 this point based on the testimony as it relates to the
11 voter's competence, and we'll let the Court evaluate that.

12 THE COURT: I'm prepared to make a ruling
13 upon that at this time. I have a legal issue that it is my
14 belief that the enactment of the new statute that has well
15 just been cited by Mr. Miller, 25-3002, where it is
16 primarily up to the board of canvassers or up to the
17 election court to determine the intent of the voter. I
18 believe that that should be done from the ballot.

19 I believe that that is tantamount to the
20 enactment of a parole evidence rule and it would be my
21 ruling in this particular case that all of the parole
22 evidence that was offered this morning by Jacqueline
23 Muhlheim is not admissible for purposes of varying whatever
24 the clear intention is of the ballot.

25 I believe that there is no way, in other words,

1 to give a fair ruling to any board of canvassers. They
2 can't take in testimony, and the board of canvassers are in
3 the same position as an election court. I think the intent
4 of the legislature is that the election court is to
5 determine from the ballot what the intention of the voter
6 is and this only makes sense. Otherwise then, you have
7 people testifying one way and the ballot saying something
8 else which might have occurred recently.

9 It's my belief that that is tantamount to a
10 parole evidence rule and none of that testimony is
11 admissible. It is clear I think in examining this ballot
12 that it was the intent of the person who cast this ballot
13 to vote for Danny P. Jones and that would be my ruling upon
14 that and that would be a vote that should be added to his
15 total.

16 MR. MILLER: Just one point if I may,
17 Your Honor.

18 THE COURT: Yes.

19 MR. MILLER: Mrs. Muhlheim's testimony
20 was that she marked her ballot in ink. I think the ballot
21 is clear that it was a Jones vote but only because somehow
22 somewhere someone marked that ballot in heavy lead after
23 and you can see the ink markings of Mrs. Muhlheim.

24 THE COURT: In all of the -- in all of
25 the -- and so the record is clear, in looking at all of the

1 votes that have been cast, and not only in this race but in
2 others, there are heavy black marks in all of the ovals and
3 there appear to be ink marks beneath them in every one of
4 the black ovals and ovals that have been blackened. To my
5 way of thinking though that doesn't destroy the intent of
6 the vote, and as the statute says, no ballot or any portion
7 thereof shall be invalidated.

8 We apply technical error unless it is impossible
9 to determine the voter's intention, and the determination
10 of the voter's intention shall rest in the discretion of
11 the court canvassing in case of a canvass and in the
12 election court in the case of an election contest.

13 MR. MILLER: Can I have just a brief
14 examination?

15 THE COURT: Sure. I should add for the
16 record that my determination is not based upon any
17 testimony offered by Jacqueline Muhlheim today. My
18 determination is purely within I believe the intent of the
19 ballot. It's not influenced by her testimony today.

20 All right. That leaves one resolution ballot
21 that you wish to present evidence on. I'll take that
22 matter up later. All right. That is all.

23 MR. WITTEMAN: With that said, Your
24 Honor, based on the Court's ruling that the intent is to be
25 drawn from the ballot itself, I don't know what evidence

1 we're offering. It has to be paroled by the definition.

2 THE COURT: We haven't heard yet,
3 counsel, so don't make an objection until he calls it. I
4 suppose I can't rule upon any objection until I see where
5 he's going with the testimony.

6 MR. WITTEMAN: Very well. So I
7 understand the Court's feeling though, it is the ballot
8 itself that wherein intent is to be determined?

9 THE COURT: I believe so, and it really
10 makes sense because the statute is that it is the board of
11 canvassers or the election court that has to make this
12 determination, and otherwise, a board of canvassers has no
13 facility for bringing in witnesses and taking testimony
14 which an election court can do, but I think that's
15 contemplated only in the case of illegal votes or votes
16 that have been cast illegally. I believe the better rule
17 would be that in cases of this nature with the board of
18 canvassers if an election court determined within the four
19 corners they can't do it, don't do it.

20 MR. MILLER: I might just draw a
21 parallel, Your Honor. That's how the Court is ruling on
22 legislative intent. That infers from the record they don't
23 bring in extemporaneous witnesses, i.e., legislatures
24 uphold that testimony as being credible relating to what
25 they may have intended. They don't take extemporaneous

1 statements. This is what we meant. They look at the
2 records and the conditions as it happened. They don't
3 later ask for very parallel situations.

4 THE COURT: Well, that's why I was
5 interested in your citation this morning from Iowa. They
6 evidently had very learned courts in Iowa that agree with
7 my position. Call your next witness, counsel.

8 MR. RUCKER: Ruby Schalk, Your Honor.

9 RUBY SCHALK,
10 of lawful age, having been first duly sworn on her oath to
11 state the truth, and nothing but the truth, testifies as
12 follows:

13 MR. RUCKER: Excuse me, Your Honor, I
14 might --

15 THE COURT: Proceed.

16 MR. RUCKER: Thank you, Your Honor.

17 DIRECT EXAMINATION

18 MR. RUCKER:

19 Q. Ruby, you testified the day before yesterday, and I
20 just wanted to have you come back for a couple of follow-up
21 questions and then Mr. Miller will also have the
22 opportunity, contestee will also have the opportunity to
23 ask you a few questions. I thought some new facts came to
24 light. That was the reason for it.

25 Ruby, you lived at 1420 South C Street during

1 what general time frame, just in a general time frame?

2 A. It was -- I moved from there in September of '92.

3 Q. All right. You moved from there?

4 A. I was just there just a few months. I didn't live
5 there very long.

6 Q. All right. While you were at the 1420 South C
7 Street address in Arkansas City, you did register to vote,
8 is that correct?

9 A. Yes, I did.

10 Q. All right.

11 MR. RUCKER: And we'd proffer again that
12 that registration card is before the Court, has been marked
13 as an exhibit.

14 THE COURT: It's somewhere.

15 MR. RUCKER: Right, okay.

16 MR. RUCKER:

17 Q. Ma'am, you testified that you moved into the Warren,
18 pardon me, the Windsor Apartments?

19 A. Windsor, yes.

20 Q. What month was that, ma'am?

21 A. That was in September of '92.

22 Q. And ma'am, what, if anything, did you do with regard
23 to your voter registration once you moved into the Windsor
24 Apartments in September of '92?

25 A. I went up and registered again because I knew moving

1 I would have to reregister in order to be able to vote,
2 which is very important to me to vote. I voted practically
3 ever since I've been able to.

4 Q. Yes, ma'am. And why is it that you remember so
5 specifically that you went down and registered to vote?

6 A. Because it was so close to the presidential
7 election, and I wanted to be sure I was registered right so
8 I could go ahead and vote for the president I wanted.

9 Q. Again, that makes sense because the president was up
10 in '92. All right. Do you recall where you specifically
11 went to register once you got to the Windsor Apartment
12 address?

13 A. Yes, I went to the water department office.

14 Q. All right. The city office?

15 A. The city office, yes, in the city building.

16 Q. It's all one I guess?

17 A. Yes, it's all in one building, yes.

18 Q. What did you do once you got inside?

19 A. I went to the desk. The lady gave me a card. I
20 filled it out. It was a white card.

21 Q. Yes, ma'am.

22 A. I filled it out and handed it back to her and then I
23 left.

24 Q. All right. And when you filled it out, ma'am, did
25 you fill it out in such a way to reflect your new address?

1 A. Yes, I did.

2 Q. All right. Okay. And as a result then of
3 registering sometime when the poll books were opened before
4 the '92 election, did you then participate as you usually
5 do in the '92 election?

6 A. Yes, I did.

7 Q. Okay. And what occurred at the election polls in
8 1992 when you presented yourself for election?

9 A. I wasn't in the book.

10 Q. Okay. Did you know --

11 A. The registration book.

12 Q. Did that make sense to you?

13 A. No, it didn't, but I did have my registration paper
14 and I gave it to them.

15 Q. All right. Okay. What did they say?

16 A. He --

17 MR. MILLER: Your Honor, objection as to
18 hearsay.

19 THE COURT: Rephrase.

20 MR. RUCKER:

21 Q. Okay. What happened as a result of you giving them
22 the registration paper that you had?

23 A. They took my vote paper and they folded it and put
24 in an envelope and said they would send it in.

25 MR. MILLER: Your Honor, at this point

1 I'd ask that any testimony be stricken when she testifies
2 as to what was said by board workers. That board worker
3 for 1992 is here for examination.

4 THE COURT: Are you offering that for the
5 truth of the matter asserted?

6 MR. MILLER: Yes, Your Honor.

7 MR. RUCKER: No, I don't believe I am.
8 Even if I were, which I am not, but if I were, Your Honor,
9 I believe she indicated what they did, not what they said.
10 I think she can testify.

11 THE COURT: Tell us what they did with
12 your vote.

13 A. They took the vote and they folded it and they put
14 it in a brown envelope and they laid it to the side and
15 they said they would see that that got sent in.

16 MR. RUCKER:

17 Q. All right. Then when you presented to the polls in
18 1994, this year --

19 A. This year, right.

20 Q. -- did you go to the exact same precinct that you
21 were at --

22 A. Yes, I did.

23 Q. -- in '92? And what happened then?

24 A. The same thing happened. I still was not in the
25 book.

1 Q. Did that cause you some curiosity?

2 A. Yes, I did. I asked them how come because I told
3 them the same thing happened during the '92, the
4 presidential.

5 Q. All right. As a result of being questioned at the
6 polls, did you then place a phone call or did you get into
7 contact with the Cowley County clerk's office?

8 A. No, I did not. I should have. I realize that now.

9 Q. All right. But you have recently got in touch with
10 the Cowley County clerk's office?

11 A. Yes, I have.

12 Q. Why have you had conversation with the Cowley County
13 clerk's office?

14 A. Because they said they did not receive my
15 registration card.

16 Q. All right. And as a result of that conversation,
17 did you get a new voter registration card?

18 A. Yes, she did. She sent me a new card. I got it
19 Friday, this last Friday. I filled it out and sent it
20 right back in that same day.

21 Q. All right. Okay. And it is -- it's always been
22 your intention to participate in the election?

23 A. Yes, I do. Every one of them I possibly can.

24 Q. All right.

25 A. It's very important to me.

1 Q. Yes, ma'am. And to many of us. Yes, ma'am.

2 MR. RUCKER: No further questions.

3 CROSS-EXAMINATION

4 MR. MILLER:

5 Q. Miss Schalk, if I understand you correctly, you were
6 aware in 1992 that there was a problem with your
7 registration?

8 A. Yes.

9 Q. If I understand your testimony, you believe that you
10 should have contacted the election office to get the
11 problem taken care of?

12 MR. RUCKER: Objection, Your Honor. That
13 is not what her testimony was.

14 A. No. I didn't know it at the time. I didn't know
15 that I should reregister again because I had registered
16 already in '92.

17 Q. Well, counsel a moment ago asked if you should have
18 contacted the election office, and I thought you said I
19 didn't, you should have.

20 MR. RUCKER: Objection, Your Honor. That
21 is not what was in the record. I think he's misstating the
22 testimony.

23 MR. MILLER: Well, it's a question, Your
24 Honor.

25 THE WITNESS: No, at the time --

1 MR. RUCKER: Which assumes facts not in
2 evidence.

3 THE COURT: Yeah, what --

4 THE WITNESS: I'm sorry. I don't
5 understand. At the time I thought I was registered and I
6 thought everything was straightened out.

7 THE COURT: In '92?

8 THE WITNESS: In '92 because they said
9 they would make a special note in there to make sure that I
10 was -- everything was taken care of and I thought it was,
11 and I did not realize that I should have contacted them
12 again until I received a call from Mr. Rucker.

13 MR. MILLER:

14 Q. Okay. So what, do you think there was a problem
15 with your registration or do you think it was taken care
16 of?

17 A. I thought at the time it was taken care of.

18 Q. Okay.

19 A. But it evidently wasn't.

20 Q. You never checked to see if it was?

21 A. No.

22 Q. Thank you.

23 MR. RUCKER: Thank you, Miss Schalk. I
24 don't believe that I have any additional questions of you.
25 I would call Barbara Warren to the stand.

1 THE COURT: May this lady be excused?

2 MR. RUCKER: Yes, Your Honor.

3 MR. MILLER: No, Your Honor, not yet
4 until I see what this testimony is.

5 THE COURT: Miss Schalk, you can stand
6 down but don't leave yet because they may want to call you
7 back to the witness stand.

8 THE WITNESS: Okay. I'll be outside.

9 MR. RUCKER: Miss Barbara Warren.

10 BARBARA WARREN,
11 of lawful age, having been first duly sworn on her oath to
12 state the truth, and nothing but the truth, testifies as
13 follows:

14 DIRECT EXAMINATION

15 MR. RUCKER:

16 Q. Miss Warren, as it relates to the ballot cast by
17 Ruby Schalk in 1992, have you looked at the challenged
18 ballot of 1992 or the poll books of 1992 in her precinct to
19 determine whether or not she did, in fact, present herself
20 to the polls to vote?

21 A. Let me look here.

22 MR. MILLER: When she answers that, can
23 we identify the precinct?

24 MR. RUCKER: You bet. I think it's 1D
25 but I'm not positive about that.

1 THE WITNESS: We've talked about so many
2 voters, it's hard to remember which voter I looked at the
3 poll book for.

4 MR. RUCKER: Why don't we come back to
5 that.

6 MR. MILLER: Does she have a poll book in
7 hand?

8 THE WITNESS: No, I don't.

9 MR. RUCKER: That would be fine but
10 before we do that, we may differentiate our testimony for
11 the sake of --

12 THE WITNESS: I do have my note, I'm
13 sorry.

14 MR. RUCKER:

15 Q. That's fine. Did you, in fact, check to see whether
16 or not Ruby Schalk did, in fact, present herself to the
17 polls in 1992 to cast her ballot?

18 A. Yes, sir, she did vote in 1992.

19 Q. All right.

20 A. November election.

21 Q. Okay. And we do have as a part of the records here
22 the 1994 attempt --

23 A. Yes, sir.

24 Q. -- attempt on her part to vote and she also
25 presented herself?

1 A. Yes.

2 Q. Ma'am, I'm trying to understand Mrs. Schalk's
3 situation. How long have you been in the election office?

4 A. I just started 15 years on December 15th.

5 Q. All right. Been there for 15 years. During that
6 period of time, do individual voters call your office or
7 during that period of time have individual voters called
8 your office indicating that they registered to vote at
9 various outpost locations and yet they have -- they don't
10 appear on your records?

11 A. Yes, sir.

12 Q. All right. And if, in fact, you had to indicate to
13 the Court, approximately how many times a year does that --
14 does that occur?

15 A. From the Ark City clerk's office three or four a
16 year.

17 Q. Times a year?

18 A. Uh-huh. DMV has just been doing it for six months
19 and we've had two that I know of that we don't have cards
20 for.

21 Q. So it does happen?

22 A. Yes, sir.

23 Q. All right. So if a voter indicates to you -- it is
24 not a rare occurrence then?

25 A. No.

1 Q. All right.

2 MR. RUCKER: No further questions.

3 THE COURT: Can they register at the
4 water department in Ark City?

5 THE WITNESS: In the city clerk's
6 office. That's the water department. Yes, sir, they can.
7 That's a permanent outpost.

8 CROSS-EXAMINATION

9 MR. MILLER:

10 Q. It happens a lot that people claim they registered
11 somewhere when, in fact, they didn't?

12 A. No, that's not what I said.

13 Q. No, that's a question. Does it happen a lot that
14 people claim they registered to vote somewhere when, in
15 fact, there is nothing in your office to indicate that they
16 have registered?

17 A. No, sir, no.

18 Q. Was there a number of voters just this last election
19 who offered challenged ballots and claimed that they were
20 registered to vote and your office verified it and found,
21 in fact, that they were not registered?

22 A. They claim they registered in our office?

23 Q. That they had registered to vote at one place or the
24 other.

25 A. And truly were not registered to vote? I wouldn't

1 say a whole lot, no, no.

2 Q. Okay. Do you have a poll book for 1992?

3 A. Not up here.

4 Q. Let me finish what I want. The 1992 general
5 election, 1D. If you don't have it, would you take a
6 moment to get it, please.

7 A. '92 November, 1D November election?

8 Q. Yes, ma'am.

9 A. Okay.

10 (Contestee's Exhibit No. 3 was marked for
11 identification.)

12 MR. MILLER:

13 Q. Now, Ms. Warren, as I understand Mrs. -- Miss
14 Schalk's testimony, in November of 1992, she had already
15 moved to 305 East Windsor Road, Apartment 410 but she had
16 registered on December 31, 1991 and did, in fact, live at
17 at that time at 1420 South C.

18 Now, where under those circumstances would have
19 been the proper place for her to vote in the 1992 general
20 election under the laws of the State of Kansas, and
21 assuming for the moment that she had moved more than -- she
22 had moved to 305 East Windsor Road, Apartment 410 more than
23 30 days prior to the election, where would it have been the
24 proper place for her to vote?

25 A. Windsor Road is in 1D precinct. She was previously

1 registered in 2C I believe. She would have moved out of
2 the precinct. If she made that move within 30 days, she
3 would have been able to vote at 2C, her former precinct.

4 Q. If it was more than 30 days, would she have been
5 eligible to vote?

6 A. She would not have been eligible to vote.

7 Q. Have you done a search of your office to find the
8 evidence that she was ever registered to vote for the
9 199- -- or excuse me, of the evidence in your office of
10 where she was registered to vote, for the 1994 general
11 election where was she registered to vote?

12 A. As of -- well, right, now see I think with her
13 challenged ballot if I could look at it --

14 Q. I'm sorry. If I said '94, I misspoke. I meant to
15 say '92.

16 A. Okay. As of '92, I would assume the 1420 South C
17 address would be -- I would assume. I don't know.

18 THE COURT: Counsel, let me interrupt you
19 here, but what is this material to?

20 MR. MILLER: I don't know that any of the
21 direct examination was material to the 1994 vote but it was
22 offered, and I'm trying to put it in context and that it
23 really has one, nothing to do with the '94 vote, and two,
24 if it is as counsel has outlined it that she presented
25 herself in precinct 1D in the general election of 1992 and

1 cast a ballot there, that was an improper vote in any way,
2 shape or form because it wasn't her previous precinct, and
3 based on what I heard from the testimony, it wasn't even
4 within 30 days.

5 THE COURT: But what does that have to do
6 with the 1994 election which is the reason why we're here?

7 MR. MILLER: Let me ask a question.
8 Maybe we can get to that.

9 MR. MILLER:

10 Q. Do you have any evidence, Mrs. Warren, that Ruby
11 Schalk was a properly registered voter for purposes of
12 voting in the November '94 general election at the polling
13 place located at precinct 1D?

14 A. The only -- like I say, the challenged ballot
15 envelope has my computer printout on it. Without looking
16 at that, I can say that probably what we have on the
17 computer is the 1420 South C address.

18 Q. I take it --

19 A. Currently, currently.

20 Q. Okay. So let's get to a yes or no.

21 A. Yes.

22 Q. Is there any evidence that she's a properly
23 registered voter for purposes of voting at precinct 1D in
24 the '94 general election?

25 A. No.

1 Q. Based on what you know about when she moved to 305
2 East Windsor Road, Apartment 410, was she a properly
3 registered voter for purposes of voting in precinct 2C?

4 A. She moved a year and a half ago or when?

5 Q. Two. I think it was two and a half years ago.

6 A. Two and a half years ago to Windsor Road?

7 Q. Yes, ma'am, East Windsor road.

8 MR. RUCKER: Objection, Your Honor. That
9 was a misstatement of the evidence. Counsel is assuming
10 facts not in evidence. The statement of the evidence is
11 this: The testimony on direct examination with Ruby Schalk
12 was that she moved in September of 1992.

13 THE COURT: Correct.

14 MR. RUCKER: And reregistered at that
15 time, sir. She was, in fact, registered before that time
16 because she makes it a habit of being a registered voter at
17 1420 South C and that is the registration that they have on
18 file. They do not have the registration on file where she
19 registered to vote after September of 1992 so that she
20 could participate in the '92 election.

21 MR. MILLER: That's her testimony. That
22 has not been established as fact.

23 THE COURT: I understand the distinction
24 you are drawing.

25 MR. RUCKER: Okay.

1 THE COURT: Her testimony was as he
2 related but whether or not there is a registration --

3 MR. RUCKER: Yes, sir.

4 THE COURT: -- it's up to the election
5 office to answer.

6 MR. MILLER:

7 Q. Is there any evidence, Miss Warren, that she was a
8 properly registered voter based on the fact that Mr. Rucker
9 just related, when she moved that she was a properly
10 registered voter to vote anywhere in Cowley County for the
11 1994 general election?

12 A. If you can let me look at my computer printout, I
13 can tell you yes or no what we have on file.

14 Q. I don't think I have that but you are welcome to
15 take time to find it.

16 THE WITNESS: I think -- have you got it
17 there, Ruby Schalk?

18 THE COURT: I think that's her stack.

19 THE WITNESS: The computer printout isn't
20 here.

21 THE COURT: What does the computer
22 printout look like?

23 THE WITNESS: Well, it's a printout, and
24 this doesn't go with this exhibit. I can't tell you what's
25 on the computer right now because I don't have a printout

1 but the card --

2 MR. RUCKER: Your Honor, I think -- I
3 think the whole point of offering Miss Schalk's testimony,
4 Your Honor, is to stipulate that she did not appear on the
5 1994 poll books and we readily admit that is our point, so
6 if that clears up counsel's problem, we would indicate that
7 she is not on the poll books at the Windsor address. We
8 would indicate -- well, she is now, of course, because
9 she's reregistered as of Friday.

10 THE COURT: As of Friday?

11 MR. RUCKER: As of Friday, right, but was
12 not at the time of election.

13 MR. MILLER: And there is no evidence --

14 MR. RUCKER: That's correct.

15 MR. MILLER: -- she was a duly registered
16 voter for the purposes of the general election in 1994.

17 THE COURT: You haven't been able to find
18 her name on any of the lists?

19 MR. RUCKER: No, Your Honor, other than
20 the testimony that you've heard today, that's right and not
21 to her own fault.

22 MR. MILLER: I think that is all I have.

23 MR. RUCKER: Well, then, I would have a
24 follow-up question to ask Ms. Warren.

25 REDIRECT EXAMINATION

1 MR. RUCKER:

2 Q. In your 15 years of experience in the Cowley County
3 election office with an individual that has a regular
4 pattern of voting behavior, has anyone ever with a regular
5 pattern of voting behavior indicated that they were
6 registered to vote at a certain election, adamant as they
7 present themselves to you and then you subsequently find
8 out they are not registered to vote?

9 MR. MILLER: Now you are speaking of Miss
10 Garcia?

11 MR. RUCKER: Ms. Garcia was, in fact,
12 purged because she did not participate in '88 and '90.

13 MR. MILLER: Well, she sounded like what
14 you just described because she adamantly --

15 MR. RUCKER: Well, that --

16 THE COURT: Counsel, counsel, instead of
17 arguing amongst yourselves, address yourselves to the bench
18 and go ahead with your questions.

19 MR. RUCKER: Yes, Your Honor.

20 MR. RUCKER:

21 Q. Have you in your 15 years of experience with an
22 individual who has a habitual voting record presented
23 themselves indicating that they were registered to vote and
24 they were challenged at the polls and you subsequently
25 can't find the card?

1 A. No, that doesn't happen.

2 Q. Were there individuals this time, the 1994 election
3 that were not on the poll books that were challenged at the
4 polls who you later found out to be appropriately
5 registered voters?

6 A. I'm going to say yes.

7 Q. There were several office errors I believe that when
8 you went --

9 A. Yes.

10 Q. Were there not?

11 A. Yes.

12 Q. Then you went back and found that the office had
13 made an error?

14 A. Yes, and those were labeled as such.

15 Q. Yes, ma'am.

16 RE-CROSS-EXAMINATION

17 MR. MILLER:

18 Q. One, yes, you found several people. Two, you
19 acknowledge you were in error about that. Mrs. Schalk is
20 not one of them, isn't that correct?

21 A. Not several people. We did find a few but
22 Mrs. Schalk was not one of those.

23 MR. MILLER: Thank you.

24 FURTHER REDIRECT EXAMINATION

25 MR. RUCKER:

1 Q. It's obvious that the Ark City office made an error
2 in this case?

3 MR. MILLER: Your Honor, we'd stipulate
4 that anything is possible.

5 MR. RUCKER: Thank you. I want to make
6 absolutely certain, Your Honor, that in the Ruby Schalk
7 evidence that has already been admitted to the Court that
8 the '92 as well as the '94 poll books are presented into
9 evidence. I believe that the registration book that you
10 have --

11 THE COURT: But '92 has been marked. I
12 don't think that's been admitted.

13 MR. RUCKER: All right. I would move for
14 it's admittance, 24.

15 THE COURT: 24 will be admitted. I
16 believe that other --

17 MR. RUCKER: I believe it's been marked
18 19B and 19C, but if it has not, I would offer it.

19 THE COURT: It's been admitted. Any
20 objection to the poll book being admitted?

21 MR. MILLER: The '94?

22 MR. RUCKER: '92 and '94.

23 THE COURT: The '94 has already been
24 admitted. It's up here somewhere but the '92 is marked
25 somewhere.

1 MR. MILLER: It's marked Contestee's 3.
2 I didn't hear that number.

3 THE WITNESS: There is the poll book
4 right next to that.

5 MR. MILLER: We have no objection to the
6 numbered exhibit that counsel asked to be admitted.

7 THE COURT: Well, did I misunderstand
8 you, counsel? You wanted the '92 poll book?

9 MR. RUCKER: Yes, Your Honor.

10 THE COURT: Well, no, wait a minute.
11 That's not -- I guess it's this one. All right. It will
12 be admitted.

13 MR. RUCKER: Yes, Your Honor.

14 THE COURT: Any other questions of this
15 witness?

16 MR. RUCKER:

17 Q. Just out of curiosity, how are the cards transferred
18 from the Ark City clerk's office to your office?

19 A. By mail.

20 Q. By mail.

21 MR. MILLER: Excuse me, I didn't hear
22 that, counsel.

23 MR. RUCKER:

24 Q. Excuse me. How are the cards transmitted, the
25 registration cards transmitted from the Ark City office to

1 the Cowley County clerk's office?

2 A. By mail.

3 Q. You have not received other articles of mail from
4 time to time, is that not accurate, in the county clerk's
5 office that were supposed to be sent to you?

6 A. Repeat the question.

7 Q. Well, have you ever had pieces of correspondence
8 sent to you that later subsequently --

9 A. Never got there, yes, sir.

10 Q. All right. Thank you.

11 MR. RUCKER: No further questions.

12 THE COURT: You may step down. Call your
13 next witness.

14 MR. RUCKER: Pardon me?

15 THE COURT: Call your next witness.

16 MR. RUCKER: Yes, Your Honor. Your
17 Honor, as far as witnesses other than the potential
18 rebuttal, there are a couple that I've told them to be here
19 at 1 o'clock today, and assuming that would be about the
20 appropriate time, we do have some other evidence in that
21 regard that we can put on now if that would be the Court's
22 desire.

23 THE COURT: Well, let's do what we can.

24 MR. WITTEMAN: Very well. I'll need
25 Ms. Warren to come to the stand. I need her to pull out

1 some information.

2 (An off-the-record discussion was here had.)

3 MR. WITTEMAN: Your Honor, at this time
4 prior to this testimony based on Court's questions
5 yesterday in regard to Mr. -- was it Bumguard or
6 Mr. Bumgarner, that we no longer contend that was an
7 illegal vote. We withdraw the intention.

8 MR. MILLER: Well, after I've heard the
9 testimony, Your Honor, we believe it is because the
10 testimony --

11 THE COURT: You believe it's an illegal
12 vote?

13 MR. MILLER: We do because there was not
14 a voter registration card at the time he voted, and under
15 the circumstances as there were attested to, it appears
16 that the law would require that he needed to fill out a
17 registration card if he was voting but if he had not moved
18 from a precinct.

19 If he had moved from one place to another but
20 within the same precinct, he can vote but he must fill out
21 a voter registration card as a condition. That's the
22 statute as a condition to voting, so as far as I've not
23 heard any testimony that he filled out a registration
24 card --

25 THE COURT: So you are saying that his

1 vote should not invalidated because he was not given a
2 registration card and filled it out?

3 MR. MILLER: I'm saying his vote is
4 illegal and it should be invalidated if we can ascertain
5 how it was cast.

6 MR. WITTEMAN: Well, we disagree. That's
7 obviously -- if the registration card information is
8 available, that's obviously technical error the poll worker
9 made and I think the Lambeth versus Levens case is quite
10 clear that technical error by a poll worker should not
11 invalidate the intent of the voter.

12 THE COURT: I'm going to -- I'm prepared
13 to rule upon that as a matter of law unless there are
14 additional facts you are wanting to present.

15 MR. MILLER: I want to make an argument
16 about it.

17 THE COURT: All right. Proceed with your
18 argument.

19 MR. MILLER: Call the Court's
20 attention -- I'd ask the Court to turn to K.S.A. 25-2316c,
21 Subsection B, pertinent part, "When a registered voter
22 changes residence, such voter must reregister in order to
23 be eligible for vote, except that when a registered voter
24 changes residence from one place in a precinct to another
25 place within the same precinct."

1 As I understand it, that is the circumstance with
2 Mr. Bumgarner. "If such voter is otherwise qualified to
3 vote in the voting place within the precinct in which the
4 current residence is located, such voter shall be allowed
5 to vote at any election in such precinct on the condition
6 that such voter registers at such time by completing a
7 registration card, making an oath in the form prescribed by
8 the Secretary of State and providing proof of residence in
9 accordance with rules and regulations adopted by the
10 Secretary of State therefor."

11 Your Honor, I'm not familiar with rules and
12 regulations from the Secretary of State that may relate to
13 what's required for proof of residence, but my point is to
14 Mr. Bumgarner. It is from my understanding of the
15 testimony he did not fill out a new voter registration card
16 at that time nor did he make any oath.

17 The law makes exceptions, Your Honor, for a
18 limited number of circumstances on election day so that we
19 do not disenfranchise voters in certain circumstances, that
20 this is one of two that I know of. The other is for people
21 who move within 30 days. That's not Mr. Bumgarner's
22 position, but the law is careful to protect the sanctity of
23 the polling place, that certain steps must be followed
24 before that ballot is counted. This is one.

25 Mr. Bumgarner was extended an extraordinary

1 privilege not held by most of the population. In
2 exercising that extraordinary privilege, the legislature
3 has been quite clear as to the requirements in which he
4 must enjoy. As I understand his testimony, that did not
5 occur here.

6 THE COURT: Counsel, your reply?

7 MR. WITTEMAN: Your Honor, I think the
8 statute -- let's look at the facts and let's look at the
9 circumstances of this election and be consistent. In
10 speaking of consistency, that's an interesting argument
11 made on the basis yesterday I think counsel was quite
12 adamant this was a legal vote, should be counted.

13 MR. MILLER: That was before I heard the
14 testimony, Your Honor.

15 MR. WITTEMAN: No, I believe it was --

16 THE COURT: Well, it wasn't yesterday.
17 It was the day before.

18 MR. WITTEMAN: I believe it was after the
19 testimony before we took a break and went home for the
20 evening. I think it was the last thing done after
21 testimony was taken.

22 MR. MILLER: Excuse me, Your Honor, the
23 objection point we left the room about was at what juncture
24 I would be required to offer his vote, how he voted.

25 THE COURT: No, it was sealed up, wasn't

1 it?

2 MR. MILLER: No. It's in the mix and I
3 simply said that he should not be forced to divulge that
4 until the Court had made a ruling.

5 THE COURT: Correct. Let's proceed.

6 MR. WITTEMAN: Your Honor, I would quote
7 some case law to the Court that I think is extremely
8 relevant and I think the Court has read that pertinent
9 evidence. We have several things to look at, the changes
10 that were made in the law in 1992, and it may have been
11 specifically pointed at voter's intent and the ballot and
12 that sort of thing where they took it out, but the point
13 was clear what the legislature wanted to do was not
14 invalidate, not disenfranchise the voter because of an
15 error not contributable to that voter.

16 In this particular election, in this particular
17 election it's reflected where the technical letter of the
18 law was not followed, where people showed up at the wrong
19 precinct, but it is the policy of this county, and I think
20 appropriately so, not to disenfranchise voters that are
21 properly registered voters. Policy of this county to not
22 say no, you need to go to the other precinct. It is the
23 policy to take their vote there, not require them to go
24 back to the precinct.

25 If we strictly construe and apply the law, we

1 need to invalidate a bunch of votes here, wouldn't be
2 appropriate disenfranchising voters that are properly
3 registered, have taken the position of Cowley County board
4 that they should be required -- not required to go to the
5 strict letter of the law. That's the argument we have
6 here.

7 A voter presents themselves at the polls, gives
8 them information, they don't have their name in the book.
9 Whether a poll worker chooses to take out a small card --
10 and I believe we'll have evidence where the poll workers
11 were not aware, and we're ready to present that evidence,
12 that these cards should be given out, and particularly on
13 the in-precinct move where that statute was changed in
14 1992. It used to say they had the same 30-day requirement
15 that an out-precinct move has. The legislature changed
16 that in 1992 and I can -- there is evidence the poll
17 workers did not know of that.

18 If they looked at some information, it was past
19 30 days, well, they are obviously not properly here and
20 didn't give them cards, and the evidence you are going to
21 see here soon is going to indicate that on some other
22 voters, poll worker's error not contributable to the voter,
23 all they have to do is be handed a card and fill it out.
24 If they were not handed that card, how can they fill it out
25 and technically comply with that statute? I don't think it

1 should be held against the voter to disenfranchise the
2 voter.

3 Lambeth versus Levens, Page 617, "A substantial
4 compliance with the law regulating the conduct of elections
5 is sufficient, and when the election has been held and the
6 will of the electors has been manifested thereby, the
7 election should be upheld. Mere election irregularities
8 should not be permitted to frustrate the will of the
9 voters."

10 I know you've read the case, Your Honor. That's
11 what that case is, stands for an irregularity not
12 contributable to the voter, should not disenfranchise them.

13 THE COURT: Your reply, Mr. Miller?

14 MR. MILLER: Counsel must have
15 misunderstood me. Now I'm worried that perhaps the Court
16 did. I'm not advancing my argument relating to the fact
17 that he went to the wrong precinct. We got into that.
18 Counsel is correct. There are scores of people who simply
19 went to the wrong precinct but were a duly registered
20 voter, duly registered voter somewhere else.

21 THE COURT: I didn't understand your
22 argument to mean that you are saying that he shouldn't have
23 been allowed to vote without him filling out a new
24 registration card at the time of the filing --

25 MR. MILLER: Regardless of where he was.

1 THE COURT: -- at the time of the filing
2 of his ballot no matter where he was.

3 MR. MILLER: Right, and counsel -- it's
4 important to note what counsel just said. The legislature
5 in 1992, that's fairly recent, revisited this statutory
6 framework and they, in fact, modified, modified the law as
7 it relates to this very situation and they liberalized
8 statutorily the opportunity for people moving within the
9 precinct to still vote even though they hadn't
10 reregistered.

11 As he said, it used to be 30 days for people even
12 within the precinct. They liberalized it. They eliminated
13 certain requirements which they no longer felt were
14 necessary. What counsel is arguing is that you be elected
15 to the state legislature at this time, Your Honor, not
16 Mr. Jones, not Mr. Shriver, that you advance the change in
17 the law that the legislature didn't contemplate as recently
18 as 1992 and that is that you must reregister, in this
19 particular set of circumstances reregister.

20 And I agree with this language about don't
21 frustrate it, the will of the voters but until the moment
22 when Mr. Bumgarner was reregistered, he was not a duly
23 registered voter any more than all the rest of the people
24 who didn't register to vote because they missed one
25 deadline or another.

1 The same thing could be said about a fellow that
2 went to a registration outpost the day before the polls or
3 the registration books closed and he was told it's too late
4 and so he shrugged his shoulders and walked away and didn't
5 register and then found out later that he had another day.

6 Harken back, Your Honor, to my first remarks in
7 these proceedings. Once we burst the bubble, there are any
8 number of situations where we can simply say oh, well,
9 let's don't apply that, but then there is no end to it,
10 Your Honor, and then we've raised a whole new set of issues
11 in addition to those that haven't even been brought to the
12 Court by the pleadings of other people whose vote was not
13 counted for one reason or the other related to statutory
14 language.

15 But if we're going to start getting into that, we
16 would respectively request the opportunity to amend, to
17 account for that. This is not a technical requirement.
18 Being properly registered to vote is fundamental to the
19 privilege of voting. He was not registered to vote as
20 prescribed, clearly prescribed. His vote should not count
21 based on the testimony.

22 THE COURT: It doesn't bother you that he
23 had nothing to do with that?

24 MR. MILLER: Oh, I think he had
25 everything to do with it, Your Honor.

1 THE COURT: Because the poll worker did
2 not give him a new registration card at the time that he
3 voted that is his fault?

4 MR. MILLER: Just the same as it would be
5 for anyone else committing an act of ignorance and not
6 getting their registration perfected. You can't just blame
7 it on the official if you don't.

8 THE COURT: So through this error then
9 the will of the legislature has frustrated his vote. He
10 shouldn't have been allowed to vote?

11 MR. MILLER: I don't know that there was
12 any error, Your Honor. There has been no testimony that he
13 was offered a card or not. All we know is he didn't
14 complete one.

15 THE COURT: Well, I don't think I'm going
16 to entertain any argument on this.

17 MR. WITTEMAN: One case law.

18 THE COURT: But now I think the matter
19 has shifted because now the contestee is alleging that his
20 vote was illegal, it was illegally cast but you've
21 abandoned that?

22 MR. WITTEMAN: Absolutely.

23 THE COURT: Well, I'm prepared --

24 MR. WITTEMAN: I have a case cite if the
25 Court would think that would be helpful.

1 THE COURT: All right. Let me hear your
2 case cite.

3 MR. WITTEMAN: Case cite is 17 Kansas
4 344, and the gist of it is in elections fairly conducted
5 mistakes of officers cannot disenfranchise electors. Since
6 the earliest days in this state it has been recognized as
7 an appropriate way to construe this type of error.

8 THE COURT: What was that?

9 MR. WITTEMAN: 17 Kansas 344.

10 THE COURT: That's the old Court of
11 Appeals.

12 MR. WITTEMAN: Actually this is the --

13 THE COURT: Not Court of Appeals, 2nd --

14 MR. WITTEMAN: No. This is not Court of
15 Appeals. This is 17 Kansas Report.

16 THE COURT: Okay.

17 MR. WITTEMAN: Supreme Court.

18 MR. MILLER: Your Honor, I need time to
19 read that case, but I'd be willing to bet you that the
20 error on the part of the election official would jump out
21 at you, that, in fact, they committed an overt error, overt
22 and obvious error, that he made some mistake.

23 There is no evidence in these proceedings that an
24 election official made any mistake. It's simply that the
25 card didn't get filled out. The voter is every bit as

1 responsible short of any evidence to the contrary that he's
2 at fault, but let's do reflect on that case when we take a
3 break because I'll bet you that it will come crystal clear
4 through that case just what happened in that situation that
5 does not compare to this one.

6 MR. WITTEMAN: I don't mean to --

7 THE COURT: What's the page number?

8 MR. WITTEMAN: The page number was 344 to
9 349 and the annotation you have in front of you -- I don't
10 in any way mean to state it's an analogous situation but
11 the ruling of law is a mistake made by the officer
12 shouldn't be contributable to disenfranchise the voter.

13 I think the Court can prepare a ruling on the
14 matter of law on the issue if there needs to be more
15 testimony from Mr. -- to bring Mr. Bumgarner back in and
16 ask him if he was offered a card, we can but that is a
17 matter of law for the Court to decide. Then we can apply
18 the facts to it.

19 THE COURT: All right. I'll read the
20 case over the noon hour. We'll reconvene at 1 o'clock.
21 It's 12:15 now. We'll be at recess.

22 (A brief recess was here had from 12:15 to
23 1:00 p.m.)

24 THE COURT: We now all have photocopies.
25 Well, we did have photocopies of Wildman versus Anderson

1 adjacent precedents cited by the contestant in this case,
2 and I believe you wish to speak to that point, counsel?

3 MR. MILLER: Yes, Your Honor. Operating
4 under the old legal theory that we should not have our cake
5 and eat it too, I want to lay out for the Court not in the
6 vacuum of this one particular voter but I do want to at
7 this time based on the evidence that I've heard modify the
8 position that we took prior to receiving the evidence,
9 maintain that posture throughout both the presentation of
10 the contestant's evidence as well as the contestee.

11 And I apologize. I know the Court is confused
12 when at one time I objected to Mr. Bumgarner's vote being
13 considered illegal. I no longer do but it's because it's
14 based on what has been offered as evidence and there are
15 others.

16 I want to make it clear what our position is and
17 I relate to evidence presented on behalf of the contestant
18 to the following people: Hal Bumgarner we believe the
19 evidence indicates and we're appreciative of the case cite
20 because we think the case supports our position. We
21 believe it to be an illegal vote.

22 Also at this time to be the vote of Filomena
23 Garcia, Moddie G. Graham, Russell Keefe, Curtis Richards
24 and Donita Richards and Walter Simmons --

25 THE COURT: Walter Eugene or Eugene

1 Walter?

2 MR. MILLER: Whatever. And we believe
3 that the ballot of Donna Schalk is a legal ballot.

4 THE COURT: Walter Eugene.

5 MR. MILLER: That has not yet been
6 counted, and on that point I think that is a clear example
7 of what we reference as it relates to a technical error
8 because of the case of Donna Schalk. The only thing that
9 prevented her -- from what I can tell from the testimony
10 prevented her vote from being counted was the failure of
11 the judge to actually finish the affidavit. We heard the
12 testimony. We heard the explanation. We think that it was
13 in the category of a technical error because --

14 THE COURT: That's where she signed it
15 M-A and didn't complete filling in her name?

16 MR. MILLER: Her attention was diverted
17 and she didn't finish it.

18 THE COURT: Well now, this is an
19 interesting development, counsel, based upon your
20 stipulation. Well, you are saying you are not going to
21 contest these? You are saying that the vote of Filomena
22 Garcia, Moddie Graham, Russell Keefe, Curtis and Donita
23 Richards and Walter Eugene Simmons were illegal votes that
24 should not have been voted?

25 MR. MILLER: And Hal Bumgarner.

1 THE COURT: And Hal Bumgarner, and Donna
2 Schalk's vote was not counted but it was legally cast and
3 should not count?

4 MR. MILLER: Yes, Your Honor.

5 THE COURT: All right. Let me interrupt
6 you there for just a second.

7 MR. MILLER: May I offer one last piece?

8 THE COURT: All right.

9 MR. MILLER: If you'll review my answer
10 to the amended notice, that's what I said that we would
11 contend. There were not illegal votes that were counted
12 and there were no legal votes that should be counted until
13 such time as that changed and once it did change, we wanted
14 to offer evidence of illegal votes, and again, I said it
15 flippantly but it can't be better categorized as having
16 your cake and eating it, too.

17 My point is be -- needs to be consistent in the
18 application of the law, and that's what we're attempting to
19 do and we're attempting to have that consistency directly
20 related to the testimony as it's presented.

21 THE COURT: All right. Let me interrupt
22 you there, counsel. First of all, let's deal with these
23 issues of Filomena Garcia, Moddie Graham, Russell Keefe,
24 Curtis and Donita Richards and Walter Eugene Simmons. Do
25 you have anything to say to counsel's comments?

1 MR. RUCKER: On those specific points,
2 Your Honor?

3 THE COURT: And Donna Schalk, I'm sorry.

4 MR. RUCKER: And Donna Schalk being
5 legal?

6 THE COURT: But not counted.

7 MR. RUCKER: No.

8 THE COURT: All right.

9 MR. WITTEMAN: I would say one thing in
10 regard to Miss Schalk, that we don't assume that to be a
11 technical error. That was clear. Everything's in place
12 ready to go.

13 THE COURT: Let me make some -- let me
14 stop you right there and make some rulings then on those
15 particular issues on those particular votes.

16 MR. MILLER: Could I say just one more
17 thing as it relates to the case that we just read?

18 THE COURT: I'll give you that
19 opportunity shortly because I'm not prepared to rule on the
20 Bumgarner thing. I want to deal with these other votes
21 first. As the parties and counsel are aware, this Court is
22 required to make findings and to determine the number of
23 legal votes cast. With respect to that, I have heard the
24 admissions now of the contestee and I've heard the
25 testimony presented by the contestant.

1 With respect to Walter Eugene Simmons, he moved
2 from one precinct to another and it was at a period of time
3 greater than 30 days prior to this election. He voted for
4 Shriver. It is the conclusion of this Court that that was
5 not a legal vote. He was not registered in that precinct.

6 With respect to Curtis and Donita Richards --

7 MR. MILLER: Your Honor, could -- I
8 apologize for interrupting. I want to make sure the record
9 is clear. I did not make any stipulations to how the votes
10 were cast.

11 THE COURT: Yes, I understand that, but
12 my findings are based upon the evidence.

13 MR. MILLER: Just so you understand my
14 position.

15 THE COURT: That's right. With respect
16 to Curtis and Donita Richards, the Court will deal with
17 them in a similar fashion. They are husband and wife.
18 Basically they had moved to a new address, did not
19 reregister in the new precinct, both of them voted for
20 Shriver but were not legally entitled to vote and those
21 were not legal votes.

22 With respect to Moddie Graham, this Court
23 concludes that she was not legally entitled to vote but I
24 cannot make a finding of how she voted. Her testimony was
25 that she did not remember. That was her sworn testimony.

1 Now there was some statements from counsel that she had
2 previously told him otherwise. That doesn't persuade me.
3 Lots of times people tell attorneys things but it's a
4 different story when they're on the witness stand and under
5 oath. I cannot make a finding with respect to Moddie
6 Graham, how she voted one way or the other so there should
7 be no deduction to that. I'll simply say that was not a
8 legal vote.

9 Russell Wayne Keefe changed addresses and
10 precincts. Again, he did not reregister. He voted for
11 Shriver, and that was not a legally cast vote.

12 Filomena Garcia was not registered to vote. She
13 was quote "on the inactive list," closed quote, which is to
14 say that under the procedures present in Cowley County
15 election office that was the urge of this but she was not
16 registered. She voted for Shriver. Her vote was counted
17 and it should not have been. I've already ruled about
18 Jacqueline Muhlheim.

19 All right. It is Donna Schalk, Donna Lloyd also
20 known as Donna S-C-H-A-L-K. Now this is a case where the
21 lady voted and her name had changed as a result of the
22 divorce. She filled out an affidavit of change of name as
23 disclosed in Petitioner's Exhibit 1B. She signed it,
24 executed it in front of the election board judge, and Doris
25 Madden clearly testified that she saw Donna Schalk sign

1 that and inadvertently Doris Madden did not complete
2 signing the bottom of the affidavit. She simply wrote
3 Doris and then M-A and didn't complete the last four
4 letters of her name.

5 To me that's clearly substantial compliance with
6 the statute. Donna Schalk did everything that she was
7 required to do. Doris Madden did almost everything she was
8 required to do except finish signing her name, and I think
9 the testimony of Barbara Warren was that this affidavit
10 wasn't sent in with the challenged ballots or it showed up
11 later, but with respect to her ballot, it has been legally
12 cast but has not been counted but this Court will conclude
13 the same, but in order to preserve the anonymity of her
14 vote, I would disclose that to the parties in camera, but
15 however that vote is cast, that vote will be added to the
16 appropriate total.

17 MR. MILLER: Can we do that now at the
18 bench, Your Honor?

19 THE COURT: We can.

20 (The following discussion was held in-camera.)

21 THE COURT: Let the record reflect that
22 the Court is opening Petitioner's Exhibit 1C which is the
23 sealed challenged ballot of Doris Schalk. Doris Schalk?

24 MR. MILLER: Donna.

25 MR. WITTEMAN: Donna, for the record's

1 sake.

2 THE COURT: Let the record reflect that
3 the vote should be counted for Danny P. Jones, Republican.

4 (The in-camera discussion was hereby concluded.)

5 THE COURT: Counsel, you have both seen
6 that ballot and I have made a note for the record.

7 MR. MILLER: We so note for the record.
8 Let's mark it now for the record, Your Honor.

9 MR. MILLER: What is it?

10 (Petitioner's Exhibit No. 1F was marked for
11 identification.)

12 THE COURT: I believe that is all of them
13 that you have stipulated to except you wanted to finish up
14 your argument concerning Mr. Bumgarner.

15 MR. MILLER: I still want to stipulate
16 that's an illegal ballot because I understand the other
17 side's no longer contending that.

18 MR. WITTEMAN: That's exactly right. We
19 believe it's a legal ballot.

20 THE COURT: Okay.

21 MR. MILLER: And Your Honor, I think the
22 case cited by counsel prior to our break is on point but it
23 is on point for the point that I was advancing, not the
24 contestant. In particular the language on Page 349 of that
25 case, the last paragraph, skipping the first line. The

1 critical language in that case as long ago as 1876 the
2 Supreme Court set the course of which I believe should
3 still be applied and that they who voted were legal
4 electors. "They voted in the manner prescribed by law."
5 This is not such a case.

6 THE COURT: Well, the facts of that
7 particular case indicated that there was a creation of a
8 smaller precinct within a larger precinct and at the
9 election court that they had at those particular times I
10 think there were three judges. Two of those judges ruled
11 that none of those votes should be counted because the
12 precinct was not legally constituted and so the Supreme
13 Court reversed that election court saying that the votes
14 should be counted.

15 With respect to Mr. Bumgarner's vote, I'm not yet
16 ready to rule upon that unless, unless you are ready to
17 tell me there is no evidence present on that. The reason
18 why I'm withholding ruling on this is because it seemed
19 like to me before the lunch break, Mr. Miller, you said you
20 were going to present some additional witnesses about that
21 and --

22 MR. MILLER: No.

23 THE COURT: Maybe I misunderstood you.

24 MR. MILLER: Let me -- let me reflect
25 because it's more likely I had forgotten than you

1 misunderstood.

2 THE COURT: Well to be frank, I thought
3 you were going to present evidence whether or not an
4 affidavit had been presented -- not an affidavit but a
5 registration certificate had been presented to him.

6 MR. MILLER: Well, no. I simply said
7 there is no evidence that there was not one presented. We
8 don't know is what I said. It hadn't been established as a
9 fact that the board workers made a mistake. I have no
10 evidence to present.

11 THE COURT: All right. You don't intend
12 to present any evidence on that?

13 MR. MILLER: Right.

14 THE COURT: Then I did misunderstand.

15 MR. WITTEMAN: I think his testimony was
16 clear today and we've already went there. He wasn't on the
17 books and they handed it to him, said here, vote the
18 challenged ballot. He clearly indicated there was nothing
19 else involved in the thing. They didn't hand him any
20 card. He didn't turn it down. He stated what happened at
21 that polling place.

22 THE COURT: Anything further on this
23 point? All right, counsel. Here's how I intend to rule
24 upon this. I do not find that that was a legal vote, but I
25 cannot say how he voted because I have no evidence

1 concerning that. The reason being is the same condition
2 was placed or a very similar condition is placed under
3 anybody attempting to vote who's not within the district
4 under 25-2316c, Subsection B as there was no -- the person
5 in Subsection A who has a change of names.

6 MR. MILLER: Your Honor --

7 THE COURT: An election board in Donna
8 Schalk's case did all that, complied with it except for the
9 minor technical part of filling that out and I think this
10 is a consistent ruling on my part.

11 MR. MILLER: I'm not sure what the ruling
12 is because you ruled in the negative. Are you finding it
13 is an illegal vote? You said you are not able to find --

14 THE COURT: I cannot say how he voted
15 because I have no evidence on that.

16 MR. MILLER: Are you finding that it is
17 an illegal vote?

18 THE COURT: Yes, because he did not fill
19 out the registration at that time because the law states --

20 MR. MILLER: I understood what --

21 THE COURT: I want to make sure.

22 MR. MILLER: -- what you said is that you
23 cannot find it a legal vote, and I took that to mean that
24 you found it was an illegal vote.

25 THE COURT: Because he did not -- because

1 it was -- because it is to be upon the condition that he
2 filled out the registration.

3 MR. MILLER: Just trying to get you to
4 state it as in if you are negative, you are finding that it
5 is an illegal vote.

6 THE COURT: Correct, but I cannot say how
7 he voted. I have no evidence of that. Now, in light of
8 all of that, next witness. Counsel, would you like for me
9 to rule on these nine ballots now?

10 MR. WITTEMAN: If we stipulate, we were
11 going to make some reservations.

12 THE COURT: You were going to stipulate
13 but you never did. You thought there was one you might not
14 stipulate to.

15 MR. WITTEMAN: And we really need to take
16 a look. It's almost a rebuttal issue in regard to those
17 things, Your Honor.

18 THE COURT: Well, I'm that close on
19 ruling on those though (indicating).

20 MR. MILLER: I'm not sure whether he has
21 the luxury of reserving that. It's either -- he's on
22 direct. He needs to advance his position. How can that be
23 reserved as rebuttal?

24 MR. WITTEMAN: It depends in regard to
25 some arguments that I anticipate counsel will argue that

1 will make one of those ballots either relevant or
2 irrelevant depending on what counsel is going to do.

3 THE COURT: What counsel does isn't
4 material. It's whether or not they should be -- whether
5 they should be counted and legally. They are or they are
6 not, and if you got some evidence that they should be
7 counted, let's hear it. If you don't have --

8 MR. MILLER: If I don't present anything,
9 it won't be rebuttal. It will be new evidence and he's not
10 entitled to that.

11 THE COURT: Maybe I just don't understand
12 what you are -- where you are coming from on this. You
13 have been fairly consistent all along that you thought that
14 the three from the 78 District should not count and then
15 the other six shouldn't be counted as well.

16 MR. WITTEMAN: If we can have five
17 minutes, I'll give you an answer, Your Honor, and I don't
18 mean -- I know these proceedings are being lengthened but I
19 can quickly check to see where we're at on that. There is
20 something on my mind.

21 THE COURT: There must be something
22 there, but the ballots are blank, the six of them but I'll
23 grant you that luxury. Were there any other witnesses that
24 you wanted to present?

25 MR. WITTEMAN: It would be on the basis

1 that we bring this witness in now on this issue if, in
2 fact, we care to.

3 THE COURT: Okay.

4 THE COURT: Shall we take a short
5 recess?

6 MR. WITTEMAN: That would be fine, Your
7 Honor. Thank you.

8 (An off-the-record discussion was here had.)

9 THE COURT: Counsel, there was one
10 other -- we can go back on the record now. There was one
11 other that was brought up Tuesday, and that is Edith
12 Dickerson. What was your position with respect to her?
13 That was the lady that --

14 MR. MILLER: I can tell you but I need to
15 sort my mind out.

16 THE COURT: Okay.

17 MR. MILLER: We don't believe -- that
18 ballot has not yet been counted and we don't believe that
19 it should be for several reasons.

20 THE COURT: All right. Well, I'm not
21 going to rule on that.

22 MR. MILLER: It hurt me to be as nice as
23 I have already.

24 THE COURT: All right, counsel. What
25 next?

1 MR. WITTEMAN: The issue was poll workers
2 related to a ballot that may or may not be issued. One of
3 those had a doctor's appointment at 11 o'clock in Wichita
4 as well as the other poll worker. We released them saying
5 be back at 3:00. We cannot present -- we don't know where
6 the information is. I hope we can come back in this Court
7 in five minutes about that. We just don't have it.

8 THE COURT: Is that pertaining to the
9 nine?

10 MR. WITTEMAN: Well, pertaining to one of
11 them.

12 MR. RUCKER: One of the nine?

13 MR. MILLER: Well, can we stipulate to
14 the other eight.

15 MR. WITTEMAN: I think so.

16 MR. MILLER: Let's pull that one out.

17 THE COURT: So with respect to WI 2,
18 WI 3, WI 4, WI 5, WI 6, WI 7, WI 8, WI 9, you are
19 stipulating how?

20 MR. MILLER: For 2 through 9, is that --
21 that they should not be counted for either candidate.

22 MR. WITTEMAN: So stipulated.

23 THE COURT: I think that is a valid
24 stipulation. That clearly exhibits WI 2 is a 78th District
25 ballot and WI 3 is a 78th district and shouldn't be counted

1 in the 79th district. WI 4, 5, 6, 7, 8, and 9 all have
2 marks on the State Representative race next to the place
3 for a write-in but no name was written in. There is no way
4 to ascertain the intention of the voter who cast that vote
5 for whom they voted so that is -- none of those should be
6 counted.

7 MR. MILLER: Your Honor, if I may make a
8 record, we stipulated to those on the basis of K.S.A.
9 25-3002, Subsection (b) (2), Capital B, which expressed --
10 voiced getting the ballot that has a mark in the write-in
11 square only and points of fact. I have a couple cases
12 where they've counted that vote, just those set of
13 circumstances for the candidate closest to it. We
14 stipulated, however, because we think the statute is
15 controlling over those cases outside Kansas jurisdiction.

16 THE COURT: Well, thank you for the
17 stipulation, counsel. I just don't think you can glean the
18 intention of a voter on this.

19 MR. MILLER: No, and I don't intend to
20 but it's relevant as it relates to a later argument about a
21 different ballot. I don't want to misrepresent to the
22 Court or counsel the position we take. We are not taking
23 the position that the intention on those is clear. We're
24 simply saying the statute makes it clear. We don't count
25 or entertain argument.

1 MR. WITTEMAN: Well, perhaps that's the
2 argument we need the Court to make it's ruling on in regard
3 to our stipulation but the voter's intent is on those
4 ballots.

5 THE COURT: Well, I've already seen it.
6 I don't think there is any way you can determine that
7 intent. Well, the ones on the 78 District shouldn't be
8 counted in the 79th District.

9 MR. WITTEMAN: Without evidence.

10 THE COURT: And the others I don't think
11 there is any way you can determine the intent of the voter
12 in that it's just they are blank. There is a mark in that
13 box but there is no name there in writing and that statute
14 does say that as well, but I'm not going to count it. I
15 wouldn't count them and that would be my ruling.

16 MR. MILLER: And maybe feel better that I
17 didn't spend time advancing that argument.

18 THE COURT: Call your next witness.

19 MR. WITTEMAN: Your Honor, with the
20 Court's indulgence in regard to that valid poll worker, we
21 don't have available to see any facts that we need to speak
22 of. In fact, we have no other witnesses to call at this
23 time. Of course, we are reserving two rebuttal issues that
24 will be raised.

25 THE COURT: You are talking about ballot

1 WI 1?

2 MR. WITTEMAN: Yes, which we would
3 perhaps like to present evidence on once the vote is back
4 in.

5 THE COURT: Are you arguing that this
6 should be counted or shouldn't be?

7 MR. WITTEMAN: We have some question in
8 our minds that we cannot resolve until these people are
9 back at 3 o'clock.

10 MR. MILLER: Your Honor, I would have no
11 problem with them reserving evidence on that particular
12 ballot and close -- beyond that exception closing down
13 their case and beginning with mine until their witness is
14 present but for that ballot.

15 THE COURT: All right. Fine. Let's do
16 that, because they won't be back until 3:00 you say and
17 it's just 1:30 now.

18 MR. MILLER: Now, do I understand that
19 with that one exception that contestant has closed on
20 presentation of his evidence?

21 THE COURT: I believe so. That's my
22 understanding.

23 MR. WITTEMAN: (Affirmative head nod.)

24 MR. MILLER: Thank you. May I call my
25 first witness?

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IN THE DISTRICT COURT OF COWLEY COUNTY
STATE OF KANSAS
SITTING IN WINFIELD

DANNY P. JONES,)
)
 Petitioner,)
)
 vs.) Case No. 94 C00201 W
)
 JOE D. SHRIVER,)
)
 Contestee.)

VOLUME III
TRANSCRIPT OF PROCEEDINGS,
taken before the HONORABLE STEPHEN D. HILL, at Winfield,
Kansas, on the 27th and 29th days of December, 1994
at 9:00 a.m. and 10:00 a.m. respectively.

A P P E A R A N C E S:

The Petitioner appeared by his counsel,
Mr. Douglas P. Witteman of Patterson, Nelson, Nolla &
Witteman, L.C., 8100 East 22nd Street North, Building 800,
Suite 102, Wichita, Kansas - 67226; and Eric K. Rucker,
Dickinson County Attorney, PO Box 696, Abilene,
Kansas - 67410.

The Contestee appeared by his counsel,
Mr. Victor W. Miller, Attorney at Law, 700 Southwest
Jackson, Suite 404, Topeka, Kansas - 66603.

1 THE COURT: You may.

2 MR. MILLER: I would call Julie
3 Coldwell.

4 JULIE COLDWELL,
5 of lawful age, having been first duly sworn on her oath to
6 state the truth, and nothing but the truth, testifies as
7 follows:

8 DIRECT EXAMINATION

9 MR. MILLER:

10 Q. Miss Coldwell, would you spell your last name for
11 the Court, please.

12 A. C-O-L-D-W-E-L-L.

13 Q. It's Coldwell with an L, Julie Coldwell?

14 A. Uh-huh.

15 Q. Miss Coldwell, where do you live presently?

16 A. 1520 North Tenth in Arkansas City.

17 Q. And how long have you lived there?

18 A. For exactly one year.

19 Q. Have you ever lived at 314 Virginia in Arkansas
20 City, Kansas?

21 A. Yes.

22 Q. When was that?

23 A. From 1991 to -- through last December.

24 Q. December?

25 THE COURT: That would be December what,

1 '93?

2 THE WITNESS: Uh-huh, yes, sir.

3 MR. MILLER:

4 Q. And during the time frame that you lived at 314
5 Virginia -- first of all, is that a single family
6 residence?

7 A. Uh-huh, yes, sir.

8 Q. During that time frame that you lived there, who
9 else lived at those premises with you, if any?

10 A. My husband and my two children.

11 Q. And what are their names, please?

12 A. My husband's name is Mark Coldwell. My daughter's
13 name is Jessica and my son's name is Conner.

14 Q. Are you familiar with a Phillip Coplen spelled,
15 C-O-P-L-E-N?

16 A. Yes, sir. That's my brother.

17 Q. Does he also go by Brett Coplen?

18 A. Uh-huh.

19 Q. What is his full name if you could, please?

20 A. His full name is Phillip Brett Coplen.

21 Q. During the time that you lived at 314 Virginia, did
22 Mr. Coplen ever live with your family?

23 A. No.

24 MR. MILLER: That is all I have, Your
25 Honor.

1 THE COURT: You may inquire.

2 MR. WITTEMAN: I have no questions.

3 THE COURT: Can this witness be excused?

4 MR. MILLER: Yes, Your Honor.

5 THE COURT: You may stand down. You are
6 excused, that is you are free to go. Call your next
7 witness.

8 MR. MILLER: If we can take a break, I'm
9 going to call Miss Warren. I'm going to have her pull all
10 the packets for the people that I have, and I'll have her
11 do them all right now and we'll hopefully complete her
12 testimony one time through.

13 THE COURT: All right. We'll be in
14 recess then. I might be arranging your exhibits while you
15 are doing that. We'll take a recess of about 10 minutes.
16 We'll reconvene at about ten till 2:00.

17 (A brief recess was here had from 1:40 to 2:00 p.m.)

18 (Contestee's Exhibit Nos. 4, 5, 6, 7, 8, 9, 10,
19 11A-C, 12A-C, 13A-E, 14A-D, 15A-C, 16A-C, 17 and 18
20 were marked for identification.)

21 MR. MILLER: I have a witness en route
22 from Arkansas City that I actually prefer to call. First
23 let me see where we're at on that.

24 (An off-the-record discussion was here had.)

25 MR. MILLER: We'll go ahead and get

1 started, Your Honor, if we could, Your Honor, with her, and
2 I think actually it will go much quicker if we interrupt
3 her testimony when that witness arrives and take her first.

4 THE COURT: That seems to be the
5 procedure followed. I'm sure she's used to it.

6 Ms. Warren, will you come on up, and you are still under
7 oath.

8 MR. MILLER: Why don't we do this,
9 counsel. Would you go through here with me and we'll see
10 what we can stipulate to.

11 MR. WITTEMAN: I'd like to have
12 Miss Warren look at these and indicate where they came from
13 and I'll stipulate.

14 THE COURT: Okay. Simple foundation
15 questions.

16 MR. MILLER: Just want to do that off the
17 record?

18 MR. WITTEMAN: That's fine with me. We
19 can stipulate if he's comfortable with that.

20 THE COURT: You want to step down and go
21 over those briefly with him. We'll go back on the record
22 here in just a few moments.

23 (An off-the-record discussion was here had.)

24 MR. MILLER: On the record, Your Honor.
25 I believe we have a stipulation as to the admission of

1 Contestee's 11A, 11B, 11C, 12A, 12B, 12C, 13 --

2 THE COURT: All right. Stop right
3 there. Is that correct, counsel?

4 MR. WITTEMAN: One moment, please.

5 (An off-the-record discussion was here had.)

6 MR. WITTEMAN: The stipulation we'll make
7 to those documents, Your Honor, as far as foundation
8 purposes is these are documents that have been in the
9 custody and control of the Cowley County election office.

10 THE COURT: All right.

11 MR. MILLER: 13A, 13B, 13C, 13D, 13E.

12 MR. WITTEMAN: So stipulated.

13 THE COURT: Very well.

14 MR. MILLER: 14A, 14B, 14C and 14D.

15 MR. WITTEMAN: So stipulated.

16 MR. MILLER: 15A, 15B and 15C.

17 MR. WITTEMAN: Yes.

18 MR. MILLER: 16A, 16B and 16C.

19 MR. WITTEMAN: So stipulated.

20 MR. MILLER: 17.

21 MR. WITTEMAN: Yes.

22 MR. MILLER: 18.

23 MR. WITTEMAN: Yes.

24 MR. MILLER: All the numbers are
25 associated with Contestee's exhibits.

1 THE COURT: Those will be admitted
2 without further foundation. Of course, relevance and
3 materiality will be upcoming.

4 BARBARA WARREN,
5 having been previously duly sworn, testified further as
6 follows:

7 DIRECT EXAMINATION

8 MR. MILLER:

9 Q. Ms. Warren, I'm going to hand you both Contestee's
10 Exhibit 18, Contestee's 14A, B, C and D, and I'm going to
11 ask you questions related jointly to those exhibits. Would
12 you briefly tell the Court what the items with 14 and
13 associated numbers, what voter those documents relate to?

14 A. Okay. This is the registration card for Kirk
15 Branscum, his challenged ballot envelope and my printout of
16 what we have on the computer currently and looks like the
17 poll book slash registration book for Pleasant Valley.

18 Q. With the documents in front of you, do those
19 documents reflect whether or not Kirk E. Branscum was a
20 registered voter in Cowley County for purposes of the 1994
21 general election?

22 A. Okay. It shows that he is a registered voter and we
23 have him -- yes, it shows he's a registered voter. Is that
24 your question?

25 Q. Yes, ma'am.

1 A. Okay.

2 Q. And where is it that he's registered? What is his
3 registration address based on your previous statement?

4 A. 406 Cedar Lane Drive, Winfield.

5 Q. A voter registered at that address is entitled to
6 vote where?

7 A. In 2 South, ward and precinct.

8 Q. Looking at the poll book that we noted earlier in
9 front of you, would you look at that poll book and tell me
10 what precinct that poll book is for or township?

11 A. Pleasant Valley.

12 Q. Pleasant Valley township?

13 A. Uh-huh.

14 Q. Is there any indication on that document whether or
15 not Mr. Branscum voted at that location or that polling
16 place?

17 A. Okay. He voted a challenged ballot in the Pleasant
18 Valley township.

19 Q. What -- you said he's registered at 2 South?

20 A. Yes, sir.

21 Q. What legislative district is 2 South in, the 78 or
22 the 79?

23 A. 2 South is in the 78th.

24 Q. By a voter receiving a challenged ballot at Pleasant
25 Valley, which legislative district would Mr. Branscum's

1 challenged ballot -- what legislative district would have
2 been on that ballot?

3 MR. WITTEMAN: I'll object unless she has
4 personal knowledge of what ballot was handed to
5 Mr. Branscum.

6 THE COURT: Are you asking about the
7 particular ballot or --

8 MR. MILLER: Well, we've established,
9 Your Honor, that Pleasant Valley is in the 79 District.
10 That's the location where he voted. He is registered in
11 the 78. I guess I need to ask Ms. Warren.

12 THE COURT: Well, I'm not sure you
13 established that 2 South was in the 78. I didn't hear that
14 Pleasant Valley is in the 79 other than from you.

15 MR. MILLER: Let me ask that question.

16 MR. MILLER:

17 Q. What legislative district is Pleasant Valley in,
18 Ms. Warren?

19 A. The 79th.

20 Q. Mr. Branscum upon presenting himself at the Pleasant
21 Valley polling location and receiving a challenged ballot
22 would have received a ballot for which of the two
23 legislative races?

24 A. If he had --

25 MR. WITTEMAN: Once again, the

1 knowledge if she has personal knowledge which ballot he
2 received.

3 THE COURT: She can testify.

4 A. Okay. Repeat the question.

5 MR. MILLER:

6 Q. Which of the legislative districts would he have
7 received a ballot for if he reported to the Pleasant Valley
8 polling place?

9 A. The 79th.

10 Q. Do they have 78th District ballots at the Pleasant
11 Valley polling location?

12 A. No, sir.

13 MR. MILLER: With that, if we could
14 because of her testimony take a few minutes of another
15 witness and I think then we'll return to her.

16 THE COURT: Well, was his vote counted?
17 Is this vote counted?

18 THE WITNESS: Yes, sir.

19 THE COURT: Okay. You may stand down.

20 MR. MILLER: We call Robert Wilson, Your
21 Honor.

22 ROBERT WILSON,
23 of lawful age, having been first duly sworn on his oath to
24 state the truth, and nothing but the truth, testifies as
25 follows:

DIRECT EXAMINATION

1
2 MR. MILLER:

3 Q. You --

4 A. Mr. Wilson, yes, sir.

5 Q. You probably don't have much to do with this
6 courtroom, but for this Court would you state who you are
7 and what you do.

8 A. My name's Robert Wilson. I'm an attorney in
9 Arkansas City.

10 THE COURT: Why wouldn't he have much to
11 do in this Court? Don't they allow Ark City lawyers into
12 Winfield?

13 THE WITNESS: Not if they can prevent us.

14 MR. MILLER: Actually they really don't.

15 MR. MILLER:

16 Q. What did I just hand you, Contestee's 4 through 10?

17 A. Correct, Contestant's 4 through 10.

18 Q. Would you identify each of those documents and as
19 you do, explain to the Court what they are.

20 A. Okay. Contestant's Exhibit 4 is an affidavit
21 executed by Kirk E. Branscum on December 27, 1994. And
22 would you like for me to read the substance of the
23 affidavit?

24 MR. WITTEMAN: Objection. Hearsay as to
25 substance.

1 THE COURT: It's not responsive to my
2 question. He's merely asking you to identify, and no, he
3 didn't ask for any substance.

4 MR. MILLER:

5 Q. Let me ask about that one and about the others. Are
6 you familiar with the execution of what you've identified
7 as an affidavit of Mr. Branscum?

8 A. Yes, I am.

9 Q. Were you present during the time that was executed?

10 A. Yes, I was.

11 Q. Was a notary public present?

12 A. Yes, sir.

13 Q. She attested the fact?

14 A. Yes, sir.

15 Q. Who is she?

16 A. Yes. That is my wife.

17 Q. Where is she employed?

18 A. She's employed here as a court clerk in Cowley
19 County District Court.

20 Q. She was there -- you were there at the same time?

21 A. Correct.

22 Q. Proceeding to the next document.

23 A. Contestant's Exhibit No. 5 is an affidavit executed
24 by Michael E. Dorrell on December 26, 1994.

25 Q. Would the questions I asked you about Mr. Branscum

1 apply also to Mr. Dorrell as to who was present?

2 A. Yes, both myself and my wife who's a notary public
3 was present.

4 Q. Continue, please.

5 A. Contestant's Exhibit No. 6 was an affidavit executed
6 by Penny Dorrell on December 26, 1994.

7 Q. Same questions, same answers?

8 A. Yes.

9 Q. Next, please.

10 A. Contestant's Exhibit No. 7 is an affidavit executed
11 by Mary J. Lenix on December 26, 1994.

12 Q. Would you spell that one for the court reporter,
13 please.

14 A. L-E-N-I-X.

15 Q. Same question, same answers as to the circumstances
16 around the execution?

17 A. Yes.

18 Q. Next document?

19 A. Contestant's Exhibit No. 8 is an affidavit executed
20 by a Phillip Coplen, C-O-P-L-E-N, also known as Brett
21 Coplen on December 25, 1994.

22 Q. Same question, same circumstances surrounding the
23 execution?

24 A. Yes, sir.

25 MR. MILLER: We would move at this time,

1 Your Honor, for the admission of Contestee's 4 through 10.

2 MR. WITTEMAN: Objection.

3 THE COURT: Well, just a second, 9 and
4 10, have they been accepted?

5 MR. MILLER: I stopped too soon. My
6 apologies.

7 MR. MILLER:

8 Q. Please proceed forth. How many have we had?

9 A. Contestant's Exhibit No. 9 is an affidavit executed
10 by Norman, middle initial D., Weigand, W-E-I-G-A-N-D on
11 December 27, 1994.

12 Q. Same questions, same answers to the circumstances
13 surrounding the execution?

14 A. Yes, sir.

15 Q. The next document, please.

16 A. Is an affidavit executed by Gladys Weigand on
17 December 27, 1994.

18 Q. Same questions, same answers regarding the execution
19 of that document?

20 A. Yes, there was one other party present on
21 Contestant's 9 and 10. We had one of our children with us
22 so there was one other person present.

23 Q. A minor?

24 A. Yes, minor.

25 MR. MILLER: Now, at this time, Your

1 Honor, I'd move for the admission of Contestee's
2 Exhibits 4 through 10.

3 THE COURT: You wish --

4 MR. WITTEMAN: Objection, Your Honor.

5 THE COURT: Do you wish to voir dire
6 first?

7 MR. WITTEMAN: Mr. Wilson, as an
8 attorney, did you examine any of these witnesses that are
9 related here on these affidavits?

10 THE WITNESS: I asked questions of them.

11 MR. WITTEMAN: And are the answers to --
12 no, I'll pass on that.

13 At this stage, Your Honor, we simply object to
14 those being hearsay, pure and simple.

15 THE COURT: Counsel, your response?

16 MR. MILLER: K.S.A. 60-460, Subsection K,
17 Your Honor.

18 THE COURT: A well-known exception to the
19 hearsay rule.

20 MR. MILLER: It slipped up on me, and
21 I've yet to meet an attorney who knew about its whereabouts
22 but it's there. I'll let counsel reflect on that point if
23 there is argument.

24 MR. WITTEMAN: There's certainly an
25 argument.

1 THE COURT: What's the argument?

2 MR. WITTEMAN: These are affidavits which
3 in and of themselves have specific exceptions within the
4 hearsay rules and these do not fit, meet that exception in
5 any way, shape or form.

6 THE COURT: How are they deficient?

7 MR. WITTEMAN: They are deficient in the
8 fact that under 60-460 (b) where it says, "Affidavits, to
9 the extent admissible by the statutes of this state."
10 Quite simply, there are several statutes of this state
11 which allow affidavits to come in.

12 60-256 in regard to summary judgment. You can't
13 question affidavits on the basis of hearsay as they are
14 attached thereto. 22-3716 which deals, and I'm just -- an
15 e.g. for example, 22-3716 which deals with relevant written
16 statements in a probation revocation can be brought in
17 under oath. There is no statute that calls for affidavits
18 to be the basis of a trial.

19 Most certainly if it was the trial I have on
20 January 9th, I'd go out -- I've had a private investigator
21 go out and get statements. I'd bring them back in,
22 affidavits. We'd hand them to the jury, give them a couple
23 hours to read them, make closing arguments. We'd be done.
24 That's not how a trial is handled.

25 We've had not had an opportunity to

1 cross-examine. There have been statements made in court by
2 witnesses that were called by the contestant that, in fact,
3 those statements once they were in here varied from what
4 they've been out of court.

5 The opportunity to cross-examine on the basis of
6 their ballots and in that regard just as Mr. Miller has
7 done with his, with the witnesses we presented forward, we
8 don't have that opportunity. It's fundamental fairness at
9 a trial. These are critical issues that are involved in
10 this matter and we should have the opportunity before these
11 affidavits are admitted indeed to have that opportunity to
12 cross-examine.

13 MR. MILLER: Well, counsel misunderstood
14 and I would ask the Court to turn its attention to the
15 section I cited. I'm not offering them as affidavits as an
16 exception to the hearsay rule. I'm offering them as
17 evidence. I don't think they have to even be affidavits.
18 I don't think the statements contained therein even need to
19 be in writing.

20 Mr. Wilson was there. He heard the statements
21 prior to the execution of the affidavit with regard to the
22 exceptions specifically cited by the contestee. The
23 exception to the hearsay rule which we wish to enter these
24 documents is as follows: "Voter's statements. A statement
25 by a voter concerning the voter's qualifications to vote or

1 the fact or content of the voter's vote." No requirement
2 that they be in writing or that they be sworn.

3 It happens that in this case all of these are,
4 and yes, counsel does not have a chance to cross-examine
5 these affidavits, but so what. That's why we have this
6 exception to the hearsay rule. If he wishes to present
7 evidence impeaching the contents of these affidavits, he
8 has every opportunity to do that in rebuttal.

9 THE COURT: Your reply, counsel?

10 MR. WITTEMAN: The reply is simply this,
11 Your Honor. The fact we have not subpoenaed these
12 witnesses is evident and I think the same holds. We have
13 no opportunity to cross-examine these folks and see what,
14 in fact, the depth of their testimony is and any errors
15 that might be made and, in fact, any coaching and/or
16 statements that were made to them that may well have
17 influenced how these affidavits were filled out, any
18 misunderstanding they might have had about their ballots
19 and their votes.

20 MR. MILLER: Each and every one of these
21 people is listed in the contents of the Contestee's amended
22 answer. The names have been given.

23 THE COURT: Answer to the amended
24 notice?

25 MR. MILLER: Yes, sir. And should

1 The only variation was on the Weigand
2 affidavits. There were some information blanks that
3 needed to be filled in on the Weigand affidavits. I
4 proceeded to take the information from Mr. and Mrs.
5 Weigand, filled in the remaining blanks. Then when Mr. and
6 Mrs. Weigand executed it, I had them initial wherever
7 information had been interlined in addition to executing
8 the instrument.

9 Q. Specifically what information was completed by you
10 at the time you spoke with the Weigands?

11 A. On Contestee's Exhibit No. 9, Paragraph 2, I
12 completed the information "1210 North Seventh, Arkansas
13 City" and also the words "approximately two years" from
14 the questions that I asked. I have resided at 1210
15 North Seventh, Arkansas City, Kansas approximately two
16 years was the information I completed on Contestee's
17 Exhibit 9.

18 On Contestee's Exhibit 10 there was no
19 information that I needed to complete in the form. The
20 faxed affidavit that I received had already been inked in
21 but I still had Mrs. Weigand initial it. There was a
22 handwritten entry versus a typed entry.

23 MR. MILLER: No further questions, Your
24 Honor.

25 THE COURT: You may inquire.

1 counsel desire to subpoena them, they had every opportunity
2 to do that and again, he still does on rebuttal.

3 THE COURT: Well, I'm prepared to rule
4 upon this as an issue of law. Perhaps 460 K is a little
5 cited exception to the hearsay rule but it is an exception
6 to the hearsay rule. Exhibits 4 through 10 will be
7 admitted pursuant to that subsection.

8 MR. MILLER:

9 Q. Now Mr. Wilson, with regard to each of these
10 affidavits and the statements contained therein, did you
11 review with any of the affiants the contents of the
12 statement prior to their signing these sworn statements?

13 A. Yes, I did.

14 Q. What was the nature of your review of the contents
15 with the affiants? And if it differs from affiant to
16 affiant, please specify.

17 A. I used basically the same process with each one.
18 Initially identified myself, identified my wife as a notary
19 public, who I was and then confirmed with them that they
20 had voted in the prior election, where they resided at, how
21 long they have lived at that residence as well as which
22 candidate they responded they voted for, had them review
23 the instrument to make sure that it was typed correctly to
24 conform with that information and they thereupon executed
25 it before the notary public.

CROSS-EXAMINATION

1
2 MR. WITTEMAN:

3 Q. Mr. Wilson, did you know all of these people
4 personally?

5 A. I knew several of them personally.

6 Q. Who would those have been?

7 A. Miss Lenix and I was acquainted with who Mr. and
8 Mrs. Weigand were. It had been a number of years but once
9 I saw Mr. Weigand, I recognized him as a junior high
10 counselor.

11 Q. What about Mrs. Weigand, did you know her?

12 A. No, I did not.

13 Q. Okay. You spoke with the Weigands and Mrs. Lenix,
14 right?

15 A. Correct.

16 Q. Anybody else?

17 A. Those are the only ones I was personally acquainted
18 with or knew.

19 Q. You were available when these affidavits were
20 given? You stated that you were there when all of these
21 affidavits were filled out?

22 A. Executed?

23 Q. Yes.

24 A. Yes.

25 Q. What identification did you look at in regard to

1 these other individuals that you didn't know?

2 A. My wife had people produce driver's licenses.

3 Q. And is your wife available today?

4 A. She's at work.

5 Q. All right.

6 A. Probably have to talk to the administrative judge if
7 she's available but I assume, yes.

8 Q. Did you personally look at any of the driver's
9 licenses?

10 A. Yes. I was standing next to my wife. Normally the
11 affiant handed me their driver's license and I presented it
12 on to my wife because she was usually seated or standing
13 somewhere with a writing surface.

14 Q. In regard to Mr. Michael Dorrell, did you -- can you
15 with personal knowledge state that you looked at that
16 driver's license and it said Michael Dorrell when he handed
17 it to you?

18 A. Yes. It was a Kansas photo ID as well as had his
19 picture on it.

20 Q. What did Mr. Dorrell look like based on that
21 photograph?

22 A. I'd guess his age fortyish, you know, around 40,
23 somewhere in there, five ten, little bit taller -- I'm
24 about five seven. He was a little bit taller than I am.

25 Q. You can tell he was five ten looking at that

1 photograph?

2 A. I was looking at him.

3 Q. Based on that person standing in front of you, he
4 was five ten?

5 A. The person standing before me had their same
6 photograph on the driver's license and the driver's license
7 purportedly belonged to Michael Dorrell.

8 Q. Had the same photograph as what?

9 A. Mr. Dorrell's photograph was on his driver's
10 license.

11 Q. All right. What about Mrs. Dorrell?

12 A. Mrs. Dorrell's photograph was on her driver's
13 license.

14 Q. What color is her hair on that driver's license?

15 A. I do not recall, sir.

16 Q. Was it the same as the hair as whoever the woman was
17 you talked to?

18 A. Yes, it was.

19 Q. Which is what color?

20 A. I do not recall what color of hair Mrs. Dorrell had.

21 Q. Okay. What was the hair color of Mr. Dorrell?

22 A. I believe it was a light color, maybe something
23 similar to mine as I recall.

24 Q. Mr. Coplen, how old did his driver's license
25 indicate that he was?

1 A. I do not know what his driver's license showed as
2 the age.

3 Q. You looked at his driver's license?

4 A. Yes, looked at his driver's license but I did not
5 check his age.

6 Q. What was the address on the driver's license?

7 A. I do not recall.

8 Q. Middle initial on the driver's license?

9 A. B.

10 Q. Was it a current valid driver's license, did you
11 check?

12 A. I did not check expiration date.

13 Q. Okay. Did you check on any of these?

14 A. No, I did not. I did not feel that the expiration
15 date on their driver's license was pertinent to having them
16 identify themselves as the affiant.

17 Q. Looking at this affidavit, it indicates that
18 Mr. Branscum, which I'm referring to now Contestee's
19 Exhibit 4, is of lawful age. Did you glean his age from
20 that, from his driver's license?

21 A. No, I didn't.

22 Q. Do you have any personal knowledge of whether he was
23 of lawful age?

24 A. He appeared to be of lawful age.

25 Q. Was his age checked by either yourself or your wife?

1 A. I did not check his age. I couldn't tell you
2 whether the wife looked at the driver's license to
3 determine his date of birth and what his present
4 chronological age would be.

5 Q. Okay. After these affidavits were executed, did --
6 well, now let me ask you this: At the point your wife as
7 you've indicated looked at the driver's license and that
8 sort of thing, was that before they filled out the
9 affidavits, before they executed them?

10 A. All of the affidavits were already filled out except
11 the one Weigand affidavit. They were all pretyped.

12 Q. Very well. Prior to the execution of these
13 documents, to your knowledge, did your wife check the
14 driver's license prior to that?

15 A. As I recall the procedure involved, after I went
16 through with the affiants the contents of the affidavit,
17 they signed them in my wife's presence. They gave the
18 affidavit to her. She got out her notarial seal, asked
19 them for identification, they presented identification,
20 then she proceeded to notarize the affidavits.

21 Q. Did you check the signatures on the driver's license
22 to see if they matched these identifications?

23 A. No, I didn't.

24 Q. Did your wife?

25 A. You'd have to ask her.

1 Q. Far as you know, she didn't check them?

2 MR. MILLER: Object. He just said the
3 information lies within his wife's knowledge and he can't
4 testify any further than that.

5 THE COURT: It's cross-examination. Go
6 ahead. He can answer if you --

7 A. Could you restate the question?

8 MR. WITTEMAN:

9 Q. I'll do my best.

10 MR. MILLER: I think it was asked and
11 answered was my objection.

12 MR. WITTEMAN: What -- and if I can
13 recall. I don't like to do this, but what was my
14 question?

15 (The requested portion of the record was
16 read by the reporter.)

17 A. I have no idea.

18 MR. WITTEMAN:

19 Q. Okay. Does your wife when you practice serve as a
20 notary for you on regular occasions?

21 A. No, she does not work in my office.

22 Q. Okay. Has your wife served as a notary for you at
23 any time before?

24 A. No, sir.

25 Q. Has your wife to your own personal knowledge ever

1 notarized a document absent the execution of the persons
2 executing it?

3 A. I have no knowledge if she has or has not. I think
4 you need to understand, I office in Arkansas City, have my
5 own office staff. My wife's employed here at Court. The
6 only reason my wife went as a notary was I couldn't raise
7 my secretary on the night of Christmas and the other
8 evenings to notarize the affidavits and my wife was
9 available to do so.

10 Q. Did you ask any of these individuals or do you have
11 any personal knowledge of any of these individuals whether
12 they would be available to attend trial today?

13 A. No, I did not inquire at to whether they would or
14 would not be available. Other than -- let me correct
15 that. In reference to one, I believe a Mr. Coplen, it's my
16 understanding that he and his family were getting ready to
17 leave for Texas the following day because that's one we
18 executed on the evening of the 25th at a motel where they
19 were staying at in Winfield, and I believe they were
20 leaving in the morning to go out of town to Texas for the
21 remainder of the holidays, so whether he was unavailable on
22 the basis of that, I do not know.

23 Q. All right. In conjunction -- I think you spoke --
24 with having talked with these individuals, did you have any
25 discussions with them about their qualifications to vote?

1 A. No, went over the information set forth in the
2 affidavit.

3 Q. Have you personally verified any of the addresses as
4 being correct that were on this affidavit, on any of these
5 affidavits?

6 A. All of the affidavits were executed at the addresses
7 set out in the affidavits except the Coplen affidavit which
8 was executed at the Comfort Inn south of Winfield.

9 MR. WITTEMAN: I don't have any further
10 questions of this witness.

11 THE COURT: Redirect?

12 MR. MILLER: No, Your Honor.

13 THE COURT: Can this witness be excused?

14 MR. MILLER: Yes, Your Honor.

15 MR. WITTEMAN: I might need to recall
16 him, Your Honor.

17 THE COURT: All right. You can step down
18 but you can't leave yet.

19 THE WITNESS: Okay. Are we sequestered?

20 THE COURT: Yes.

21 MR. MILLER: Barbara Warren.

22 THE COURT: Ms. Warren, come back
23 forward.

24 THE COURT: You are still under oath.

25 BARBARA WARREN,

1 having been previously duly sworn, testified further as
2 follows:

3 DIRECT EXAMINATION

4 MR. MILLER:

5 Q. Barbara, I'm going to hand you what's marked
6 Contestee's Exhibit 4 which has been admitted as an
7 affidavit of Kirk E. Branscum. There is information on
8 that affidavit relative to the residence of Mr. Branscum.
9 Is it consistent or inconsistent with the records that you
10 have in the Cowley County election office? And to the
11 degree it might be inconsistent, would you please
12 elaborate.

13 A. Okay. Everything on the affidavit appears to be
14 just what we've got on his registration card.

15 Q. And as we were interrupted on your previous
16 testimony as I recall and if I haven't gotten confused, all
17 indicators from the election office are that Mr. Branscum
18 is a duly registered voter in 2 South?

19 A. In 2 South.

20 Q. In Winfield which is in the 78th legislative
21 District?

22 A. Correct.

23 Q. But that he voted at Pleasant Valley township
24 polling location and received a 79th District ballot?

25 A. Correct.

1 Q. Are there any circumstances that you are aware of
2 that would make him a legal voter to vote in the 79th
3 District?

4 MR. WITTEMAN: Objection. Calling for a
5 legal conclusion, province of the Court.

6 MR. MILLER: I asked the circumstances,
7 Your Honor.

8 MR. WITTEMAN: And defining legal.

9 THE COURT: Rephrase.

10 MR. MILLER:

11 Q. Was he qualified to vote in the 79th District?

12 A. He's a legal voter in the 78th.

13 Q. Thank you. I'm going to hand you a number of
14 exhibits that are marked 11A, 11B, 11C, 12A, 12B, 12C, 17.
15 I'm first going to ask you -- well, tell me, please, what
16 17 is.

17 A. 17 is the registration slash poll book for 3 South.

18 Q. Now, explain to the Court the voting at 3 South, and
19 as I understand it, that is a colocation at that location
20 or copoll at that location, two precincts voting at the
21 same place.

22 A. Okay. We have two precincts voting at the Elks
23 Lodge. 3 South votes there and they are the 79th
24 Representative District, and then the third ward votes at
25 the same location and they are 78th District.

1 Q. Now, do you they maintain separate poll books or
2 registration lists, however we might enumerate it, for each
3 of those two precincts even though they vote at the same
4 location?

5 A. Yes, sir.

6 Q. And what is the process for a voter receiving a
7 ballot if they live or if they receive a ballot for the
8 precinct 3S or 3 South? I understand that stands for 3
9 South.

10 A. Yes, sir.

11 Q. What's the process for a voter reporting to the
12 polls to receive a ballot for all races relative to that
13 precinct?

14 A. The election board has two different ballots. They
15 have a 3 South ballot and they have a third ward ballot.
16 All the people in the 3 South ballot, she verifies them on
17 the 3 South list. They sign the 3 South list. Then she
18 knows to give them the 3 South ballot.

19 Q. Did Michael Dorrell sign the 3 South list?

20 A. He signed as a challenged ballot.

21 Q. Did Penny Dorrell sign the 3 South list?

22 A. Well, okay. This is -- okay. In this registration
23 book, there was the third ward list and then the 3 South
24 list was underneath the third ward list. The instructions
25 given to the board workers by Mr. Gaston and myself were

1 that if they had any challenged voters that they were to --
2 and their name was not on the list to take the blank spaces
3 afforded them at the back of the book and write the names
4 in, so what this sheet -- I would assume these are third
5 ward. These addresses here are all third ward people.

6 Q. Well, I think you'll find they are not, but how do
7 you come up with that assumption?

8 A. The addresses tell me that these are all third ward
9 people, not 3 South.

10 Q. Actually the Dorrell's are marked --

11 A. 2 West.

12 Q. -- back in the election records as 2 West voters,
13 are they not?

14 A. I'll rephrase that then. I know these are not
15 3 South voters. I'll rephrase that. So what she has done
16 is written in the -- taken the first space available at the
17 back of the book and written the challenged ballot names on
18 the first available space at the back of the book which is
19 what she was instructed to do. Not necessarily did these
20 people receive 79th ballots.

21 Q. Let me hand you what's been marked as Contestee's 6
22 and Contestee's 5 and ask you to read Paragraph 4 on each
23 of those affidavits.

24 A. This is Michael Dorrell and Penny Dorrell at that
25 location -- oh, gosh. In the race for State Representative

1 I have voted for the Republican, Danny P. Jones and Penny
2 Dorrell voted for the 79 candidate also, and Danny P.
3 Jones, so she did give them 79 ballots.

4 Q. That's certainly possible because both sets of
5 ballots were at the polling place?

6 A. Right.

7 Q. Were the Dorrell's -- based on the records of the
8 Cowley County election office, were the Dorrell's qualified
9 voters to vote either in the third ward or 3 South, either
10 one?

11 A. We have them precincted -- okay. We have Michael
12 precincted in 2 West at 1222 Millington. Penny Dorrell is
13 precincted in the fourth ward at 921 Stewart Street.

14 Q. What legislative districts are either of those?

15 A. Both of them are the 78th.

16 Q. Thank you.

17 THE COURT: I take it from those exhibits
18 their votes were challenged but counted?

19 MR. MILLER: All this group that relate
20 to Exhibits 4 through 10, counsel correct me if I'm wrong,
21 as I understand it, have all been challenged, were all
22 counted and are part of the existing counts.

23 MR. MILLER:

24 Q. Now Ms. Warren, I'm going to hand you what's been
25 marked Contestee's 16A, 16B and 16C, and briefly tell the

1 Court what those documents relate to, please.

2 A. Okay. This is the challenged ballot envelope for
3 Mary Lenix.

4 Q. Why was she challenged?

5 A. Well, the envelope says moved from 1102 West Kansas
6 to Lakewynd's Estates in October of '93 and parenthesis, she
7 was told to just vote at the old precinct.

8 Q. Would you tell me which precinct each of those two
9 addresses corresponds to, please.

10 A. 1102 West Kansas is 4E. Lakewynd's Estates is a very
11 broad statement.

12 Q. Is it 4E?

13 A. Well, I can't -- just a minute here. Lakewynd's I
14 have in my precinct book is part of East Creswell.

15 Q. So the information on the challenged -- well, let me
16 look at the affidavit that Miss Lenix signed. Based on the
17 information there relating to her current residence at
18 Lakewynd's Estates, which precinct would she be a registered
19 voter in if she was duly registered?

20 A. Well, she has clearly moved and not reregistered.
21 Well, let's see. We've got an affidavit here.

22 Q. What's that affidavit say as to when she moved?

23 A. Former precinct which stipulates a 30-day time
24 frame, she has to move within that time frame. She says
25 she moved October 8th of '93.

1 Q. Which would be over a year?

2 A. Over a year, yeah.

3 Q. That's what she says on the affidavit --

4 A. That's what --

5 Q. Let me finish. That's what she said on the
6 affidavit when she voted that she moved in October of '93?

7 A. Uh-huh.

8 Q. Isn't that also what she filled out when she
9 moved -- when she filled out Contestee's 7?

10 A. Yes, sir.

11 Q. And in that case she would have been required to
12 reregister?

13 A. Yes, sir.

14 Q. Prior to any vote in the '94 general election?

15 A. Yes, sir.

16 Q. She cast a ballot, it was challenged but it's been
17 counted?

18 A. (Affirmative head nod.)

19 THE COURT: You have to say yes or no.

20 A. Yes, sir.

21 Q. Ms. Warren, I've handed you Contestee's 15A, 15B and
22 15C. Can you tell what these documents -- who those
23 documents relate to?

24 A. This is the registration card for Phillip Coplen,
25 his challenged ballot envelope and my screen print from the

1 computer from the active file.

2 Q. Look closely if you would at the registration card
3 of Phillip Coplen. How did he sign that card?

4 A. Brett.

5 Q. Brett Coplen?

6 A. Uh-huh.

7 Q. Yes or no?

8 A. Yes, sir.

9 Q. What did Mr. Coplen -- can you tell what Mr. Coplen
10 indicated when he went to vote in the general election of
11 this year?

12 A. The explanation on the challenged ballot envelope
13 reads moved 11-17 to 203 1/2 East Madison from 1314
14 Virginia.

15 Q. Now, would he have written that information in
16 there?

17 A. Instructions are given to the judge for the judge to
18 fill this out. I have no idea if she did or he did.

19 Q. He did. The language that you cited, there is no
20 signature contributed to the language?

21 A. There is no signature of the board or the judge or
22 anything.

23 Q. Let me hand you what's been marked Contestee's No. 8
24 and ask you to read, if you would for the Court,
25 Paragraph 2 as well as the date the document was executed.

1 A. Paragraph 2 reads I have resided at 203 1/2 East
2 Madison, Arkansas City, Kansas approximately four months.

3 Q. That's inconsistent with the language on the
4 challenged envelope, isn't it?

5 A. Yes.

6 Q. Now, assuming for the moment that the language on
7 the challenged ballot was correct, let's just assume for
8 the moment that it is correct, that he moved on 11-7 to
9 this address of 203 1/2 East Madison, would that be enough
10 for his ballot to be counted when he cast it in that
11 particular precinct?

12 A. There is no affidavit here. If he has moved, he
13 would not be a valid voter unless he had registered again
14 at the new -- at 203 1/2 East Madison or there'd be an
15 affidavit found and there is not an affidavit here.

16 Q. Now, am I mistaken or isn't the law that if you move
17 within 30 days, you must go to your old precinct?

18 A. Yes, sir.

19 Q. Is this his old precinct, the one he went to?

20 A. He went to his former precinct, yes, sir.

21 Q. Okay. Now, if I were to tell you that earlier
22 testimony indicated that he never or at least since
23 between -- at least on September 25th, 1992 that if
24 previous testimony was that he did not live at 314 Virginia
25 on that date --

1 A. On this day?

2 Q. On that day, September 25, 1992, would he be -- at
3 that time when he filled out that card, would he be
4 properly registered if he didn't live there?

5 A. Well, there is an affidavit at the bottom of the
6 card.

7 Q. No, ma'am. Listen.

8 A. He is affirming to --

9 Q. I understand that.

10 A. -- living there.

11 Q. Listen to the question. If the testimony earlier
12 and we were to believe the testimony earlier that he didn't
13 even live at --

14 A. 314 --

15 Q. -- 314 Virginia, Arkansas City, Kansas on
16 September 25th, 1992, would he have been a duly registered
17 voter even then?

18 A. If he has never lived at 314 Virginia?

19 Q. Well, if he didn't live there. I want to focus just
20 on September 25, 1992 when he completed the card. If he
21 didn't reside there on that date, can he register to vote
22 at that address?

23 A. No.

24 Q. His vote as I understand was cast at what precinct?

25 A. 1C.

1 Q. Is that in the 79 District?

2 A. Ark City, yes.

3 Q. Did he cast a challenged ballot?

4 A. Yes.

5 Q. And has that ballot now been counted?

6 A. Yes. 12-29-94, election hearing.

7 Q. I'm handing you Contestee's Exhibits 13A, 13B and
8 13C and 13D and 13E. Would you tell me briefly what those
9 exhibits relate to.

10 A. It's the registration card for Norman Weigand and
11 also voter his challenged ballot envelope and then the
12 challenged ballot envelope for Gladys and her screen print
13 from the computer for Gladys Weigand.

14 Q. Mr. Weigand's registration card appears that he was
15 registered on October 15th, 1974 at the address of 315
16 North Second, Arkansas City, Kansas, is that accurate?

17 A. Yes, sir.

18 Q. And that would place him as a registered voter
19 where, what precinct?

20 A. The card says 4A.

21 Q. Now if I were to tell you that Mr. Weigand has lived
22 at 1210 North Seventh, Arkansas City, for approximately two
23 years and that's where he lived on the day that the general
24 election was held, would he be a duly registered voter to
25 cast a vote in 4D?

1 A. No, he couldn't be.

2 Q. That is, in fact, where he cast his vote on that
3 day, correct?

4 A. 4D, he cast it at 4D.

5 Q. Would he be a duly registered voter if he had lived
6 at 1210 North Seventh, Arkansas City for the last two
7 years? Based on the records of the election office, would
8 he be a duly registered voter eligible to vote anywhere?

9 A. Not as long as he had this registration card and
10 it's not been changed.

11 Q. What about Mrs. Weigand, where do you show her as
12 being registered?

13 A. I show her registered at 315 North A, Arkansas City.

14 Q. Did you misspeak? Do you mean 315 --

15 A. 315 North Second, sorry.

16 Q. Just as Mr. Weigand?

17 A. Yes, sir.

18 Q. If her affidavit indicates that she had lived at
19 that same address for approximately two years as well,
20 would the same be true about her eligibility to vote in the
21 November election?

22 A. She wouldn't be a valid voter unless she had changed
23 her registration.

24 Q. Do you have any evidence in the Cowley County
25 clerk's office that either one of these individuals changed

1 their registration to the address 1210 North Seventh,
2 Arkansas City, Kansas?

3 A. No, sir. We searched the card file. We had several
4 people looking for these cards, searching every place it
5 possibly could be.

6 Q. Did Mr. Witteman offer to help you in that endeavor?

7 A. He wasn't around the night we were doing it.

8 Q. But he would be welcome to conduct just such a
9 search, would he not?

10 A. Yes.

11 MR. MILLER: That is all I have for this
12 witness at this time, Your Honor.

13 THE COURT: You may inquire.

14 CROSS-EXAMINATION

15 MR. WITTEMAN:

16 Q. Ms. Warren, I just have a few questions. I believe
17 looking through the Dorrell's ballot you indicated they are
18 registered in the 78th District, and then I believe
19 Mr. Miller handed you their affidavits where it said they
20 voted for Danny Jones.

21 A. Uh-huh.

22 Q. Your response was oh, my goodness or something to
23 that effect.

24 A. Uh-huh.

25 Q. They must have voted 79 ballots.

1 A. Uh-huh, uh-huh.

2 Q. Do you have any personal knowledge as to whether
3 they actually had a 79th ballot?

4 A. No, sir, I don't.

5 Q. Do you have any knowledge whether, in fact, that
6 affidavit that you base that statement on is accurate and
7 their recollection is clear on that affidavit?

8 A. No, sir, I don't.

9 Q. So you really don't know whether they voted a 79th
10 ballot?

11 A. That is correct.

12 Q. I believe there were some questions asked in regard
13 to Mr. Coplen and it was postured we've had testimony about
14 how on September 25th, 1994 he didn't live at the 314
15 Virginia address, and I believe Mr. Miller asked you that
16 if we were to believe that testimony whether he would be
17 properly registered if that, in fact, was true and your
18 response was -- is that too long a question?

19 MR. MILLER: Excuse me, counsel.

20 A. Could I have the document in front of me?

21 Q. Sure.

22 MR. MILLER: Could you rephrase?

23 MR. WITTEMAN: I will.

24 A. Thank you. That will help.

25 MR. WITTEMAN:

1 Q. Indicated there on the registration card marked
2 Contestant's 15A I think is the address of 314 Virginia, is
3 that correct?

4 A. Yes, sir. Yes, sir.

5 Q. Mr. Miller indicated that if the witness had gave
6 testimony or the testimony heard was that on September 25th
7 of 1992 Mr. Coplen didn't live at 314 Virginia. Do you
8 recall that?

9 A. As of September?

10 Q. Yes.

11 A. Yes, sir.

12 Q. Now, what's the date of that registration card?

13 A. September 25th, 1992.

14 Q. Well, let me ask this: If we weren't going to
15 believe that testimony, that he didn't live there on
16 September 25th of 1992, if we didn't believe that testimony
17 and, in fact, that's where he lived as he signed and
18 executed that card, then would he have been properly
19 registered on that date?

20 A. He was an active voter. It was on the active file
21 so yes, he would be a proper voter.

22 MR. MILLER: When you say that date, you
23 mean September 25th, 1992?

24 MR. WITTEMAN: Yes. That is all the
25 questions I have right now. Thank you.

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THE COURT: Redirect?

MR. MILLER: I don't believe so, Your Honor.

THE COURT: All right. You may stand down. I don't think you are free to go yet, but call your next witness.

MR. MILLER: May we take a short break?

THE COURT: Are your witnesses returned yet?

MR. WITTEMAN: Yes, they have.

THE COURT: Did you want to call them now?

MR. RUCKER: It is not ripe, I don't believe.

MR. MILLER: Well, the agreement was, Your Honor, I agreed that when they came back, I would defer to them to call their last witness.

MR. RUCKER: Fine.

THE COURT: You want to speak to them?

MR. RUCKER: If we could, Your Honor.

THE COURT: All right. We'll take a short recess of about 10 minutes.

(A brief recess was here had from 3:00 to 3:17 p.m.)

THE COURT: Well, where are we at in the scheme of things, counsel? I think during the recess you

1 talked to your --

2 MR. WITTEMAN: We are ready to present
3 that evidence.

4 THE COURT: All right. Well, you want to
5 bring them forward or one of them?

6 MR. RUCKER: Yes. We have kept them in
7 sequestration.

8 MR. MILLER: I think direct testimony on
9 this witness will be limited to that one write-in ballot
10 that we held out. That was the only limitation or that was
11 the limitation was to extending the direct testimony.

12 THE COURT: WI 1 I think.

13 MR. WITTEMAN: Your Honor, at this time
14 she's also being offered -- there has been testimony put on
15 and she'd be rebuttal testimony. We would be glad to put
16 it all on in the end that would dispute Mr. Miller's case.

17 THE COURT: Concerning what particular
18 issue?

19 MR. WITTEMAN: Regarding the 3 Ward and
20 the 3 South issues that were raised concerning the 78th
21 District ballot.

22 MR. RUCKER: This is the poll worker of 3
23 South.

24 MR. MILLER: Let's not begin with
25 rebuttal. I want to make sure we're done with direct. I

1 want to make sure the only direct is for that write-in
2 ballot.

3 THE COURT: Well, for the sake of the
4 witness, is there any reason we can't have all the evidence
5 at one time instead of recalling her?

6 MR. MILLER: No. My issue relates to the
7 proper presentation of evidence. I'm very close to being
8 done with our case completely so it will not be that much
9 time in between. I want to make sure we're done with their
10 case, and I did extend to them the opportunity as a
11 convenience to the witness to retain evidence directly on
12 that one ballot, that one ballot only. Certainly if they
13 want to raise rebuttal testimony, he may. I'm not
14 objecting, but it's too early to be offering rebuttal
15 evidence because I'm not done.

16 MR. WITTEMAN: Your Honor, it would be
17 our view we would agree with the Court if we could get the
18 witnesses up at one time and do everything together. I
19 don't see any difference doing it all at once. That's what
20 we'd rather do. We're going to put her on as rebuttal at
21 the end of his case as counsel suggested. We'll just take
22 care of it at that time.

23 MR. RUCKER: We have other witnesses,
24 Your Honor.

25 MR. MILLER: That's why I'm not going to

1 release her until I've heard all the rebuttal witnesses so
2 she's going to be tied up regardless.

3 THE COURT: Well, all right. If that's
4 the case then, ma'am, you'll have to wait. Call your next
5 witness then.

6 MR. MILLER: Well, I thought we were
7 going to complete their case.

8 THE COURT: No. If they are going to
9 call her as a rebuttal witness, you go ahead and present
10 your evidence.

11 MR. MILLER: That's fine, but I want --
12 they have not completed their direct examination and they
13 said they reserve the right to ask questions on their chief
14 case, case in chief on that one write-in ballot, and I want
15 to make sure we're done with their case in chief and that's
16 why they reserved their right to do that and that alone,
17 and if they are waiving any case in chief at this point, if
18 they are done, that's fine.

19 THE COURT: I don't think he waived
20 anything. I think they want to as an accomodation to the
21 witness have her testify all at one time instead of call
22 her and let her go and then call her back.

23 MR. MILLER: Well, that's fine, Your
24 Honor. I would not have agreed at the time they rested
25 save for this ballot. Had they done that, had I known that

1 was going to be the case --

2 THE COURT: I note your objection.
3 You'll have to wait outside.

4 MS. ATHEARN: Okay.

5 THE COURT: Call your next witness then.

6 MR. MILLER: I said I wouldn't do this,
7 but I'm going to have to. I need to call Barbara Warren
8 back.

9 THE COURT: You are still under oath.

10 (Contestee's Exhibit Nos. 19 and 20 were marked
11 for identification.)

12 REDIRECT EXAMINATION

13 MR. MILLER:

14 Q. Ms. Warren, I'm going to hand you what's marked
15 Contestee's 19 and ask if you recognize that document.

16 A. Yes, sir.

17 Q. What is that?

18 A. That's a sign that's in the election supplies for
19 each polling area.

20 Q. And what are the election workers to do with that
21 sign?

22 A. Make sure that it is posted.

23 Q. Contestee's 20, do you recognize that document?

24 A. Yes, sir.

25 Q. What is that?

1 A. That's the instructions to voters sign also to be
2 posted.

3 Q. Thank you.

4 MR. MILLER: We ask for the introduction
5 of Contestee's 19 and 20, Your Honor.

6 THE COURT: Any objection?

7 MR. WITTEMAN: Which one was 19?

8 THE COURT: (Indicating.)

9 MR. WITTEMAN: No objection.

10 THE COURT: 19 and 20 will be admitted.

11 MR. MILLER:

12 Q. Barbara, or excuse me, Ms. Warren, we've already
13 introduced resolution ballot 3, excuse me, RB 3. I'll call
14 your attention to the race for State Representative. Do
15 you see the markings?

16 A. Yes, sir.

17 Q. Given the markings on that ballot and the
18 instructions to the voters, what is the proper procedure
19 when a ballot is so marked for the voter?

20 A. To return it to the election board workers to
21 receive another ballot.

22 Q. Now, as I understand it, there are two acceptable
23 ways of marking the ballot. One is by blackening, one is
24 by indicating a cross, is that correct?

25 A. The instructions say to blacken the oval.

1 Q. In fact, there is two --

2 MR. WITTEMAN: Your Honor, we would
3 stipulate to the instructions speaking for themselves as
4 well as any law that they are based on.

5 MR. MILLER: My question wasn't going to
6 relate to the instructions.

7 THE COURT: All right. Proceed.

8 MR. MILLER:

9 Q. There are two ovals actually blackened in the race
10 for State Representative, are there not?

11 A. Yes.

12 Q. Including one with an X?

13 A. Yes, sir.

14 MR. MILLER: That is all I have, Your
15 Honor.

16 THE COURT: Cross-examination?

17 MR. WITTEMAN: No.

18 THE COURT: You may step down again.

19 MR. MILLER: Well, I meant that is all I
20 had on that issue.

21 THE COURT: Don't leave then.

22 MR. MILLER: But I think I'm done
23 altogether with her and everybody.

24 THE COURT: You may step down.

25 THE COURT: Does the Contestee rest?

1 MR. MILLER: Very uncomfortably, yes, I
2 do.

3 THE COURT: All right. Now, counsel, I
4 didn't catch the name of the lady that was in here before.
5 You want to call her back now?

6 MR. WITTEMAN: Mrs. Athearn.

7 THE COURT: As I understand it, this
8 relates to testimony, rebuttal testimony and testimony as
9 it relates to this one ballot?

10 MR. WITTEMAN: Uh-huh.

11 THE COURT: Thank you, ma'am.

12 DONNA JEAN ATHEARN,
13 of lawful age, having been first duly sworn on her oath to
14 state the truth, and nothing but the truth, testifies as
15 follows:

16 DIRECT EXAMINATION

17 MR. RUCKER:

18 Q. Donna, I'm Eric Rucker, and you and I had the
19 opportunity to at least talk on the telephone before today,
20 is that not accurate?

21 A. Uh-huh, yes.

22 Q. Donna, if you would, would you state your full name
23 and your address.

24 A. Donna Jean Athearn, 1209 Mansfield here in Winfield.

25 Q. And Donna, you have had the opportunity to work as a

1 poll worker. Would you tell the Court how long you've had
2 the opportunity to work as a poll worker at elections?

3 A. Well, I did the primary and then the regular
4 election just -- this is my first year.

5 Q. All right. And who was your partner that you worked
6 with?

7 A. Virginia Boyd.

8 Q. All right. And how many members total were there on
9 your board?

10 A. Just two.

11 Q. Just the two. All right. Now, at your two-person
12 board, did you serve simply one precinct or did you serve
13 two?

14 A. Two.

15 Q. All right. And would you inform the Court which
16 precinct you served?

17 A. 3W, third ward, 87 -- no 78, and the other one is
18 A3 -- 3A and it's 79.

19 Q. Okay. For the sake of simplicity perhaps maybe we
20 can say that's the third precinct --

21 A. Yes.

22 Q. -- was the 78th District, and the 3 South precinct
23 was the 79?

24 A. Uh-huh.

25 Q. So this was a split precinct election for you as far

1 as the legislature is concerned, would that be fair?

2 A. Yes.

3 Q. All right. On election day, November 8th, as you
4 were serving as the poll worker at 3 and 3 South on this
5 two-member board, what were your primary responsibilities?

6 A. I passed out the ballots or gave them out and then
7 put them in the buckets or whatever you want to call it.

8 MR. MILLER: Your Honor --

9 MR. RUCKER: I'll take care of it.

10 MR. MILLER: Could we --

11 MR. RUCKER: Could you, please --

12 MR. RUCKER:

13 Q. It's very difficult --

14 MR. MILLER: Your Honor --

15 MR. RUCKER: Let me anticipate.

16 MR. RUCKER:

17 Q. It's very, very difficult for everyone to hear with
18 your hand to the mouth.

19 MR. RUCKER: And if wasn't counsel's
20 objection, you can state something else.

21 MR. MILLER: I just wanted her to speak
22 up. I didn't mind her hand.

23 MR. RUCKER:

24 Q. Your testimony was that you took care of the
25 ballots, is that correct?

1 A. Yes.

2 Q. That left what responsibilities to your partner?

3 A. She got the signatures and called names out and told
4 me whether it was 78 or 79.

5 Q. And her name?

6 A. Virginia Boyd.

7 Q. Virginia Boyd, and she is here subject to
8 cross-examination as well, is she not?

9 A. Yes, she's out there now.

10 Q. Out in the hallway. All right. Now, as it was your
11 responsibility to hand out the ballots, what special
12 precautions did you take, ma'am, to make absolutely certain
13 that you did not give 78 District ballots to 79th voters
14 and 79th District voters 78 ballots?

15 A. Well, the 78 was at the front of the book and 79
16 were in the back of the book and you more or less could
17 tell what was going on, and she told me each time so that
18 way we knew what we were doing.

19 Q. Okay. Were you careful?

20 A. Very because it was my first time. I didn't want to
21 goof up.

22 Q. All right. Did you, to your knowledge, hand any
23 78 District voter a 79 ballot?

24 A. Not that I know of.

25 Q. Did you hand any 79th District voter a 78 ballot?

1 A. Nope, not that I know of.

2 Q. All right. How certain are you about that?

3 A. Well, we rechecked them all. We recounted them
4 all. They all come out what they were supposed to come out
5 to so --

6 Q. So you felt comfortable?

7 A. Yes. I thought we did a real good job, and like I
8 said, I was very careful.

9 Q. All right. You didn't do any of the writing in the
10 poll books that day, did you, ma'am?

11 A. No.

12 Q. All right.

13 MR. RUCKER: Then I'm finished with this
14 particular witness. I'll call Miss Boyd.

15 THE COURT: Okay. You may inquire,
16 counsel.

17 MR. RUCKER: Oh, excuse me. I'm sorry.

18 MR. MILLER: Let's make sure we're on the
19 same track here. Is that the testimony also relating to
20 the write-in?

21 MR. RUCKER: Yes, it was.

22 CROSS-EXAMINATION

23 MR. MILLER:

24 Q. Ma'am, are you familiar with who the candidates were
25 this year for the respective legislative races, 78th

1 District and 79?

2 A. Jones and Shriver. Jones was one of them and the
3 other one is the man there. I know because his picture's
4 been in the paper.

5 Q. Mr. Shriver?

6 A. Shriver.

7 Q. Do you know which legislative race they were running
8 for, 78 or 79?

9 A. Ninth.

10 Q. 79th. And do you remember who the candidates were
11 in the 78 District?

12 A. No, I couldn't tell you.

13 Q. Let me hand you what's been called Contestee's
14 Exhibits 5 and 6, and if I told you that those individuals
15 that have signed those affidavits voted at your polling
16 place, what would you tell me about which ballot you gave
17 them, whether it was a 78th or 79?

18 A. Well --

19 Q. Let me call your attention to --

20 A. Well, 1222 Millington, he shouldn't have been in our
21 district because he was on the other side.

22 MR. RUCKER: Your Honor, this goes beyond
23 the scope of direct examination.

24 THE COURT: I'll permit it due to --

25 THE WITNESS: It will be a challenged

1 ballot.

2 MR. RUCKER: I'm sorry. I didn't
3 understand the nature of your ruling.

4 THE COURT: I'll permit that. You were
5 going to call her and she'll present testimony on that and
6 you didn't have a chance to present it. I'll permit it.

7 MR. MILLER:

8 Q. Let me call your attention to Paragraph 4 on each of
9 those affidavits and let you have a chance to read that one
10 sentence.

11 A. He voted for Danny Jones.

12 Q. What would that tell you about whether that
13 particular voter had a 78th District ballot or the 79 that
14 we're speaking of today?

15 A. I don't know. I don't remember this man voting.

16 Q. By --

17 A. Did he say he voted at our place?

18 Q. Well, if the testimony was that he did vote at your
19 precinct location --

20 THE COURT: What are those exhibit
21 numbers?

22 A. It doesn't say where he voted at. It just says he
23 voted but it doesn't say he voted at our place.

24 MR. MILLER: Contestee's No. 5 and 6,
25 Your Honor.

1 MR. MILLER:

2 Q. Listen to me closely.

3 A. Okay.

4 Q. This is a lawyer trying to ask a lawyer question so
5 bear with me. If we assumed that the two people here, if
6 we assumed they did vote at your polling place --

7 A. We would have gave them a 78 because the 79 are
8 mostly all around the outskirts of town.

9 Q. Notwithstanding their statement that he voted for
10 Danny Jones?

11 MR. RUCKER: Objection, Your Honor.

12 Again -- and counsel has been good about holding his
13 objections to a minimum. I want to as well. I guess what
14 I would say, Your Honor, is that he's asking for
15 speculation on the part of the witness. I don't know that
16 this particular witness is capable of offering this sort of
17 speculation and answer to the speculation he's attempting
18 to retrieve. She has no specific knowledge. You know
19 about what it is that he is trying to elicit. Speculation
20 is the objection.

21 MR. MILLER: Well, she may not have any
22 knowledge. That's what I'm acquiring about.

23 THE COURT: Do you have any recollection
24 of these two?

25 THE WITNESS: No, I've never -- huh-uh.

1 If we did -- if he did come to us, he couldn't have voted
2 for Danny Jones because we didn't give him a 79. We would
3 have give him a 78 because he lives in the city, and it
4 would have been a challenged ballot because this isn't the
5 right address to where people come normally, but if he did
6 come to us --

7 THE COURT: Check both affidavits.

8 THE WITNESS: Like I say, it doesn't say
9 where he went to. He could have went anyplace in town.

10 MR. MILLER:

11 Q. Aren't both the precincts that you work for, aren't
12 they both in the city?

13 A. Yes.

14 Q. City of Winfield?

15 A. Yes.

16 MR. MILLER: That is all I have, Your
17 Honor.

18 THE COURT: Can this witness be excused?

19 MR. MILLER: Yes, Your Honor.

20 MR. RUCKER: Hold on for just a moment,
21 please. I have just one question, Your Honor.

22 REDIRECT EXAMINATION

23 MR. RUCKER:

24 Q. So if they came to you, your testimony is that --
25 and they were from 3 South, you gave them a 79 ballot?

1 A. No. They were not from 3 South because the address
2 is Millington which is on the other side of town and we
3 would have had a challenged ballot and that would be the
4 only thing and he would have had a 78.

5 Q. That's exactly what I thought you would say. Okay.

6 MR. RUCKER: No further questions. They
7 were in the 78. That's the point.

8 THE COURT: You may step down.

9 THE WITNESS: Okay.

10 THE COURT: Thank you, and you are
11 excused. Call your next witness.

12 MR. RUCKER: Virginia Boyd.

13 VIRGINIA B. BOYD,
14 of lawful age, having been first duly sworn on her oath to
15 state the truth, and nothing but the truth, testifies as
16 follows: Swear impair

17 DIRECT EXAMINATION

18 MR. RUCKER:

19 Q. If you would, state your full name for the Court.

20 A. Virginia Baker Boyd.

21 Q. Miss Boyd, if you would, your address, ma'am.

22 A. 1315 Mansfield in Winfield.

23 Q. Thank you. Did you participate as a poll worker in
24 the 1994 general election that we just held in November?

25 A. Yes, I did.

1 Q. All right. And what were your duties and
2 responsibilities as a poll worker at that election?

3 A. I was presiding judge and it was my job to check the
4 poll books to be sure people were registered to vote and
5 have them sign the poll book.

6 Q. Let's talk a little bit about the poll book,
7 Virginia, if we could, because first of all, you actually
8 had the opportunity to serve two precincts, did you not?

9 A. Yes, I did.

10 Q. Would you state for the Court which two precincts
11 you served?

12 A. It was the third ward and what they call 3 South
13 which was the 79, 78 and 79 --

14 Q. All right.

15 A. -- districts.

16 Q. If I indicated to you that I was a voter from
17 precinct 3 --

18 A. Uh-huh.

19 Q. -- which legislative district would I have been in,
20 if you can recall?

21 A. 78.

22 Q. All right. And if I was from 3 South, which would I
23 have been in?

24 A. 79.

25 Q. Yes, ma'am. Now as it relates specifically to

1 challenged ballots --

2 A. Uh-huh.

3 Q. -- there were a number of individuals that were
4 challenged that day, were there not?

5 A. I can't recall definitely, but I think there were
6 only three.

7 Q. All right. But there were several?

8 A. Yes.

9 Q. Is that correct?

10 A. Yes, uh-huh.

11 Q. Far as the placement of those names on the
12 registration books --

13 A. Uh-huh.

14 Q. -- were 3 and 3A's registration books separate or
15 were they together?

16 A. There were in one folder.

17 Q. All right. And where did you place the challenged
18 voters? Go ahead, ma'am.

19 A. I was told to put the challenged voters in the back
20 of the book.

21 Q. All right.

22 A. So I put them in back of the 3 South. I realized
23 later that I should have put the ones that were from in
24 town which would have been 78 in back of that section but I
25 didn't.

1 Q. All right. Do you know whether there were any
2 challenged voters from the third precinct?

3 A. Yes, that's where they were, the three. I did not
4 have any from the 3 South.

5 Q. All right.

6 MR. RUCKER: No further questions.

7 CROSS-EXAMINATION

8 MR. MILLER:

9 Q. Miss Boyd, who told you to put the names in the back
10 of the book?

11 A. That was told to us as a group when we had our
12 training for the election board.

13 Q. Who told you that?

14 A. I can't remember whether it was Mr. Gaston or his
15 assistant.

16 Q. Who would -- in referring to when you say his
17 assistant, Barbara Warren?

18 A. Uh-huh.

19 Q. If I told you that she indicated earlier it was
20 Mr. Gaston that said that, would there be any reason for
21 you to doubt that?

22 A. Not a bit.

23 Q. As I understand it, you didn't hand the ballots out,
24 it was the other --

25 A. No.

1 Q. It was Mrs. Athearn that did that?

2 A. Uh-huh.

3 Q. You have to answer yes or no.

4 A. Oh, excuse me. No, I did not. It was Mrs. Athearn.

5 Q. You did not do that?

6 A. No.

7 MR. MILLER: Thank you.

8 MR. RUCKER: Just one follow-up.

9 REDIRECT EXAMINATION

10 MR. RUCKER:

11 Q. But you did pay attention to whether the right
12 ballots were being issued to the appropriate people?

13 A. Yes.

14 Q. Did you see any inappropriate -- did you see
15 Miss Donna do anything inappropriate as far as handing
16 ballots to the wrong people?

17 A. No, I did not.

18 MR. RUCKER: No further questions.

19 THE COURT: Could I see the poll book?

20 MR. MILLER: Yes, sir.

21 THE COURT: Proceed counsel.

22 RECROSS-EXAMINATION

23 MR. MILLER:

24 Q. Miss Boyd, you paid close attention you indicated?

25 A. I tried to. We were very busy.

1 Q. Just a few minutes ago you told me things were very
2 hectic that day?

3 A. Yes.

4 Q. That was Mrs. Boyd's first time working at polls?

5 A. No, she had worked before.

6 Q. She indicated a moment ago I thought -- I
7 misunderstood perhaps, but I thought a moment ago when she
8 testified she said this was her first time.

9 THE COURT: No. She worked in the
10 primary.

11 A. Yeah, there. She worked at the primary and then at
12 the general. These were the first.

13 MR. MILLER:

14 Q. Those were her first two times?

15 A. Yes, uh-huh.

16 Q. She worked with you in the primary?

17 A. Yes.

18 Q. At this location?

19 A. Yes.

20 Q. And was it difficult trying to run the polling
21 station for two polls, try to keep track of which ballots
22 are given to each of the voters, to ensure they were given
23 the appropriate ballot? Is that difficult?

24 A. No, it wasn't really difficult. It was more a
25 matter of noticing. I mean, I was sitting here, the voter

1 signed the poll book and she was handing out right here. I
2 mean, there was not a big long distance or an obstacle
3 (indicating throughout).

4 Q. Do you remember two people, last name Dorrell, that
5 voted that day?

6 MR. RUCKER: Objection, Your Honor. I
7 raise again specifically beyond the scope of redirect
8 examination.

9 MR. MILLER: Well, I suppose I can wait
10 and recall her myself.

11 THE COURT: That's true. He could do
12 that.

13 MR. RUCKER: That would be fine.

14 THE COURT: Well, rather than go through
15 that, you may ask the question now.

16 MR. MILLER: Thank you, Your Honor.

17 MR. MILLER:

18 Q. Miss Boyd, do you remember two people voting that
19 day by the last name of Dorrell?

20 A. I don't remember the name. Was their address on
21 Millington?

22 Q. Well, pardon me, but just let me ask the questions.

23 A. Oh, I'm sorry.

24 Q. Do you remember them?

25 A. I don't remember names.

1 Q. Do you remember a couple people then on Millington?

2 A. Yes.

3 Q. Okay. What happened with those people who lived on
4 Millington?

5 A. Their names were not in the book, but we have been
6 told many times and I think it's a policy every place, if
7 somebody comes in and wants to vote, you give them a
8 challenged ballot.

9 Q. Now when you say not in the book, did you check --

10 A. In the poll book.

11 Q. Let me finish, please. Did you check both
12 precincts?

13 A. Yes.

14 Q. They were not on either of the precinct lists?

15 A. That's right.

16 Q. Thank you.

17 THE COURT: You may inquire.

18 MR. RUCKER: No further questions, Your
19 Honor.

20 THE COURT: Before you step down, ma'am,
21 I'm going to hand you an exhibit marked Contestee's
22 Exhibit 17. I want to call your attention to the back page
23 of that. If you will, examine that, please. You'll have
24 to turn it over.

25 THE WITNESS: Uh-huh.

1 THE COURT: You'll see some handwritten
2 names.

3 THE WITNESS: Uh-huh.

4 THE COURT: You have to say yes or no,
5 ma'am.

6 THE WITNESS: Yes.

7 THE COURT: All right. Who wrote those
8 names on that document?

9 THE WITNESS: I did.

10 THE COURT: All right. That is your
11 handwriting?

12 THE WITNESS: That is my handwriting.

13 THE COURT: What was your reason for
14 doing so?

15 THE WITNESS: I was supposed to.

16 THE COURT: Okay. But why did you do
17 it?

18 THE WITNESS: Well, they were challenged
19 votes and you were supposed to and I was supposed to write
20 them down.

21 THE COURT: All right. And whose
22 signatures appear to the side?

23 THE WITNESS: The voting -- the people
24 that were voting.

25 THE COURT: And they signed that document

1 in your presence?

2 THE WITNESS: Yes.

3 THE COURT: So I understand it correctly,
4 those two people, and I'm talking about Michael Dorrell and
5 Penny Dorrell that have an address listed on Millington
6 Street, voted?

7 THE WITNESS: Yes, challenged votes.

8 THE COURT: Challenged votes. Then you
9 sealed the -- well, what happened? What did you do then?

10 THE WITNESS: Well, when a vote is
11 challenged, it's placed in a challenged envelope and on the
12 outside of the envelope you write why they were challenged
13 and seal the envelope.

14 THE COURT: And then send that over with
15 the election supplies?

16 THE WITNESS: Yes.

17 THE COURT: And where do you return it
18 to?

19 THE WITNESS: To the courthouse.

20 THE COURT: Thank you. That's all I
21 have. You may inquire.

22 MR. RUCKER: As a point of clarification
23 to the Court is what happened here were both of the
24 precincts were, in fact, together and, in fact, if a person
25 were just to look, you would think that all of the

1 challenged ballots were just in one precinct.

2 MR. MILLER: Well, Your Honor, could we
3 save that for argument? Are we through with the witness?

4 THE COURT: I'm not entirely sure. I
5 am.

6 MR. RUCKER: I just want to make certain
7 the Court understood that they put down regardless of where
8 the individuals voted, they were all put at one place on
9 the poll books.

10 THE COURT: Is that correct?

11 THE WITNESS: Yes. However, I did not
12 have any challenged votes from 3 South.

13 MR. RUCKER: And yet at the back of the 3
14 South poll books, Your Honor, are where the voters are, and
15 you understand --

16 THE COURT: I understand.

17 MR. RUCKER: -- the significance of
18 that? All right. Thank you.

19 THE COURT: 3 South being in the 79th
20 District?

21 THE WITNESS: Yes.

22 MR. RUCKER: And all of the individuals
23 listed were in 78 or in precinct 3.

24 THE COURT: You may step down. Unless
25 there is any other inquiry, you may step down.

1 THE WITNESS: Thank you.

2 THE COURT: And you are excused, that is
3 you are free to go. Call your next witness.

4 MR. RUCKER: Yes, Your Honor. I would
5 call to the stand Penny Dorrell.

6 PENNY DORRELL,
7 of lawful age, having been first duly sworn on her oath to
8 state the truth, and nothing but the truth, testifies as
9 follows:

10 DIRECT EXAMINATION

11 MR. WITTEMAN:

12 Q. Miss Dorrell, for the record would you state your
13 name and address, please.

14 A. Penny Dorrell, 1222 Millington, Winfield, Kansas.

15 MR. MILLER: Your Honor --

16 THE COURT: You need to speak into the
17 microphone.

18 THE WITNESS: Okay.

19 THE COURT: Late in the day, these
20 attorneys are having a hard time hearing people.

21 MR. MILLER: The old ones are, Your
22 Honor.

23 THE COURT: Proceed.

24 MR. WITTEMAN:

25 Q. Ms. Dorrell, do you recall on November 8th of this

1 year participating in the election, the general election?

2 A. Uh-huh, yes.

3 Q. And where is it that you cast your vote?

4 A. The Elks Club building.

5 Q. Okay. I want to hand you what's been previously
6 marked and admitted into evidence as an affidavit which has
7 been marked as Contestee's Exhibit 6. Would you take a
8 look at that. Is that your signature on that affidavit?

9 A. Yes.

10 Q. Okay. If you would, please, if you would, tell
11 us where you were when that affidavit was executed,
12 Miss Dorrell.

13 A. At home.

14 Q. At your home?

15 A. Uh-huh.

16 Q. At 1222 Millington?

17 A. Right.

18 Q. Who all was present when that affidavit was
19 executed?

20 A. That I knew, my husband and a notary public and I
21 don't remember his name.

22 Q. Was it a Mr. Wilson? Did he represent himself as an
23 attorney?

24 A. Right, from Ark City.

25 Q. Attorney in Ark City?

1 A. Uh-huh.

2 Q. All right. What date did you execute that
3 affidavit?

4 A. Monday the 21st. Is that right, 21st?

5 Q. Now it states on that affidavit I believe an
6 indication thereon that in the race for State
7 Representative you voted for the Republican, Danny Jones.
8 Isn't that what it says?

9 A. Uh-huh.

10 MR. MILLER: Your Honor, I'm still having
11 difficulty.

12 THE COURT: You'll have to say yes or no
13 since we're making a record of this.

14 THE WITNESS: Yes.

15 THE COURT: Thank you.

16 MR. WITTEMAN:

17 Q. Okay. Now prior to filling out and executing that
18 affidavit, were you asked any questions by Mr. Wilson?

19 A. He asked if we remembered who we voted for and when
20 he asked me, I said I voted Republican. Then I didn't
21 remember the names, so I asked which one was the Republican
22 and which was Democrat and so --

23 Q. What did Mr. Wilson respond to you?

24 A. He told me which was which and told me that's the
25 one I voted for.

1 Q. He told you that?

2 A. Well, he told me which was which and I said that
3 must be the one I voted for.

4 Q. Okay. Let's go back to November 8th when you
5 actually cast your ballot. Well, in the State
6 Representative race did you go to the polls with the
7 intention, with the intention of voting for Danny Jones?

8 A. No.

9 Q. Did you have his name in mind?

10 A. No.

11 Q. No, you did not?

12 A. We're really not that familiar with the different
13 ones for locally. We haven't lived here. It had been
14 about a year, a little over a year so --

15 Q. Well, I want to ask you, do you recall -- when you
16 voted your ballot, do you specifically recall seeing the
17 name of Joe Shriver on that ballot anywhere?

18 A. No.

19 Q. Do you specifically recall seeing the name of Danny
20 Jones on that ballot anywhere?

21 A. No.

22 Q. Do you specifically recall seeing the name of Greta
23 Goodwin on that ballot anywhere?

24 A. No.

25 Q. Okay. Do you specifically recall marking -- looking

1 at the name Danny Jones and marking the ballot, the oval
2 next to his name?

3 A. No, I don't.

4 Q. No recollection of that?

5 A. No.

6 Q. Okay. Well, you indicated that you voted
7 Republican, is that correct?

8 A. Right.

9 Q. Well, let me ask you, if you came -- if you came to
10 a race on that ballot wherein there was no Republican
11 candidate listed in that race, would you have marked the
12 Democrat's name?

13 A. No.

14 Q. Would you have voted that race at all if there was
15 no --

16 A. No.

17 Q. -- no Republican on that?

18 A. No, not if I was told.

19 Q. I'm sorry?

20 A. Not if I was told whether it was or not. If I
21 didn't have a Republican or Democrat, I would skip over
22 that one.

23 Q. You would skip over that one. Now well, it says in
24 your affidavit there that you voted for Danny Jones. Do
25 you know that for a fact to be true that you cast a mark

1 next to Danny Jones' name?

2 A. No, no.

3 Q. Okay.

4 A. I assume at the time there was one ballot, that was
5 it, so if it said he was Republican, that's who I would
6 have voted for.

7 Q. All right. If his name wasn't on that ballot at all
8 that you voted, then you didn't vote for Danny Jones, is
9 that correct?

10 A. Right.

11 Q. All right. Well, let's look specifically at that
12 affidavit then. Assuming that there was no Mr. Jones on
13 the ballot you voted, can you tell this Court with any
14 certainty whatsoever that you voted for Danny Jones?

15 A. No.

16 Q. If, in fact, Mr. Wilson, the attorney, hadn't
17 indicated to you the names of -- well, let me ask this:
18 Did Mr. Wilson ask you whether you voted for Greta Goodwin?

19 A. No, I don't think so.

20 MR. MILLER: Your Honor, I would ask if
21 we could admonish counsel to try to hold his head still.
22 He may not realize it, but he's answering the question
23 himself by --

24 THE COURT: Well, you should ask the
25 questions from the lectern anyway, counsel.

1 MR. WITTEMAN: I apologize, Your Honor.
2 It's habit.

3 THE COURT: And with respect to the head
4 shaking --

5 MR. WITTEMAN: Very well.

6 THE COURT: -- try to refrain.

7 MR. WITTEMAN:

8 Q. Did Mr. Wilson ask you if you recall voting for
9 Greta Goodwin?

10 A. No.

11 Q. Okay.

12 A. He didn't start out asking -- he just asked, you
13 know, who we voted for and I said I didn't remember, that
14 it was Republican all the way through so --

15 Q. Okay. Well then, your testimony is if, in fact,
16 Miss Goodwin was a Democrat and was on that ballot and
17 there was no Republican candidate available in the State
18 Representative race on the ballot you voted that you
19 wouldn't have -- wouldn't have cast a vote in that race?

20 A. Right.

21 Q. You would have skipped over it?

22 A. Right.

23 Q. Okay. Well, we need to talk about the only who
24 names that Mr. Wilson brought up as a possibility of two
25 you voted for in the State Representative race was Joe

1 Shriver, a Democrat and Danny Jones was a Republican, is
2 that correct?

3 A. No. I asked who was the Republican and he gave me
4 the name. I said that must have been it.

5 Q. He didn't mention to you that the 78 District ballot
6 didn't include a Republican on it for that race?

7 A. No.

8 Q. Okay. One final question. Are you certain that you
9 voted for Danny Jones at all?

10 A. No, not for sure.

11 Q. Okay.

12 CROSS-EXAMINATION

13 MR. MILLER:

14 Q. Miss Dorrell, when Mr. Wilson's wife -- that was his
15 wife -- when they arrived at your house for signing the
16 affidavit --

17 A. Uh-huh.

18 Q. -- was that the first time you had discussed with
19 anyone who you had voted for in the race for 79th District
20 State Representative?

21 A. Outside of my husband you mean?

22 Q. Whoever.

23 A. Anyone calling, yes.

24 Q. Did anyone call you on the telephone and ask you who
25 you voted for?

1 A. They called, they called before they came over. He
2 called.

3 Q. Do you remember the person on the phone identifying
4 themselves as an attorney by the name of Vic Miller?

5 A. I believe so.

6 Q. And did you not volunteer that you voted for Danny
7 Jones without any mention of whether he was Republican or
8 Democrat, do you remember that?

9 A. No. I don't think I did, no.

10 Q. Do you remember being on the telephone at the same
11 time your husband was on the telephone?

12 A. Right.

13 Q. You had two extensions? You --

14 A. Right.

15 Q. You don't recall volunteering that information?

16 A. Well, he probably -- my husband might have said it
17 and I said I did too because we both voted Republican.

18 Q. But you don't recall one way or the other?

19 A. No, not really.

20 Q. Now when the conversation was complete, do you
21 recall a request that you sign an affidavit that confirmed
22 all of that information?

23 A. Yes.

24 Q. And you said you would?

25 A. Right.

1 Q. Did you discuss after you hung up the phone with
2 your husband how you cast your vote for State
3 Representative?

4 A. We talked, yeah. I guess we talked about it.

5 Q. Did you understand the significance of signing the
6 affidavit under oath as to what you did and did not do?

7 A. Well --

8 Q. What do you do, Mrs. Dorrell? Are you a housewife?
9 Do you work?

10 A. That and part-time I clean houses.

11 Q. Have you -- what's your level of education?

12 A. High school.

13 Q. Here locally?

14 A. Udall.

15 Q. Do you own your own home?

16 A. Yes.

17 MR. MILLER: I don't -- that is all, Your
18 Honor.

19 THE COURT: Can this witness be excused?

20 MR. MILLER: Yes, Your Honor.

21 THE COURT: All right. You may step
22 down. You are excused. Call your next witness.

23 MR. RUCKER: Michael Dorrell.

24 MICHAEL DORRELL,
25 of lawful age, having been first duly sworn on his oath to

1 state the truth, and nothing but the truth, testifies as
2 follows:

3 DIRECT EXAMINATION

4 MR. WITTEMAN:

5 Q. Mr. Dorrell, for the record, would you state your
6 name and your address.

7 A. Mike Dorrell, 1222 Millington of Winfield.

8 Q. And as a matter of courtesy, I'll tell you my name
9 is Doug Witteman. I'm an attorney for Danny Jones in the
10 court today. Mr. Dorrell, what's your occupation?

11 A. Pastor.

12 Q. How long have you been a pastor, sir?

13 A. Fifteen years.

14 Q. Okay. And you live in the Winfield area. What,
15 pastor a church?

16 A. Uh-huh.

17 Q. Which church is that?

18 A. Sure Foundation Fellowship.

19 Q. Okay. Now Mr. Dorrell, do you recall -- I'd like to
20 take you back to November 8th, 1994, the general election
21 on that date.

22 A. Uh-huh.

23 Q. Did you participate in that election?

24 A. Uh-huh.

25 THE COURT: Mr. Dorrell, you are going to

1 have to say yes or no.

2 A. Yes, yes.

3 Q. Where did you go to vote?

4 A. Elks -- I think it is the Elks Lodge.

5 Q. Okay. And you cast a vote that day?

6 A. Yes.

7 Q. Okay. Mr. Dorrell, I'm going to hand you what's
8 been previously marked and admitted into evidence as
9 Contestee's Exhibit 5. Could you identify that for us,
10 please, sir.

11 A. (Affirmative head nod.)

12 Q. What is it?

13 A. What is it?

14 Q. Yes.

15 A. It's an affidavit that I signed.

16 Q. What was the date you executed that affidavit, sir?

17 A. Says --

18 Q. Is on it there?

19 A. Yeah, the 26th day of December.

20 Q. Day after Christmas?

21 A. Yeah, seemed like it. I couldn't remember if it was
22 the day before or the day after.

23 Q. All right. Where were you at when you executed that
24 affidavit?

25 A. In my home.

1 Q. Who all was present at the time you executed that
2 affidavit?

3 A. I believe my wife and some notary and another
4 attorney from Ark City.

5 Q. All right. You don't see him in the courtroom
6 today, do you?

7 A. No, he's not.

8 Q. Have you seen him before?

9 A. Yeah. He's out in the hall.

10 Q. Does Robert Wilson ring a bell? Does that
11 attorney's name --

12 A. Not in particular.

13 Q. Okay. Well, I believe we've established on that day
14 that they also brought another affidavit for your wife to
15 execute.

16 A. Uh-huh.

17 Q. Did you -- did you talk with these people in your
18 home and then did they type up or print the affidavit after
19 you talked with them?

20 A. No. It was already printed up.

21 Q. They had already brought it to you?

22 A. Yeah. It was already brought to me.

23 Q. Okay. Do you recall having any conversations with
24 Mr. Wilson, the attorney, from Ark City?

25 A. Yeah. If I'm getting it right, he's the one that

1 called us before they came up, yeah.

2 Q. Okay.

3 A. And talked with us.

4 Q. Well, what did -- what did Mr. Wilson ask you?
5 Well, perhaps let me back up there. How many calls from
6 attorneys did you get before they came up with this
7 affidavit?

8 A. I think just this one.

9 Q. Okay.

10 A. Far as I know.

11 Q. Could, in fact, the person that called you instead
12 of being Mr. Wilson perhaps be Mr. Miller? I know you
13 didn't see anybody over the phone, but might it have been
14 him instead that called you?

15 A. Well, it was the same person that came up. Let me
16 put it that way.

17 Q. Well, if Mr. Miller had a conversation with your
18 wife in regard to that and indicated he had a telephone
19 conference with her in which you were a party to that
20 telephone conference -- was it a conference call you were
21 involved in in talking with this attorney? I shouldn't say
22 conference call, but you and your wife involved on
23 different lines? If you don't remember, that is quite
24 fine.

25 A. Yeah, I don't remember that now. I know talking to

1 I believe this other gentleman, we both, you know, we both
2 talked to him for sure. I know that.

3 Q. Okay. All right. Well, let's go back to
4 Mr. Wilson. On the day they came to your home with that
5 affidavit that had already been typed up and ready for your
6 signature, do you recall Mr. Wilson asking who you voted
7 for as State Representative?

8 A. Yes.

9 Q. What was your response?

10 A. I don't know.

11 Q. Okay.

12 A. My response was I didn't know. I know I voted
13 Republican but I wasn't sure who it was.

14 Q. Okay. Did you -- or do you recall your wife asking
15 who the Republican candidate was?

16 A. Yes, I did.

17 Q. He told you it was Danny Jones?

18 A. He told us it was Mr. Jones.

19 Q. Danny Jones?

20 A. Yeah.

21 Q. Do you recall Mr. Wilson indicating to you -- do you
22 recall him mentioning the name of Greta Goodwin?

23 A. Huh-uh.

24 Q. Do you recall him mentioning the name of Joe
25 Shriver?

1 A. Yeah. I think he told us which one -- what the
2 candidates were.

3 Q. Okay. And so did he tell you Mr. Shriver was the
4 Democrat?

5 A. I think so.

6 Q. Did he tell you that Mr. Jones was the Republican?

7 A. Uh-huh.

8 Q. He never mentioned the name of Greta Goodwin?

9 A. Huh-uh.

10 Q. Okay. Did he ask you whether you voted the ballot
11 with the name of Greta Goodwin on it in the --

12 A. No, sir.

13 Q. -- State Representative race? Was it ever brought
14 up --

15 A. No.

16 Q. -- as a possible candidate that you might have voted
17 for?

18 A. No.

19 Q. Okay. I think you indicated you voted Republican,
20 is that right?

21 A. Uh-huh.

22 Q. Was that in response to his question who you voted
23 for? Was that your response that you voted Republican?

24 A. Yes.

25 Q. Okay. Well, on November 8th if you were given a

1 ballot wherein there was a race that only a Democrat was
2 listed in that race, would you have voted that race, voted
3 for the Democrat or would you have skipped it, your best
4 recollection?

5 A. If I didn't know the candidate, I'd say I probably
6 might have skipped it. There is a good chance.

7 Q. Well, on the ballot you were voting then, in fact,
8 you might have skipped a race on this ballot if there was a
9 race that didn't have a Republican on it?

10 A. Yes, that's a possibility.

11 Q. Okay. Well let me ask you, you've indicated you
12 voted Republican. Just curious, do you recall when you
13 went to the polls that day, did you go -- did you go to the
14 polls with the intention of voting for Danny Jones?

15 A. No.

16 Q. Okay. Had you heard of Joe Shriver before that day?

17 A. Yeah, I've heard the name, yes.

18 Q. You heard of Danny Jones before that day?

19 A. Yeah.

20 Q. Okay.

21 A. But I wasn't familiar with them.

22 Q. All right. Did you -- and maybe I've asked this and
23 I'll ask it a different way. Did you have any intent when
24 you went to vote that day to vote for Danny Jones for State
25 Representative?

1 A. No, sir.

2 Q. Well then, let me ask this: To your very best
3 recollection, on November 8th when you went in and cast
4 your ballot, do you recall placing a mark next to the name
5 of Danny Jones?

6 A. No, sir.

7 Q. Okay. Do you recall placing a mark next to the name
8 of Greta Goodwin?

9 A. No.

10 Q. Well, let's refer back to the affidavit, the one
11 that apparently was prepared and filled out and read to you
12 for you to execute when it was brought to your home. I
13 believe it was indicated that Mr. Shriver and Mr. Jones
14 were the candidates of your choice?

15 A. Uh-huh.

16 Q. You stated thereon and certainly it's under sworn
17 oath that you, in fact, voted for Danny Jones?

18 A. Yes.

19 Q. But it's your testimony -- and you understand sworn
20 oath here in front of a judge?

21 A. Yeah.

22 Q. Is it your testimony that you have no personal
23 recollection of marking and voting for Danny Jones?

24 A. Yes.

25 Q. Okay.

1 A. And it's like, you know, it's like I said, he said
2 that's who it was and I know I voted Republican. That's
3 why I said okay, then I must have voted for him.

4 Q. Okay.

5 A. Is that what you are wanting?

6 Q. Well, that's -- your answers are better than my
7 questions.

8 MR. WITTEMAN: I think that's all I have.

9 THE COURT: You may inquire.

10 CROSS-EXAMINATION

11 MR. MILLER:

12 Q. Since Mr. Wilson visited your home, Pastor Dorrell,
13 who have you talked to about who you voted for?

14 A. You mean other attorneys?

15 Q. Anybody.

16 A. Anybody. I would say maybe my brother-in-law but
17 that's it.

18 Q. Who's your brother-in-law?

19 A. Tom Sweet.

20 Q. Sweet?

21 A. Sweet, yes.

22 Q. Anyone else?

23 A. I don't think so.

24 Q. What did you tell Mr. Sweet?

25 A. I just told him, you know, what had happened and,

1 you know, the conversations that we had and that was it,
2 just --

3 Q. Does he know Mr. Jones?

4 A. I don't think so. I don't really know.

5 Q. Did he make any comment?

6 A. No.

7 Q. Did you talk to either of the attorneys --

8 A. Yes.

9 Q. -- at this table prior to your testimony today?

10 A. Yes.

11 Q. When was that?

12 A. Oh, that's good.

13 Q. You've had a lifetime of lawyers in the last three
14 days.

15 A. Right, yes, and this isn't a normal week so it's
16 kind of hard to remember two days ago.

17 Q. Would you remember which --

18 A. Well --

19 Q. Would you identify which of the attorneys you talked
20 to?

21 A. The middle one.

22 Q. The ugly one. What was your conversation with him?

23 A. Well, he first talked to my wife and I think she was
24 getting a little irritated so she passed the phone to me,
25 and then we visited about it, you know, just I think it was

1 about the facts about whether I knew for sure about whether
2 I had voted for Danny Jones or voted Republican.

3 Q. That was in the course of talking to this gentleman
4 in the middle that your wife became irritated, is that
5 correct?

6 A. Right. She gets irritated sometimes.

7 Q. Did he ask her several times?

8 A. Oh, I don't know. I don't have any idea.

9 Q. Do you have any idea why she became irritated with
10 him?

11 A. She was watching a movie, Rest of Her Family. What
12 do you call it?

13 Q. That was over the telephone?

14 A. Right.

15 Q. Did you talk to him over the telephone?

16 A. Yeah.

17 Q. And then did you talk to him in person?

18 A. Yes, today.

19 Q. You talked to him prior to your testimony in court?

20 A. Right.

21 Q. Where was that?

22 A. He came to my house.

23 Q. What did you talk about then?

24 A. That he wanted me to come up here.

25 Q. Did he explain to you in either of these

1 conversations the significance of your testimony today?

2 A. No.

3 Q. Did he explain to you what the outcome of your
4 testimony might be as it relates to this election?

5 A. No.

6 Q. What's your educational level, Mr. Dorrell?

7 A. Well, I finished high school and then, you know,
8 I've had training outside of high school.

9 Q. How long have you been a pastor?

10 A. Fifteen years.

11 Q. How large is your congregation?

12 A. Right now it's about 30.

13 Q. What denomination, if I may?

14 A. Non.

15 Q. Did you understand the significance of signing a
16 sworn statement at the time you swore to it in front of
17 Mr. Wilson?

18 A. Yeah, I think so. I mean, I didn't understand the
19 fact that there were two possibilities, we may have had the
20 wrong ballot. Do you understand what I'm saying?

21 Q. Who explained that to you?

22 A. I think this --

23 Q. The man in the middle?

24 A. Yeah, that there may have been -- that we were in
25 the wrong precinct.

1 Q. Which conversation was that, the one over the
2 telephone or the one in person?

3 A. The one over the phone I think.

4 MR. MILLER: That is all, Your Honor.

5 REDIRECT EXAMINATION

6 MR. WITTEMAN:

7 Q. So then, Mr. Rucker actually informed you that there
8 might have been more candidates to vote for than Danny
9 Jones or Joe Shriver on perhaps a different ballot, is my
10 understanding?

11 A. The only thing that I remember him saying was the
12 fact that there was a possibility at that station we could
13 have had different ballots, been given the wrong ballot to
14 vote on, and therefore if we were then, you know, he may
15 not have been the Republican on that ballot so --

16 Q. Okay. And the other attorney that talked to you
17 besides Mr. Rucker, apparently the attorney for Mr. Shriver
18 who is representing him, they didn't fully inform you that
19 there might have been more choices than Joe Shriver?

20 A. No.

21 Q. Or Danny Jones?

22 A. No, huh-uh.

23 MR. WITTEMAN: That is all I have, Your
24 Honor.

25 THE COURT: Can this witness be excused?

1 MR. MILLER: No, Your Honor. I want to
2 recall Mr. Wilson before we do that.

3 THE COURT: You may stand down but we
4 can't let you go yet.

5 MR. MILLER: Can we get his wife as
6 well?

7 THE COURT: Call your next witness.

8 MR. WITTEMAN: One moment, Your Honor.

9 THE COURT: You are still under oath.

10 MR. WILSON: Yes, sir.

11 MR. WITTEMAN: Did we call him?

12 MR. RUCKER: No.

13 MR. MILLER: I didn't either.

14 MR. RUCKER: I understood even though I
15 thought it was irregular because I thought he had rested.
16 I thought he called him to the stand.

17 MR. MILLER: Well, it's rebuttal. It's
18 surrebuttal when they are done with the rebuttal.

19 THE COURT: That's true. I thought you
20 called him. Call your next witness. You'll have to wait
21 outside.

22 GLADYS WEIGAND,
23 of lawful age, having been first duly sworn on her oath to
24 state the truth, and nothing but the truth, testifies as
25 follows:

DIRECT EXAMINATION

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MR. RUCKER:

Q. Miss Wygan, pardon me, Weigand, and I am going to get it right.

THE COURT: Hold on.

MR. RUCKER: All right.

MR. RUCKER:

Q. Miss Weigand, if you would, state your full name for the Court.

A. Gladys Faye Weigand.

Q. And you pronounce the -- pronounce the D so Weigand. What is your address?

A. 1210 North Seventh, Arkansas City.

Q. And how long have you lived there, ma'am?

A. Two years in November.

Q. And ma'am, before that you resided where?

A. 315 North Second.

Q. Now that's -- you resided at 315 North Second up to and including the time before -- I mean, it was an immediate move from that address to the 1210 North Seventh address, is that accurate?

A. Right.

Q. All right. Both of the addresses that you mentioned, ma'am, are in Arkansas City, Kansas?

A. Right.

1 Q. All right. Miss Weigand, on the date of the primary
2 election, did you present yourself to vote?

3 A. Yes.

4 Q. All right. When you presented yourself to vote,
5 ma'am, what, if anything, occurred which gave rise to the
6 fact that your ballot would be challenged? What happened?

7 A. They didn't have our name on the book when we went
8 in to vote.

9 Q. All right. And when you went in to vote and they
10 didn't have your name on the books, what was your response?

11 A. At the primary?

12 Q. Yes, ma'am.

13 A. We filled out a card.

14 Q. All right. What were you told that that card would
15 do?

16 A. It would be all we would need to do to be
17 registered --

18 Q. All right.

19 A. -- in this particular precinct.

20 MR. MILLER: Your Honor, I'm going to
21 object to that being hearsay unless we can identify the
22 person that said it, that and they are available for
23 cross-examination.

24 MR. RUCKER: I do not know got this
25 juncture, Your Honor, whether or not the individual poll

1 workers from 4D are here or not.

2 MR. MILLER: The question is are they
3 here now?

4 MR. RUCKER:

5 Q. Well, after you signed the cards --

6 THE COURT: Well now, is this at the
7 primary?

8 MR. RUCKER: It is, Your Honor.

9 THE COURT: Well, ascertain if she can --
10 if she can tell you the names of individuals that might
11 have told her this.

12 MR. RUCKER:

13 Q. All right. Do you know, ma'am, who the individual
14 poll workers were?

15 A. No.

16 MR. MILLER: I ask the testimony be
17 stricken as hearsay.

18 THE COURT: You offering that for the
19 truth of the matter asserted?

20 MR. RUCKER: No, Your Honor.

21 THE COURT: Well then, why are you
22 offering it? ?

23 MR. RUCKER: I'm offering it for -- I
24 think it will become clear in just a few moments.

25 MR. MILLER: Well, my question is what

1 other reason?

2 MR. RUCKER: If it's an objection, the
3 Court can understand that. I don't know what you are
4 doing, Mr. Miller.

5 THE COURT: Well, allow him to finish.
6 Proceed, counsel.

7 MR. MILLER: Well, he can say he's not
8 offering it for the truth of the matter certainly, but the
9 question remains what is the purpose, and the purpose
10 should be clear now, not after we've elicited the
11 testimony. He should be able to tell us the purpose at
12 least, Your Honor.

13 THE COURT: Well, I'll let him proceed
14 but I may sustain the objection on the basis of hearsay.
15 Proceed.

16 MR. RUCKER:

17 Q. After you were handed the card, what was your
18 impression that that card would accomplish for you?

19 A. That we would be registered in this precinct.

20 Q. All right. With no further anything?

21 A. No. I thought it was taken care of.

22 Q. No further requirements on your part?

23 A. Right.

24 Q. And did you, in fact, then cast a ballot at the
25 primary election?

1 A. Yes.

2 Q. All right. And then ma'am, moving onto the November
3 general election, did you, in fact, attempt to cast a
4 ballot in the November general election?

5 A. Yes, we went there to vote and they still didn't
6 have our names on the books.

7 Q. What was your reaction to that?

8 A. Good grief, why is our names not here.

9 Q. What happened after that, ma'am?

10 A. They said go ahead and vote. We'll give you a
11 challenged ballot.

12 Q. Were you registered to vote got your prior address,
13 ma'am, of 315 North Second?

14 A. Yes.

15 Q. How many years did you reside got that address?

16 A. Nineteen.

17 Q. And before that, ma'am, where did you reside?

18 A. We lived over on Third Street.

19 Q. To the best of your recollection, ma'am, were you a
20 registered voter got that address?

21 A. Yes.

22 Q. Got any time during -- got any of the three
23 residences that you are referring to or four residences
24 that you are referring to, did you ever receive a purge
25 notification in the mail that you were going to be purged

1 from the voter registration list?

2 A. No.

3 Q. To the best of your knowledge and belief, did you,
4 in fact, participate in every election every two years from
5 the time that you lived in Ark City?

6 MR. MILLER: Object as to relevance, Your
7 Honor.

8 THE COURT: No. I can see where that
9 would be material. You may answer it.

10 A. Yes.

11 MR. RUCKER:

12 Q. Do you recall when you filled out that document that
13 anyone asked when you were last registered to vote?

14 MR. MILLER: Well, Your Honor, I object
15 to it as hearsay.

16 THE COURT: What document is it?

17 MR. RUCKER: The document that she filled
18 out at the primary.

19 MR. MILLER: The document she alleges she
20 filled out.

21 THE COURT: Do we have that?

22 MR. MILLER: Yes, we do.

23 MR. RUCKER: Yes, we do.

24 MR. MILLER: We do. Do we have it

25 marked?

1 MR. RUCKER: All right.

2 MR. MILLER: May we have it marked, Your
3 Honor?

4 MR. RUCKER: I don't have any further
5 questions of this witness.

6 THE COURT: All right. You may inquire.

7 MR. MILLER: I'm -- excuse me, Your
8 Honor. Do we have the document counsel just indicated to
9 the Court?

10 THE COURT: Evidently he does not or he
11 is not offering it at this time. You may proceed.

12 CROSS-EXAMINATION

13 MR. MILLER:

14 Q. Miss Wygan, excuse me, I've gotten flustered on
15 that, Weigand. When you voted in the primary of 1994, was
16 your ballot challenged?

17 A. No.

18 Q. You were not on the poll books at the time?

19 A. No.

20 Q. You had moved from your previous address some --
21 close to two years before that?

22 A. Yes.

23 THE COURT: That was 4D, precinct 4D, is
24 that correct?

25 THE WITNESS: The one prior to the --

1 THE COURT: No.

2 THE WITNESS: Or the one we moved into?

3 THE COURT: Your present address is 1210
4 North Seventh, Ark City, and that's where you went to vote
5 and that was got 4D, is that right, if you know?

6 THE WITNESS: We went to the Presbyterian
7 Manor, wherever that is.

8 MR. MILLER: Both times?

9 THE WITNESS: Yes.

10 THE COURT: Okay.

11 MR. MILLER: That's all the questions.

12 THE COURT: Any other questions of this
13 witness?

14 MR. RUCKER: No, Your Honor.

15 THE COURT: All right. Can this witness
16 be excused?

17 MR. RUCKER: Yes.

18 MR. MILLER: Yes, Your Honor.

19 THE COURT: You may stand down. You are
20 excused, that is you are free to go. Call your next
21 witness.

22 MR. RUCKER: Thank you, Your Honor.
23 Norman Weigand.

24 NORMAN WEIGAND,
25 of lawful age, having been first duly sworn on his oath to

1 state the truth, and nothing but the truth, testifies as
2 follows:

3 MR. MILLER: While he's doing that, Your
4 Honor, I guess now we've gotten this far on the evidence,
5 it's clear that counsel indicated earlier that he was -- he
6 was not advancing -- he was not continuing to advance the
7 argument that Lucy Otte had cast an illegal vote. I would
8 like to make that -- and Lucy Otte is an attorney. That's
9 a serious allegation. I would like a stipulation.

10 MR. WITTEMAN: We so stipulate.

11 THE COURT: All right. So noted.

12 DIRECT EXAMINATION

13 MR. RUCKER:

14 Q. Mr. Weigand, if you would, state your name full
15 name.

16 A. Norman Donald Weigand.

17 Q. Your current address, sir?

18 A. 1210 North Seventh.

19 Q. And how long have you lived got that address, sir?

20 A. It will be -- it was two years November 5th.

21 Q. And before that time, Mr. Weigand, where did you
22 reside?

23 A. 315 North Second.

24 Q. And were you registered to vote got 315 North
25 Second?

1 A. Yes.

2 Q. Did you present yourself to the polls to vote,
3 pardon me, did you go to the polls, present yourself for a
4 ballot at the August 1994 general -- pardon me, 1994 August
5 primary?

6 A. Yes.

7 Q. And what occurred when that -- when you presented
8 yourself?

9 A. They -- the people in the clerk's, whoever they are
10 called, looked for our names and couldn't find them and
11 asked whether we had moved, and we told them when we had
12 moved and we told them this had happened a year before and
13 they said if we'd signed --

14 MR. MILLER: Your Honor --

15 A. If we signed it, it would be taken care of and we
16 wouldn't have to register.

17 MR. MILLER: I'm going to object. Ask
18 that be stricken as hearsay. Again, if it's being advanced
19 as evidence, I'd like to know other than to prove the
20 matter just for certain.

21 MR. RUCKER: I'll rephrase the question.

22 MR. MILLER: Well, I ask that his answer
23 be stricken, and Your Honor, I know --

24 THE COURT: Well technically, it's not
25 responsive to the question.

1 MR. MILLER: And I respect the Court's
2 ability to sort it out, but I'm worried about what may be
3 interpreted later.

4 THE COURT: Rephrase.

5 MR. RUCKER: Thank you, Your Honor.

6 MR. RUCKER:

7 Q. Mr. Weigand, when you were handed that document,
8 what was the impression you had if you filled out that
9 document they handed you at the August primary election
10 1994?

11 A. My impression was that would take care of it because
12 I asked whether it would. They said it would. We didn't
13 have to reregister.

14 MR. MILLER: Your Honor, ask as it
15 relates to statements that were made other than those by
16 Mr. Weigand, I ask it be stricken unless we can name the
17 individuals and have them subject to cross-examination.

18 THE COURT: I'm not entirely certain that
19 isn't being offered for the truth of the matter. I think
20 he testified about why he did what he did and it was based
21 upon that statement, so I'll overrule your objection with
22 respect to hearsay.

23 MR. RUCKER:

24 Q. Mr. Weigand, did you then present yourself to cast a
25 ballot at the November general election 1994?

1 A. Right.

2 Q. Did you, in fact, cast a ballot in that election?

3 A. Sure did.

4 Q. Under what circumstances?

5 A. It was again -- it was a challenged ballot again,
6 same as before.

7 Q. What was your response when you showed up at the
8 polls in November and you were challenged again?

9 A. I told them that I thought that this had been taken
10 care of before when it happened the first time.

11 Q. And sir, during the two years that you have lived
12 got 1210 North Seventh, are these the only two elections
13 that have occurred since the time that you moved?

14 A. Right.

15 Q. Before sir, when you lived got 315 North Second,
16 were you a regular voter?

17 A. Sure was.

18 Q. All right. As a matter of fact, have you missed an
19 election during the years that you lived got that address
20 to the best of your knowledge?

21 A. Not to my knowledge.

22 Q. And before that when you lived got another address
23 in Ark City, were you a registered voter even got that
24 address?

25 A. Yes.

1 Q. Did you miss an election even during that period?

2 A. I don't think so.

3 Q. Mr. Weigand, I'm going to hand you what has been
4 marked 13B, 13A and ask you whether the card that you
5 received on August the 2nd -- well, whatever the primary
6 election was in August of 1994, this card resembles the
7 card that you filled out on that date?

8 A. Well, the information looks approximately the same
9 but I remember it as a sheet of paper, 8 1/2 by 11.

10 Q. I see. Okay. But the information was approximately
11 the same?

12 A. Yes.

13 Q. All right. And when you say that the information
14 was approximately the same, what do you mean by that, sir?

15 A. Well, where we lived, names, correct names and
16 that's an election. That's what they are interested in,
17 and you are given that information and you look got it and
18 you sign it and that was for the challenged ballot. That
19 was my understanding of it.

20 Q. Again, what do you believe that that would
21 accomplish?

22 A. That would take care of it because I said will this
23 take care of it, should we reregister? Will this handle
24 it?

25 MR. RUCKER: No further questions.

1 MR. MILLER: I wasn't sure I heard that
2 last answer. Could we have the question and the answer
3 read back, please.

4 (The requested portion of the record was
5 read by the reporter.)

6 CROSS-EXAMINATION

7 MR. MILLER:

8 Q. So you remember, Mr. Weigand, signing an 8 1/2 by 11
9 sheet of paper?

10 A. That's what I recall.

11 Q. Do you remember who you talked to that day?

12 A. Well, my wife said she knew one person but I didn't
13 know them. I had seen them but I didn't know them that was
14 on the board there.

15 Q. Who has your wife stated that she knew that she
16 talked to?

17 A. That's been way back there. I asked her. She acted
18 like she knew them and since then, I hadn't asked her. I
19 don't know.

20 MR. MILLER: That is all I have, Your
21 Honor.

22 THE COURT: Can this witness be excused?

23 MR. WITTEMAN: I'd like to call Barbara
24 Warren to the stand.

25 MR. RUCKER: Yes, Your Honor, the answer

1 to the question is yes, he may be excused. We don't want
2 him to leave right away. We would like to question Miss
3 Warren.

4 THE COURT: I guess the answer is they'd
5 like you -- you are excused. They would like you to hang
6 around in the hallway a little bit.

7 THE COURT: Ms. Warren, come forward.
8 You are still under oath.

9 BARBARA WARREN,
10 having been previously duly sworn, testified further as
11 follows:

12 DIRECT EXAMINATION

13 MR. WITTEMAN:

14 Q. Ms. Warren, I'd like to hand you what's been
15 previously admitted into evidence as Contestee's 13E which
16 is, of course, attached to 13D. Could you tell me what 13E
17 is?

18 A. That's Gladys Weigand's challenged ballot envelope
19 and attached to that is my computer printout.

20 Q. Is that the document, that's 13E, your computer
21 printout?

22 A. Yes, sir. Yes, sir.

23 Q. I'd like to draw your attention specifically to that
24 computer printout. Do you recall when that printout was
25 made?

1 A. Okay. The date up at the top says November 10th.

2 Q. That would have been after the election then, is
3 that correct?

4 A. Yes, sir.

5 Q. That was printed --

6 A. The day before the canvassing.

7 Q. What status does it indicate Miss Weigand is?

8 A. She's on the active roll.

9 Q. On the active roll?

10 A. Yes, sir.

11 Q. What address is listed?

12 A. 315 North Second.

13 Q. Okay. What date does that indicate she became
14 active?

15 A. This tells me she registered on August 2nd, '94.

16 Q. That would have been the date of the primary?

17 A. Yes, sir.

18 Q. Okay.

19 A. Yes, sir.

20 Q. Well now, why is it -- would there have to have been
21 some information or some document or some reason that she
22 would have been brought active on that date or would
23 somebody have just sat at the computer?

24 A. Well, that's the date -- the registration date that
25 we put on the computer is the date that they registered.

1 That's not the day that we put it on the computer. That's
2 the registration date.

3 Q. Okay. Is there a registration card available to
4 indicate that date?

5 MR. RUCKER: It could be loose in the box
6 back there. We've been through that box several times.

7 Q. Okay. Would you have -- well, I won't say you. In
8 your election office down there, would somebody have went
9 ahead and made someone active and noting a specific date --

10 MR. MILLER: Calls --

11 Q. -- for some reason?

12 MR. MILLER: Calls for speculation.

13 THE COURT: Rephrase it, counsel.

14 MR. WITTEMAN: Yes.

15 MR. WITTEMAN:

16 Q. First, I'll ask if there would be any reason
17 whatsoever if you were to have inserted that voter, any
18 voter I'll say, into the computer as an active registration
19 date, what would have prompted that action? Why would --
20 why would that be done?

21 A. Well, we would have some documentation telling us to
22 do so.

23 Q. Okay. Would it just be got your whim or fancy that
24 you ought to type somebody in?

25 A. Oh, gosh, no. We can't do that.

1 Q. You wouldn't have typed somebody in unless there was
2 documentation?

3 A. I wouldn't, no, sir.

4 Q. Indicating that they registered on that date?

5 A. That's right.

6 Q. Would that be the -- would your view in regard to
7 both those questions be the policy of the election office?

8 A. Yes, sir.

9 Q. Everyone in there that had any responsibility on
10 entering --

11 A. Yes, sir.

12 Q. -- entering someone on the active list? Okay.

13 MR. WITTEMAN: Do we have her
14 registration card marked as an exhibit?

15 THE WITNESS: I --

16 THE COURT: Is that in any of your
17 exhibits, counsel?

18 MR. MILLER: No. That was a document
19 referred to and I asked where is the document, but no, I
20 haven't seen one on Mrs. Weigand got any date.

21 MR. RUCKER: I expressed a belief, Your
22 Honor, and then did not ask anymore questions.

23 THE COURT: There is several over there
24 but I don't see them.

25 THE WITNESS: I find a note here on the

1 bottom of the computer printout after we got to talking
2 that says "couldn't find card" in Carmelita Clarkson's
3 writing. She did talk to her over the phone, so the card
4 could very well be misfiled. We obviously have a card.
5 It's not filed where it should be.

6 MR. MILLER: Well, Your Honor, how is
7 that obvious?

8 THE WITNESS: Because -- may I answer
9 that?

10 THE COURT: Yes, go ahead.

11 THE WITNESS: Because we have it on the
12 computer. We don't just arbitrarily make an entry.

13 MR. MILLER: Well, the entry on the
14 computer is also 315 North Second which is the previous
15 address.

16 THE WITNESS: Uh-huh.

17 MR. MILLER: Not a current address which
18 would indicate that it's a previous registration.

19 MR. WITTEMAN: This is argumentative.

20 THE COURT: That's true. Go back to
21 asking the questions, counsel.

22 MR. WITTEMAN:

23 Q. When you get a registration card entered up in the
24 computer, is there the potential for human error in the
25 election office as far as entering the data on the address?

1 A. Yes, sir. Yes, sir.

2 THE COURT: That being city employees are
3 humans?

4 MR. WITTEMAN: The answer to that
5 question I suppose is so obvious that it didn't need to be
6 asked.

7 MR. WITTEMAN:

8 Q. Has it ever been -- does it happen that on occasion
9 a registration card can get lost in your office?

10 A. We have help filing our voter cards, so yes, it
11 could happen very easily and sometimes we do it in a rushed
12 way. Right now I'm so far behind on my filing that I might
13 have to do a rush job on it.

14 Q. Okay. Has this been your experience that you
15 believe a card has been lost?

16 A. Yes, sir.

17 Q. Or misplaced?

18 A. Yes, sir. That happens, yes, sir.

19 Q. Specific instances that you can recall?

20 A. Lost being misfiled.

21 Q. Then on occasion are they never found when they are
22 misfiled?

23 A. We keep looking until the problem is solved.
24 Usually we even go upstairs to the old card file and look
25 in there but we keep looking until something is found.

1 Q. Ever had an occasion when something wasn't found?

2 A. In 15 years, probably but right now I can't think of
3 anything.

4 Q. Okay. Would it be possible that registration card
5 could in the haste of getting them together and you have
6 help and what all perhaps get misplaced on a pile of
7 documents that might, in fact, be discarded?

8 A. Oh, I hope not, but I suppose the possibility is
9 there. Not intentionally I would say.

10 Q. Oh, absolutely, and no -- in no way, shape or form
11 to infer. You said you have some help sometimes. What's
12 that help that are you referring to?

13 A. Okay. We have had other people in the office that
14 are not familiar with voter registration. We have had
15 people file instead of by last name file by first name or
16 file incorrectly way out of -- it's hard to figure out why
17 they filed the way they do. We have had students in, two
18 students I can think of right off help file got one time.
19 Then, of course, myself, and I'm not above making a
20 mistake.

21 Q. Or any of us, Ms. Warren. Are these students
22 specifically trained?

23 A. No.

24 Q. You laugh. Why is that?

25 A. Well, one day we had a girl in. She was an 8th

1 grader and I would have thought they would have known the
2 alphabet by then, but I was aghast at the problems she was
3 having. I was --

4 Q. How old would that 8th grader have been?

5 A. 8th grade, is that 13, 14?

6 Q. That's about right as near as I can tell.

7 Miss Warren, I'll hand you what's been marked previously as
8 Contestee's Exhibits 13A, 13B and 13C and please -- I
9 apologize.

10 A. That's all right. That's all right.

11 Q. Could you tell us what those are?

12 A. That's Norman Weigand's voter registration card and
13 his challenged ballot envelope.

14 Q. Okay. Well, I think you were present in the
15 courtroom and heard Mr. Weigand's testimony that he and his
16 wife at the same time they had filled out registration
17 cards?

18 MR. MILLER: Your Honor --

19 Q. Is the registration --

20 MR. MILLER: Objection. It's not his
21 testimony.

22 MR. WITTEMAN: I believe it was.

23 THE COURT: Well, he testified about a
24 sheet of paper. Rephrase.

25 MR. WITTEMAN: Well, all right.

1 MR. WITTEMAN:

2 Q. His testimony was he filled out, in his
3 recollection, some sort of sheet of paper that he felt was
4 his registration at the same time his wife filled hers
5 out. Do you recall that testimony?

6 A. Yes, sir.

7 Q. Do you see any registration current of this year in
8 that?

9 A. No, sir. There is no nothing here.

10 Q. I don't notice any computer printout in regard to
11 Mr. Weigand.

12 A. Huh-uh, no, sir.

13 Q. Does such a thing exist?

14 A. I can get you one real easy.

15 Q. We perhaps ought to do that.

16 MR. MILLER: Why don't we.

17 MR. WITTEMAN: It may also have an
18 indication of the same registration.

19 THE COURT: Well, if you are requesting
20 it, go ahead and request it.

21 MR. WITTEMAN: Well, I'll -- I think
22 that's fine. We'll just leave it.

23 THE COURT: Okay.

24 MR. WITTEMAN: That is all the questions
25 I have, Your Honor.

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THE COURT: You may inquire.

CROSS-EXAMINATION

MR. MILLER:

Q. Mrs. Warren, is the polling place a place to vote or a place to register to vote?

A. It's a place to vote.

Q. There are limited circumstances, are there not, where certain people may also register to vote?

A. Ultimately, yes.

Q. Those would be people who moved within 30 days -- excuse me, those people who moved within a precinct?

A. Yes.

Q. Those are the only individuals who may register to vote at the polling place under any circumstances?

A. No, sir.

Q. What are the others?

A. You mentioned the change within a precinct and then there is also the change of former precinct. That has to be within a 30-day time frame, and that affidavit enables the county election office to change their voter file in order for them to be reregistered.

THE COURT: But you go back to your former polling place to do that, don't you?

THE WITNESS: Yes.

MR. MILLER:

1 Q. But in all your exceptions that you listed, do the
2 Weigands fit under any of those exceptions either for the
3 August '94 primary or the November general election?

4 A. They said they moved when?

5 Q. Approximately two years before November.

6 A. Two years. No, they changed precincts so they would
7 have to do it within the 30-day time frame.

8 Q. So the law does not allow them to register at the
9 polling place regardless of what they were told?

10 A. Correct.

11 MR. MILLER: That is all, Your Honor.

12 THE COURT: You may step down.

13 REDIRECT EXAMINATION

14 MR. WITTEMAN:

15 Q. I'm sorry, my apologies to you. If, in fact, a poll
16 worker had somebody register on the date of election, would
17 you contribute that error to the voter or to the poll
18 worker?

19 A. Register on what?

20 Q. Well, let me say if someone wasn't properly
21 registered and a poll worker had them fill out a
22 registration card, would that be the voter's fault in your
23 mind as representative of Cowley County election office?

24 MR. MILLER: Your Honor, I would object
25 to the form of the question.

1 MR. WITTEMAN: That's fine.

2 MR. MILLER: He can ask it, what's proper
3 and what is not. As far as it laying fault, it calls for
4 speculation and the fault -- the fault for not properly
5 registering should be obvious.

6 MR. WITTEMAN: I'm asking her opinion.

7 THE COURT: Well, I'm not entirely sure
8 fault is material here. Rephrase it.

9 MR. WITTEMAN:

10 Q. If an election worker offered -- and offered a voter
11 an opportunity to register with the appropriate papers and
12 such and the voter had filled that out, would you assume
13 that the voter, in fact, would believe he is properly
14 registered?

15 A. Yes, sir.

16 Q. Okay.

17 MR. WITTEMAN: That is all I have.

18 THE COURT: You may step down. Call your
19 next witness.

20 MR. WITTEMAN: At this time we have no
21 further rebuttal. We are finished.

22 THE COURT: That finishes the rebuttal
23 testimony. Surrebuttal?

24 MR. MILLER: Yes, Your Honor. We would
25 like to call Cheryl Wilson.

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CHERYL WILSON,

of lawful age, having been first duly sworn on her oath to state the truth, and nothing but the truth, testifies as follows:

DIRECT EXAMINATION

MR. MILLER:

Q. Miss Wilson, would you identify yourself and your place of employment and your address, please.

A. Cheryl Wilson. I live got 1407 East Madison in Ark City and I work for the District Court.

Q. And how long have you been employed there?

A. Since '87.

Q. 1987?

A. 1987.

Q. You were with your husband as he traveled about Cowley County these last few days assisting you in having certain affidavits executed, correct?

A. Yes.

Q. Do you recall being at the home of Michael and Penny Dorrell who reside got 1222 Millington, Winfield, Kansas?

A. Yes, I do.

Q. Would you relate for the Court what occurred upon your arrival got that address.

A. We walked in and we identified who we were. They were handed the affidavits. My husband asked them to read

1 them, see that -- asked them if everything on the affidavit
2 was correct and sign it, and after they signed while I
3 watched them sign it, I asked them for their driver's
4 license. I compared their signatures with the signature on
5 the affidavit.

6 Q. Did they ask any questions while they were reading
7 the affidavits, either one of them?

8 A. No, not while they were reading the affidavits,
9 no.

10 Q. Did they ask any questions prior to signing the
11 affidavits?

12 A. Not that I recall.

13 MR. MILLER: Thank you, Your Honor.

14 THE COURT: You may inquire.

15 MR. WITTEMAN: I don't have any questions
16 of this witness.

17 THE COURT: Can this witness be excused?

18 MR. MILLER: Yes, Your Honor and I call
19 Robert Wilson.

20 THE COURT: Back to work. Mr. Wilson,
21 you are still under oath.

22 MR. WILSON: Yes, sir.

23 BARBARA WARREN,
24 having been previously duly sworn, testified further as
25 follows:

DIRECT EXAMINATION

1
2 MR. MILLER:

3 Q. Mr. Wilson, harkening back to your earlier testimony
4 of today relative to Michael Dorrell and Penny Dorrell,
5 residence got 1222 Millington, Winfield, Kansas, did the
6 Dorrells when you were got their home ask any questions of
7 you or your wife prior to executing the affidavit that you
8 delivered to them that day?

9 A. No. I just started in, you know, had them review
10 the affidavit to make sure it's accurate from what
11 information I had previously given.

12 Q. Did they ask you any questions?

13 A. No.

14 MR. MILLER: That is all, Your Honor.

15 THE COURT: You may inquire.

16 CROSS-EXAMINATION

17 MR. WITTEMAN:

18 Q. Mr. Wilson, do you recall them asking you as best
19 you can recall who the candidates were in this race?

20 A. They did not ask me who the candidates were. Went
21 over them with the affidavit, asked if the affidavit
22 correctly recited, you know, the different facts and they
23 replied affirmatively and executed the affidavits.

24 Q. Did you ever talk to them besides the time you were
25 in the home?

1 A. After we did the affidavits, a question was raised,
2 you know, what the affidavits were for and I frankly
3 replied to them I'm not sure. I wasn't involved in the
4 case and was just errand boy in getting the affidavits, and
5 I didn't understand all the legal issues involved and I
6 still don't.

7 Q. All right. Well then, you hadn't talked to the
8 Dorrells prior to having the affidavits put together, is
9 that right?

10 A. Correct.

11 Q. Well then, how did you know to put Danny Jones' name
12 down there?

13 A. I did not prepare the affidavits.

14 Q. Who did?

15 A. I'm not sure who prepared them. They were supplied
16 to me.

17 Q. By who?

18 A. I believe they were faxed down, and Mr. Shriver I
19 think had some faxed in to Dillons and I picked them up. I
20 can only assume who prepared them.

21 Q. So you received them on a fax?

22 A. One of --

23 Q. Are you sure where they came from, who faxed them to
24 you do you believe?

25 MR. MILLER: Your Honor, I'm going to

1 object as to relevance.

2 THE COURT: You may answer it. Go
3 ahead. You may answer, if you know.

4 A. I don't know who prepared them. I don't know. I'd
5 have to make an assumption who prepared them.

6 MR. WITTEMAN:

7 Q. What's your assumption?

8 A. I assume counsel prepared them.

9 Q. Okay. Well, I'd like to take a look got -- I don't
10 see any indications of fax marks particularly on the
11 affidavits of Mr. Dorrell and Mrs. Dorrell. Did you
12 receive all the affidavits you had filled out at the same
13 time? Did they all come in to you?

14 A. They came in got different times.

15 Q. Okay. Yes.

16 A. I'd just say they came in got different times. I
17 think it was spread over three different days.

18 Q. Well, while we're talking about affidavits, with
19 respect to No. 8, I'll hand you what's been previously
20 entered into evidence as Contestee's No. 8. I'll identify
21 that as an affidavit of Phillip Coplen. Do you see any
22 indications at the top of that where it was faxed from?

23 A. It shows law offices.

24 MR. MILLER: Your Honor, we'll stipulate
25 that it was prepared -- my wife prepared it on a personal

1 computer and faxed it from my office.

2 MR. WITTEMAN: Stipulation to all of
3 them?

4 MR. MILLER: No, just that one.

5 MR. WITTEMAN: Any stipulations as to any
6 others?

7 MR. MILLER: We would stipulate that I
8 prepared the text of all affidavits. Quite frankly, it
9 would take me a long time to go back and trace it after
10 conversations with each of the affiants.

11 MR. WITTEMAN:

12 Q. Well, let's talk about any of these folks you were
13 involved in getting the affidavits from. Did you explain
14 to each of them you were a lawyer?

15 A. Yes. When I first identified myself, identified
16 myself as Bert Wilson from Arkansas City, that I was a
17 lawyer, identified my wife, introduced her, she was a
18 notary public and advised them I had affidavits it was
19 asked for me to bring for them to review, if they were
20 accurate and if they were willing to sign the affidavits,
21 so I identified myself, my name, address as well as what my
22 occupation was.

23 Q. Other than the two I believe that had to be filled
24 in by the Weigands, did you ask any of the other folks
25 whether they would like to make any changes to their

1 affidavit before they signed it?

2 A. No. I asked them if the affidavit was correct and
3 correctly recited the facts as they believed them to be and
4 none of them had any changes or corrections to it.

5 Q. Okay. Now, as a lawyer in being there, did you
6 explain to any of those folks what an oath was and the
7 gravity and meaning of an oath?

8 A. I advised them it needed to be notarized, signed
9 before a notary public. I did not explain to them what
10 perjury was and all that, no.

11 Q. Did you indicate to them that they were signing this
12 under oath?

13 A. Yes. I think it was apparent from the face of the
14 document.

15 Q. Well --

16 A. I had none of them sit there and say what is a
17 notary public. It's apparent to me every one of them
18 understood what it meant to sign something in front of a
19 notary.

20 Q. So you know what they were thinking when they signed
21 it?

22 MR. MILLER: Objection, Your Honor.
23 Calls for speculation.

24 MR. WITTEMAN: Talking about exactly
25 that's what we're getting, apparent.

1 THE COURT: That's pretty argumentative,
2 counsel, and quite frankly, I'm not interested in what he
3 was thinking at that time.

4 MR. WITTEMAN: Very well. I think that
5 will be all the questions I have now.

6 MR. MILLER: No more, Your Honor.

7 THE COURT: You may stand down. Can this
8 witness be excused?

9 MR. MILLER: Yes, Your Honor.

10 THE COURT: You need to call him any
11 further? You are excused and free to go. Call your next
12 witness.

13 MR. MILLER: I believe I'm finished, Your
14 Honor.

15 THE COURT: All right. No surrebuttal
16 and no sur-surrebuttal?

17 MR. WITTEMAN: I have a hard time
18 passing.

19 THE COURT: If there is such a thing.
20 I've never heard of it, but this is an election contest.

21 MR. MILLER: I do have -- I would like to
22 call Mr. Gaston for a question or two.

23 THE COURT: Well, you weren't done then.

24 MR. MILLER: No, I wasn't. I apologize.

25 THE COURT: Okay. Go get Mr. Gaston.

1 Hold on, counsel. He's going to call Mr. Gaston.

2 H. JOE GASTON,

3 of lawful age, having been first duly sworn on his oath to
4 state the truth, and nothing but the truth, testifies as
5 follows:

6 DIRECT EXAMINATION

7 MR. MILLER:

8 Q. Mr. Gaston, in Winfield voters in ward -- I don't
9 know if it's ward or precinct, just a 3. That's called
10 Ward 3 then. There is another designation, 3S. Is that a
11 precinct?

12 A. 2 South?

13 Q. 3 South is what I'm referring to.

14 A. 3 South? Okay.

15 Q. There is a 3 South and a 3. Those are the locations
16 or two precincts I'm talking about. Do you understand?

17 A. I think I do.

18 Q. Where are those?

19 A. We just got 57.

20 Q. Where do those two precincts vote if you know?

21 A. I'm not sure that I remember but I think it's down
22 at the Nazarene Church.

23 Q. They vote together?

24 A. Yes, uh-huh.

25 Q. One board?

1 A. One board.

2 Q. Two precincts?

3 A. Uh-huh.

4 Q. Two lists?

5 A. Two lists.

6 Q. Do you recall instructing the board workers got that
7 polling place to only write the names of challenged voters
8 at the end of the two precincts list or did you instruct
9 them that if they were challenged voters to write them in
10 the respective precinct?

11 A. I think we told them to write them in the respective
12 precinct.

13 MR. MILLER: Thank you, Your Honor. That
14 is all.

15 THE COURT: Any other questions? All
16 right. You may step down. Now any other surrebuttal?

17 MR. MILLER: No, Your Honor.

18 THE COURT: Any other witnesses?

19 MR. WITTEMAN: No, Your Honor.

20 THE COURT: All right. While you are
21 here, Mr. Gaston, counsel, let's have all of the exhibits
22 up here on the bench, please. Let the record reflect,
23 Mr. Gaston, that all election materials including ballots
24 and poll books and all of that other than what I have
25 retained here on the bench in this trial on the record are

1 returned to your custody to be kept pursuant to law.

2 We won't need anything further from you on that
3 so you can -- all of these stay with me quite frankly to be
4 given to the clerk of the court for transmittal to the
5 House of Representatives, but all other election materials
6 that you've kept up here are now returned to your custody.

7 MR. GASTON: Now what you have is of
8 record so that if somebody's looking for something why --

9 THE COURT: If somebody's looking for
10 something, they are going to have to apply for my
11 permission to do it because it's going to be in the custody
12 of the clerk of the court. Okay. So all of these other
13 materials can be returned to you. Thank you very much.

14 MR. GASTON: Thank you.

15 THE COURT: Now, counsel, before you sum
16 up, there are some -- couple of things that I want to bring
17 up to you. Petitioner's Exhibit WI 1, are you wanting to
18 stay with the stipulation?

19 MR. WITTEMAN: We won't stipulate one way
20 or the other. We'll stick with the Court's ruling.

21 THE COURT: Court will rule that the WI 1
22 is State Representative vote for 78 District. There is
23 listed Greta Hall Goodwin, Democrat, Winfield, Kansas. The
24 oval is blank next to her name and then beneath that name
25 there is an oval that is darkened and filled in and written

1 in in pencil and appears the name Danny Jones, D-A-N-N-Y,
2 J-O-N-E-S. That is a vote that I think should not be
3 counted because it's in the 78th District and that would be
4 the ruling of the Court. 78th District votes shouldn't be
5 counted in the 79 District, so I think that is the last of
6 the nine ballots.

7 Now, with respect to RB 3, you wish to make an
8 argument on that?

9 MR. MILLER: Argument No. 1, Your Honor,
10 will be that the intention of the voter cannot be garnered
11 from that ballot. More importantly, the ballot is
12 prohibited by law to be marked that way, and as I think I
13 cited this morning, the voter is instructed by law, and
14 whether there is a notice or not posted they are just as
15 those who have a heavy foot presumed to know -- would be
16 presumed to know the law.

17 If a ballot is so marked, it shall be returned
18 and replaced with an appropriate ballot so as to be
19 properly marked notwithstanding the fact that instructions,
20 part of the voters' instructions -- and I don't have the
21 exhibit number but there is a -- it's the green, large
22 green document. It clearly states there what the voter is
23 to do. Those instructions are posted at the polling place.

24 25-3001, Subsection B once again allows the Court
25 to determine the voter's intent, requires the Court to

1 determine the voter's intent, but that doesn't apply herein
2 as much as the ballot isn't even a valid ballot in the
3 fashion that it's marked, and it so enumerates that it's
4 just for this race. The rest of the ballot may be properly
5 counted.

6 And as a subsection of that statute (b) (2),
7 which is a list of rules to canvassers, "The occurrences
8 listed in this subpart (2) shall not invalidate the whole
9 ballot but that portion, and that portion only, in which
10 the occurrence appears," and I left out, Your Honor, some
11 of the language. It doesn't apply to this circumstance but
12 I tried not to take license with the statute.

13 The voter has a duty to properly mark his ballot
14 so we do not have to speculate as to intent. I think the
15 clear intention of the statute is to not get ourselves in
16 situations where we must speculate, and it's that
17 particular marking contained on that ballot is the one that
18 I specifically cited is you cannot place a voting mark in
19 more than one of the blanks, and that's what's occurred
20 therein.

21 There was a mistake on the part of the voter
22 which may be why that ballot reads as it does. The ballot
23 should have been returned if the intention of the voter was
24 to cancel his vote on that race. That's quite legitimate
25 and is consistent. The results would be consistent with

1 what he intended because that's exactly what he did is he
2 made his vote null and void by making two marks in that
3 race.

4 Voters, like drivers, are presumed to know the
5 law, and that would have been a proper way should that
6 voter not have cared to take the time to go back and get
7 another ballot but simply to cancel his vote. The statute
8 so specifies that's exactly the way to do it. We would
9 argue, Your Honor, that the clear intention of the voter
10 cannot be garnered because of the way the voter marked that
11 ballot and the ballot cannot be counted for either
12 candidate for the 79th District. Thank you.

13 THE COURT: Your reply?

14 MR. WITTEMAN: Your Honor, we do think it
15 is a simple matter, and really the issue for the Court here
16 is to make a determination as to the voter's intent, and I
17 think what needs to be looked got is the entire ballot.
18 How did this voter vote each race, which identifies his
19 intent to vote for a candidate, and I think it's absolutely
20 clear if you look at every race on this ballot, he
21 carefully marked in the oval to the candidate he wants to
22 vote for.

23 THE COURT: He or she, counsel.

24 MR. WITTEMAN: Yes. Maybe we should
25 presume she. That's the issue before the Court. The

1 Court's well aware of the changes that were made in the law
2 in 1992, and I would direct the Court's attention -- and I
3 apologize for having paused in the middle of my argument
4 but, in fact, there are statutes, several of the statutes
5 that don't particularly relate to anything. It does relate
6 particularly to this.

7 Several of the statutes have dual statutes in
8 them. Before 1992 there is still a statute out there where
9 the law says it is unlawful to mutilate an identifying mark
10 or anything like that on a ballot. That law still exists,
11 but in 1992 what they did, as the Court is well aware, is
12 to take out this language. There is no penalty. They took
13 it out, determined the voter's intent.

14 We're not going to disenfranchise a voter because
15 he made a mistake on a ballot or that sort of thing, Your
16 Honor. I think -- I hope there really is no argument that
17 this is a matter of determining the voter's intent. We're
18 not trying to look for excuses because of some reason to
19 disenfranchise the voter because of some sign that hangs on
20 a wall. I think the sign on the wall, if not on the ballot
21 is clear. The legislative made it clear that does not
22 invalidate a ballot because of the law they struck,
23 25-3002.

24 THE COURT: Your cocounsel's wanting to
25 hand you something.

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MR. WITTEMAN: And well, here's the specific example I wanted to make to you, Your Honor, K.S.A. 25-2427.

MR. MILLER: Excuse me, counsel. I didn't catch that.

MR. WITTEMAN: 25-2427, and perhaps counsel thinks this bolsters his argument but I think the legislative intent is clear and that's why I point to it.

MR. MILLER: That's a criminal statute. I don't know how that bears on this.

MR. WITTEMAN: I think how it --

THE COURT: Go ahead and finish your argument, counsel.

MR. WITTEMAN: Right. It deals with elections indicating marking ballots to identify. You know you are not supposed to do that. You can read the ballot. I don't have to quote it for you. That's exactly the kind of language that used to be in 25-3002. If you mark a ballot to identify it, then that ballot is void or that sort of thing. They struck that out of there.

The fact that there are other statutes that you can go to and say well, the sign said you are supposed to give it back and that sort of thing, the voter's intent is what the legislature is after by leaving that in there and yet making it absolutely clear that that does not void a

1 ballot if the voter's intent can be gleaned from the
2 ballot.

3 It's clear in the little technicalities if you
4 can cite a statute elsewhere. You can guess at the voter's
5 intent as to the reason he came down and made that X was
6 because he realized he made a mistake. He wanted to vote
7 for Danny Jones and he did so in the exact same manner as
8 every other candidate he voted for. He darkened in the
9 oval next to that name, does not indicate he wanted to vote
10 for somebody by putting a big X for somebody. He did it by
11 marking in, darkening in an oval.

12 Perhaps he should have gone back and grabbed -- I
13 wish he would have gone back and grabbed another ballot and
14 made the vote for Danny Jones like he intended to by that
15 one but he doesn't and it's not invalidated because of
16 that.

17 THE COURT: Your reply, counsel?

18 MR. MILLER: Thank you, Your Honor. Your
19 Honor, if you would, please, the green instructions are
20 what, in fact, are posted. Excuse me. Says "To place any
21 mark other than in the oval, or to erase any printed figure
22 or letter thereon, or to deface or tear ballot, is not
23 lawful, and the vote will not be counted."

24 "Spoiled ballots: A ballot wrongly marked,
25 defaced or torn, must be returned to the judges and another

1 obtained. No ballot can be taken from the polling place,
2 and none voted except ballots received from the judge of
3 election."

4 There is that requirement, that reciting statute
5 that requires that the procedure be followed. I misspoke,
6 Your Honor. The principal reason I got back up, the
7 particular section that applies here is K.S.A. 25-3002 (b)
8 (2), capital (B), "Whenever a voting mark is placed in the
9 square at the left of the space where no candidate is
10 listed." It invalidates that portion of the ballot, just
11 as I noted earlier on those that had simply a mark in the
12 right write-in line, it invalidated it by placing that
13 mark.

14 THE COURT: Well, I'm prepared to rule
15 upon this, counsel. I don't think we need anymore argument
16 because you'll go back and forth because your positions are
17 directly opposed to one another. In examining this ballot,
18 3, RB 3 -- and I've previously ruled on the other
19 resolution ballot, I think -- and this is the only one that
20 I have not ruled on. An examination of the ballot is clear
21 that in the race for the national offices, the state
22 offices, Governor and Lieutenant Governor, Secretary of
23 State, Attorney General, State Treasurer, Commissioner of
24 Insurance and district judges, State Board of Education and
25 then on the Justice of the Supreme Court and the judges of

1 the Court of Appeals, the voter unequivocally and without a
2 doubt filled in the oval and in heavy lead pencil mark in
3 the portion of the ballot.

4 On the 79th District race, Joe D. Shriver,
5 Democrat, the oval next to that name is blank and the oval
6 next to the name of Danny P. Jones, Republican, the oval is
7 filled in with a pencil mark, and then below that is the
8 oval for the write-in space and that is partially filled in
9 as I previously said about three-quarters full and then a
10 large pencil mark X has been placed over that.

11 Now, my first impression of this ballot is that
12 it is the intent of the voter in this particular instance
13 to vote for Danny P. Jones and that would be my view in how
14 to resolve that except we have this question and now a
15 legal question, and that is the statute 25-3002 and it's
16 parens small d parens 2 and then parens large B and that is
17 the question that has been raised by the contestee
18 concerning this ballot, and I'll read that for the record.

19 "Rules for canvassers; (2) The occurrences listed in this
20 subpart (2) shall not invalidate the whole ballot but shall
21 invalidate that portion, and that portion only, in which
22 the occurrence appears. The votes on such portion of the
23 ballot shall not be counted for any candidate listed or
24 written in such portion, but the remainder of the votes in
25 other portions of the ballot shall be counted. The

1 occurrences to which this subpart (2) shall apply are:"

2 And then going down to parens large B, capital B,
3 "Whenever a voting mark is placed in the square at the
4 left of a space where no candidate is listed." We have a
5 specific statement here by the legislature that that is how
6 that is to be handled by the canvassers. I would
7 therefore, rule as a matter of law in this particular case
8 that this is not a legal vote for Danny P. Jones pursuant
9 to that particular statute although I previously stated on
10 the record my impression of the intention would be that it
11 was set for Danny P. Jones so that would be my ruling and I
12 think that concludes the resolution ballots.

13 The next issue that I have is concerning the
14 votes, the ballots of Edith Dickerson and Ruby Schalk.
15 I've previously ruled concerning Donna Schalk's, formerly
16 known as Donna Lloyd's, change of name, and that vote
17 should be included. I have not ruled upon the votes of
18 Ruby Schalk and Edith Dickerson. Counsel, do you wish to
19 speak to that and make a record with respect to that?

20 MR. RUCKER: Yes, Your Honor.

21 THE COURT: All right. I would ask that
22 you speak to both of them.

23 MR. RUCKER: Your Honor, Edith Dickerson
24 cast her ballot at the precinct 4D at the polling place
25 located got her place of employment. You might recall that

1 she both worked got the Presbyterian Manor as well as that
2 served as a precinct polling place on the 8th of
3 December -- pardon me, 8th of November.

4 Miss Dickerson indicated to a poll worker I
5 believe the facts in the evidence will show that she had
6 recently moved. She indicated that affirmatively to the
7 worker and asked whether she should vote there or go back
8 to her old polling place. The poll worker indicated as you
9 have heard on a number of occasions they had been
10 instructed not to release individuals if they desire to
11 vote and we had a chuckle over that, but that they were
12 encouraged as poll workers to get them to vote in the
13 location where they were presenting themselves even though
14 that was an error.

15 The poll worker did state that she should go
16 ahead and vote there and offered her a change -- pardon me,
17 offered a challenged ballot vote and offered her an in-move
18 precinct ballot card pursuant to 25-2316, Subsection B.
19 Miss Dickerson had previously moved her residence in
20 precinct 4C. She commenced her move on October the 3rd,
21 actually vacated the residence and completed her move on
22 October 14th, 1994, the date the new owners actually were
23 to take possession.

24 We entered as an exhibit that is before the Court
25 the contract of real estate that indicated a closing date

1 of the 11th, clearly within the 30-day period, a closing
2 date of the 14th, clearly within the 30-day period, in
3 which to cast an appropriate ballot in precinct.

4 Kansas law permits a registered voter to vote
5 without reregistering if that voter moves within 30 days of
6 the election, 25-3701. The Court has had the opportunity
7 to review that statute. I need not review it again for
8 counsel, pardon me, for the Court. She completed her move,
9 obtained her new residence within 30 days of the date of
10 the election.

11 Through the errant instruction of the poll
12 worker she voted in the precinct of her new residence.
13 Miss Dickerson was a qualified elector, should not be
14 disenfranchised because she voted in the wrong place
15 pursuant to the instructions of a poll worker, particularly
16 instructions, Your Honor, that, in fact, was part and
17 parcel of this election not only in this precinct but in
18 every other, and again, we would insist that the election
19 examples are replete with this sort of error and we would
20 classify it as technical in nature and technical in nature
21 not rising to the level which should disenfranchise a
22 voter.

23 Miss Dickerson went on to indicate that she's a
24 long time resident of Arkansas City but she is more
25 importantly a long time resident voter of that community,

1 and I do believe that bears on the intention of the voter.
2 That's why I repeatedly asked voters that I had direct
3 examination how is it that you voted, where did you vote,
4 how many times have you voted, is it a regular pattern of
5 life for you to vote, because I honestly believe that does
6 directly bear on a voter's intention and to what lengths
7 they will go to have their votes counted.

8 But for the misfeasance, if you will, or simple
9 ignorance on the part of poll workers, many of these
10 individuals would have, in fact, voted in the correct place
11 had the policy been what you do is instruct the individuals
12 to proceed to the correct polling place and cast your vote
13 accordingly. We believe that Miss Dickerson was within the
14 contemplation of 25-3701 and therefore, her vote should be
15 counted and the vote added to the appropriate candidate's
16 vote total.

17 Ruby Schalk is again in mere proximity of time
18 more familiar to the Court because we elicited her entire
19 direct testimony today. The trial brief does, in fact,
20 misstate in part what our earlier understanding of
21 Miss Schalk's testimony to be. She first registered in
22 Cowley County in 1991 at the 1420 South C Street address.
23 She moved approximately a year later, around September.
24 She says September, October to 305 East Windsor which is
25 commonly known as the Windsor Apartments.

1 Ruby cast her ballot in 1992 anticipating that
2 she had reregistered after moving to the Windsor Apartments
3 in September or October time frame, a date specific not
4 known, and except, of course, to cast her ballot, she
5 specifically indicates that when she presented herself to
6 vote, she had a specific reason for doing so. She was
7 anticipating the 1992 election, appropriately presents
8 herself at the city offices.

9 Uncontrovertedly the testimony was that she
10 remembers as opposed to testimony that we heard today that
11 it was a white card that she filled out and not a larger
12 sheet of paper, as an example. She, in fact, filled out
13 the appropriate card at the appropriate location in
14 Arkansas City, Kansas and then proceeds as I indicated
15 earlier to cast her vote at the November general election,
16 a vote that she had long awaited for.

17 Upon her arrival as the Court realizes -- pardon
18 me, she first cast it in August and she was curious when
19 she was, in fact, challenged, did not understand the
20 significance of that, stated as much and indicated that she
21 had, in fact, registered and registered got that earlier
22 date. The ballot was, in fact, challenged.

23 Then presenting herself again in November her
24 ballot was once again challenged. She was once again
25 surprised because it had been fully explained. Again,

1 pursuant to her testimony her impression was she had the
2 ability to vote and she did so.

3 It was our intention and I want to make sure that
4 I'm clear, the November general election of 1992 having
5 just voted, pardon me, having just registered in October,
6 September time frame before the closing of the books, she
7 had no reason to believe that she was not a full-fledged
8 registered voter.

9 I would submit to the Court with her voting
10 pattern and with her having executed a white registration
11 card that she had no reason not to believe that she was an
12 appropriate voter to participate -- well, in August as well
13 as November. She knew what she had done. She testified
14 under oath that she did reregister. If, in fact, if there
15 was a mistake, why would she assume it was a mistake on her
16 part? She would naturally assume and what I would assume,
17 what the Court would assume, that it was the poll worker's
18 error. I know what I would have done.

19 As a matter of fact, her testimony was that I
20 knew I had to reregister, I moved and anticipating the 1992
21 election, I did so. We have had further testimony from
22 Barbara Warren that, in fact, not only at the city place
23 but also the registration outposts in Ark City they, in
24 fact, have several individuals aware that registration
25 cards simply disappear and it is not -- I asked whether it

1 was a rare occurrence. She said no, she wouldn't classify
2 it as rare because it happens more often than that.

3 The real issue before the Court is do you have
4 sufficient basis to determine what the intention of this
5 voter was, and I think that clearly you do have the
6 testimony which clearly indicates what the intention of the
7 voter was but also the facts, the uncontroverted acts of
8 the voter, I attempted to register, I did at the
9 appropriate location. If it were not the appropriate
10 location, of course, we would have heard about that by now.

11 If you look got what she said, it was
12 reasonable. It was, in fact, appropriate and she did try
13 to execute her franchise not only in '92 but also in '94.
14 She relates by her testimony she isn't -- doesn't miss
15 election periods in various locations in Cowley County,
16 Kansas.

17 The Supreme Court has noted that substantial
18 compliance with the law in registering is sufficient and
19 that minor irregularity should not invalidate the act of a
20 qualified elector, and the only way you stay qualified,
21 Your Honor, is to continue to vote and this person
22 continues to vote year after year after year.

23 I think Barbara Warren testified specifically in
24 the 15 years that she had worked in the election office she
25 never had a voter with a habitual record of voting claim

1 that they were registered when, in fact, they were not.
2 Again, we would cite for authority Lambeth versus Levens
3 and respectfully ask the Court to count this ballot and to
4 allow the franchise of this long-standing voter to be
5 counted in this election.

6 THE COURT: Counsel, do you wish to speak
7 to both of these ballots, that of Edith Dickerson and Ruby
8 Schalk?

9 MR. MILLER: Yes, Your Honor. I think
10 I'll take the last first because if I take the other one, I
11 will forget what I wanted to say about Mrs. Schalk.
12 Mrs. Schalk did testify that she never missed an election
13 but so did Mrs. Garcia. If Your Honor recalls that
14 testimony, the contestant presented a number of documents
15 to prove that Mrs. Garcia notwithstanding her ardent
16 insistent to the contrary had missed an election.

17 If Mrs. Schalk has never missed an election, why
18 did this problem with her registration not arise in the
19 August primary of 1994? If Mrs. Schalk voted in the 1992
20 general election, as counsel advanced, why was there not
21 evidence documents introduced on the part of the contestant
22 to prove that fact?

23 Mrs. Schalk is no different than a number of the
24 ballots that the Court has already deemed illegal in that
25 they were cast by voters who had not properly

1 reregistered. Mrs. Schalk's testimony as to what occurred
2 when she supposedly registered vacillates between whether
3 it was a white document or a yellow document that she left
4 with, but, Your Honor, when you register to vote, you don't
5 leave with a receipt. You leave the registration card with
6 the registering agency.

7 What I believe happened here is I believe
8 Mrs. Schalk picked up a registration form, she filled it
9 out and that's what -- that's the document that she
10 remembers presenting to some poll worker on some occasion.
11 You can't blame that on the water department. We can
12 speculate as to what might or might not have happened, but
13 we can do that for practically all the voters that
14 contested they registered and have no proof that they did.

15 There were no witnesses presented to support
16 Mrs. Schalk's testimony as to what occurred got some
17 supposed voting location two years ago. The pure and
18 simple fact of the matter is she went to vote this time got
19 a precinct she was not registered at and for which she
20 could not have voted anyway until such time as she was
21 properly registered.

22 The liberal policy -- by the way, Your Honor, the
23 liberal policy of the clerk's office to try to accommodate
24 voters who themselves are confused about where they should
25 vote should not be held against the clerk's office when

1 these problems that are created by the voter going to the
2 wrong place are created. It's an accomodation in an effort
3 to try to count their ballot whenever possible. But in all
4 their efforts to accommodate the voter, the voter in this
5 case, she indicates she knew there was a problem and she
6 should have done something more to follow-up but she didn't
7 back when if what she says is true it arose the last time.
8 It's her responsibility to insure she's properly registered
9 to vote.

10 There has been no evidence presented to prove
11 that a mistake was committed by the election office, the
12 city water department, if that was the supposed
13 registration outlet or the board members. And again, this
14 has no little difference to those we disposed of this
15 morning, Your Honor, consistent with the case cite by
16 counsel of Wildman versus Anderson. It is not a technical
17 error. We have a nonqualified voter casting a ballot that
18 has not yet been counted nor should it for several
19 reasons.

20 That case equally applies to the case I just
21 cited, equally applies to the case of Edith Dickerson.
22 Your Honor, we do not believe that Edith Dickerson changed
23 residences within 30 days of the election. We believe
24 Mrs. Dickerson established residency by her own testimony
25 on October 3rd of 1994 at 1321 North Fourth Street, an

1 address contained within precinct 4D.

2 In all her testimony she never expressed that she
3 had any intention of returning after establishing the
4 residency on Fourth. By her own testimony she said she had
5 a residence starting that date on Fourth Street. She never
6 expressed in all her testimony any intention to return to
7 her previous residence.

8 MR. RUCKER: Your Honor, of course, I'm
9 going to respond to this, but I'll arise now to object
10 stating that is a misstatement of the evidence.

11 MR. MILLER: Well, he can certainly do
12 that at the appropriate time. I beg that I not be
13 interrupted. I do misspeak. I do that a lot. I'd rather
14 be corrected when I'm done because I can't get back on
15 track when I'm interrupted.

16 THE COURT: Proceed.

17 MR. MILLER: Just like right now. Her
18 testimony is that in the event the deal fell through on her
19 house, she might have to return to her house because she
20 couldn't afford to own that house and also rent. That's a
21 condition of terminating her residence that she had already
22 established on October the 3rd.

23 All that notwithstanding, Your Honor -- and it's
24 a very, very technical question as it relates to the entire
25 set of facts surrounding where her residence is and it's

1 unfortunate that the timing is such that within a matter of
2 days those kinds of questions arise, but all that
3 notwithstanding, her bigger problem in advancing the
4 inclusion of her vote is that she in no way, shape or form
5 followed the required steps provided by law to cast a
6 ballot when she voted within 30 days after having moved.

7 There is one and only one place you may cast a
8 ballot and that's in your previous precinct. We would say
9 to the Court there is a very important reason behind the
10 legislature's crafting of the law such as it is regardless
11 of the policy of Cowley County officials, and that's
12 policy, not law.

13 Familiarity with voters presenting themselves is
14 a very fundamental underbelly of election day and we allow
15 again, as we do for Mr. Bumgarner in his circumstance where
16 he moved within a precinct, we allow an extraordinary
17 privilege to those people who move within 30 days but it is
18 very specific and is contained in K.S.A. 25-3701 as well as
19 25-3702.

20 Mrs. Dickerson made no attempt to follow the
21 arrived process. In fact, as a matter of convenience, she
22 voted where she worked. That was her testimony. She made
23 no inquiry of the election office indicating to them her
24 circumstances and where she should go to vote.

25 Notwithstanding what counsel said a moment ago, Your Honor,

1 the direct testimony from the one board worker that was
2 called as it relates to what Mrs. Dickerson represented
3 when she arrived at the polls, she gave no indication that
4 her move was a recent move which would have triggered a
5 different discussion about what steps she needed to follow
6 to perfect her vote.

7 Again, Your Honor, see little distinction -- I
8 see no distinction between her situation and the one the
9 Court has ruled upon as illegal.

10 THE COURT: A brief reply, counsel?

11 MR. RUCKER: Emphasis on brief, Your
12 Honor?

13 THE COURT: Yes, it's the essence.

14 MR. RUCKER: Having failed in a variety
15 of other ways this past week, Your Honor, perhaps maybe I
16 have an opportunity to redeem myself.

17 Let's make it as tough on these voters as
18 possible. If, in fact, when you follow Mr. Miller's
19 conclusion to its natural conclusion, voters are going to
20 have become legal experts, poll workers are going to have
21 to become attorneys, individual voters are going to have to
22 ask intricate and very, very detailed questions about
23 whether or not it's law or whether it's policy.

24 They are going to have be fully informed of
25 election laws of the State of Kansas, and that's just not

1 what the Kansas polls have. In the past they have
2 repeatedly stated in spite of what the legislature's clear
3 wording of laws have been, that we ought not to as a matter
4 of good public policy in this state disenfranchise voters
5 for mere technical errors.

6 I think it does somewhat of a disservice to lump
7 an individual like Miss Garcia in the same sentence with
8 Miss Schalk. Why would I make such a statement?
9 Particularly because I've indicated to the Court in my
10 first argument the way that you stay a registered elector
11 in the State of Kansas is, in fact, to vote, but if you
12 fail to vote in the case of Miss Garcia -- and we have her
13 direct testimony on that, she failed to vote.

14 Now, I understand -- I understand contestee's
15 point of view. His point of view is that they both
16 insisted that they voted, but there is a major
17 distinction. One was shown to be not only, not only on the
18 inactive list, there is a distinction, she was purged a
19 double N and that means that she missed two November
20 elections. As Your Honor knows, you can be purged for
21 missing one. It's a may be subject to a purging procedure
22 and then there is shall be subject to purging procedure and
23 then there is a separate purging procedure for having
24 missed two general elections.

25 Your Honor, Miss Schalk stated that she voted

1 repeatedly, and I think that I would remind the Court that
2 we had a little discussion up here where I fully intended
3 to get the 1992 poll book in for that specific reason. It
4 will go up to the Kansas House of representatives. I think
5 it can be considered by the Court. She was a habitual
6 voter, not only got this address but got others.

7 I think that any sort of references as far as
8 residence or cards are concerned are rather esoteric.
9 Again, many voters, I would imagine every single person
10 including the Court has never stopped to read the
11 instructions posted at a polling place, never stopped to
12 read the notices on their way in to cast their ballot. As
13 it was once eloquently said, voting and, in fact,
14 participating in elections to many individuals is a
15 necessary nuisance. Now I disagree.

16 But I think that if, in fact, you place
17 additional burdens, if, in fact, you place onerous burdens
18 on determining which polling place do I go to, not trusting
19 your polling officials to present their appropriate
20 language, these voters are seeking assistance from quasi
21 governmental officials. We should blame --

22 In fact, the voters are informed of governments
23 when, in fact, they present themselves as good citizens
24 exercising a franchise. I think not. I don't think that's
25 what the legislature intended. I think again courts across

1 the state for a long period of time have indicated that.

2 As far as Miss Dickerson is concerned, I would be
3 pleased if we could find the appropriate reference in the
4 transcript of these proceedings, Your Honor, but I think
5 what you would find is I asked a specific question, what
6 was your intention if this, you know, what was your
7 intention, where did you intend to return, what did you
8 consider your residence?

9 In all of those instances she indicated that her
10 residence was a prior residence that she owned and did not
11 get rid of until 19- -- until -- pardon me, until the 14th
12 of October, 1992, well within that 30-day time frame. I
13 honestly and truthfully believe that when you have -- it is
14 germane when you have habitual voting patterns when, in
15 fact, you have exercised your franchise over and over and
16 over again, and the testimony was uncontroverted in that
17 regard. There was no showing here that Miss Schalk had a
18 voracity problem and there was no -- and quite frankly,
19 Miss Dickerson herself, same sort of thing, habitual
20 voter.

21 I think, in fact, it would be a disservice if, in
22 fact, we took habitual voters who had technical errors, not
23 of their own fault, and disenfranchised them and kept their
24 voice from being heard when their voice on an individual
25 vote can determine the outcome of this election. Thank

1 you.

2 MR. MILLER: Just one point, Your Honor.
3 I would hope that exhibits marked but not admitted don't go
4 up to the Kansas legislature as part of this record as
5 referred to by counsel.

6 THE COURT: We'll deal with that in a
7 second. I'm prepared to rule upon these issues. With
8 respect to Ruby Schalk's ballot, it was challenged and not
9 counted, so we have the challenged ballot contained within
10 the challenged envelope. Her testimony was clear that she
11 lived got 305 East Windsor Road in Arkansas City, Kansas
12 and moved there sometime in September of 1992. She
13 believes she registered at the water department in Ark City
14 and had participated in elections after that.

15 Prior to that, she lived got 1420 South C Street
16 in Ark City. The registration for Ruby Schalk is 19B,
17 shows her registered got 1420 South C Street. K.S.A.
18 25-2316c, Subsection D states when a registered voter
19 changes residence, such voter must reregister in order to
20 be eligible to vote. Now, she has not registered.

21 This is got that new address and it is a
22 different precinct, and therefore, it is the ruling of this
23 Court that is not a legal vote and should not be counted,
24 and I believe that is consistent with my prior rulings
25 concerning Curtis Richards and Donita Richards who had

1 moved and not reregistered, although in their particular
2 case they did not testify that they had reregistered at the
3 water department in Ark City. Clearly there is no
4 registration. It's not a legal vote.

5 Now, in the case concerning Edith Dickerson, in
6 this particular case she voted at the Presbyterian Manor in
7 Ark City which is also her place of employment. Her new
8 address is 1321 North Fourth Street, and prior to that, she
9 was a 20-year resident got 810 North Third Street. Now, on
10 October the 14th of 1994 she gave up possession got
11 5:00 p.m., she was quite clear on that, of her former home
12 got 810 North Third Street.

13 However, she had rented the dwelling at 1321
14 North Fourth Street on October the 1st, 1994. She finished
15 moving on October the 14th, 1994 and she first slept there
16 on October the 3rd, 1994. I remember her testimony to be
17 quite clear that it was her intention to move back into the
18 Third Street address if the sale had fallen through and that
19 was certainly consistent with somebody who is a 20-year
20 resident and as a result of a divorce and subsequent decree
21 had to sell her home. I can see that that would make sense
22 and was her intent.

23 Under the law you can have more than one domicile
24 but you can only have one residence. I believe as a matter
25 of law that I would rule her residence until the time she

1 gave up possession on October the 14th was 810 North Third
2 Street and then and only then she became a resident of 1321
3 North Fourth Street although she considered both of these
4 her residence, but residence is a legal implication.

5 As I stated before, you can have more than one
6 domicile but you can only have one residence. Now, if that
7 is the case, K.S.A. 25-3701 states, "For the purposes of
8 this act, a "former precinct resident" shall mean a person
9 who is otherwise a qualified elector of the State of
10 Kansas, who has removed from the precinct of his former
11 residence in this state and established residence in
12 another precinct in this state during the 30 days next
13 preceding any election held in the precinct of his former
14 residence. Such person may vote in such election in such
15 precinct of his former residence to the same extent and in
16 the same manner as if he had retained his residence in such
17 precinct, except otherwise provided in the act," and then
18 25-3702 is an affidavit that needs to be filled out.

19 Well, in this particular instance an affidavit
20 was filled out, an affidavit of change of residence within
21 precinct and signed by Edith J. Dickerson and by Terri Lee
22 Stamper, S-T-A-M-P-E-R on the 28th day of November, 1994.
23 I believe that that is a technical error. I believe that
24 she should have been allowed to vote in her former
25 precinct, but by this method her vote was challenged and

1 not counted. I think that it is the intent of these
2 statutes that somebody that moves to a new precinct within
3 30 days should be allowed to vote. She voted. Whether it
4 should be counted, it should be counted in the former
5 precinct. It wasn't counted in the former precinct, but
6 I'm sitting here as an election court.

7 I think as a matter of law the vote should count,
8 and if counsel wants to approach the bench, I'll open that
9 challenged ballot. Let the record reflect that I am
10 opening Petitioner's Exhibit 15D. I'm doing this in-camera
11 so that the anonymity of her vote can be reserved. We'll
12 mark this ballot 15F.

13 (The following discussion was held in-camera.)

14 THE COURT: Let the record reflect that
15 the Court has opened the ballot and she has voted for Danny
16 P. Jones, Republican. That is a legal vote, should be
17 counted.

18 (The in-camera discussion was hereby
19 concluded.)

20 (Petitioner's Exhibit No. 15F was marked for
21 identification.)

22 THE COURT: Now counsel, if my records
23 are correct, I have ruled upon all of the individuals that
24 the contestant has presented in this contest, is that
25 correct?

1 MR. MILLER: That's what my notes
2 reflect, Your Honor.

3 MR. RUCKER: I would let Mr. Witteman
4 respond for us, Your Honor.

5 MR. WITTEMAN: Your question relates to
6 all of the ballots that had not been counted? I apologize,
7 Your Honor, you ruled on --

8 THE COURT: No, I think I ruled -- have I
9 not ruled on all of the issues that you presented, Donna
10 Schalk, Ruby Schalk, Edith Dickerson, those were
11 challenged, not counted. I ruled upon those then on the
12 counted but alleged to be illegal votes. I've ruled upon
13 Filomena Garcia, Russell Wayne Keefe, Hal Bumgarner, Moddie
14 Graham, Curtis Richards and Donita Richards and I ruled
15 concerning Jacqueline Mulhliem, that vote. Were there any
16 other others that you adressed?

17 MR. WITTEMAN: I think that is everything
18 we have.

19 THE COURT: All right. Now we'll turn
20 then counsel --

21 MR. MILLER: To the good stuff.

22 THE COURT: -- to your allegations
23 concerning Kirk Branscum, Michael and Penny Dorrell,
24 Mary J. Lenix, Phil Coplen and Norman and Gladys Weigand.
25 I think we need a short break at this time for technical

1 adjustments, so we'll be in recess for about five minutes.

2 (A brief recess was here had from 6:05 to 6:13 p.m.)

3 THE COURT: All right. Please be
4 seated. Without further ado then, counsel, if you wish to
5 speak to your contentions of illegal votes that were
6 counted and I believe there are seven.

7 MR. MILLER: Your Honor, if you would
8 indulge me, if you would take the affidavits that are 4
9 through 10, and if you'll read them back in order, then
10 I'll address them in order, if you could. I don't have
11 them numbered on my copies and I apologize.

12 THE COURT: Well, Kirk Branscum is 4.
13 And that doesn't seem to be up here.

14 MR. MILLER: Are we in agreement with
15 Mr. Branscum or do we need to argue?

16 THE COURT: Michael Dorrell and Penny
17 Dorrell are 5 and 6.

18 MR. MILLER: Are we in disagreement on
19 all these?

20 THE COURT: 9 and 10 are Weigand and
21 Weigand. I don't have 4. It needs to be up here.

22 (An off-the-record discussion was here had.)

23 MR. MILLER: Mr. Branscum, Your Honor,
24 registered to vote in November of '93 and is a duly
25 registered voter at 406 South Cedar Lane Drive and his vote

1 ought to be counted in all respects but for this race in
2 that he is a duly registered voter in Ward 2, Precinct
3 South and as the evidence established that in the 78th
4 Legislative District.

5 He, however, voted his challenged ballot and it
6 subsequently got cancelled and mixed among the others now
7 got Pleasant Valley township and the poll worker for
8 Pleasant Valley is up there and his signature is at the end
9 of that poll book demonstrating that is, in fact, where he
10 voted. The only ballot they have got Pleasant Valley are
11 79 District ballots.

12 His affidavit again verifies who he marked when
13 he received his ballot for State Representative. That's
14 Contestee's 4 and that indicates that he voted for Danny
15 Jones. We would ask that his ballot be determined as
16 illegal, as illegal as it relates to the 79th District
17 State Representative, and that the Court make a finding of
18 fact that his ballot was cast for Danny Jones and that be
19 deducted from the totals presently of Mr. Jones. You want
20 to go through all of them?

21 THE COURT: Yes, if you would, please. 5
22 and 6 concern Michael and Penny Dorrell.

23 MR. MILLER: Yes, Your Honor. I think
24 there is nothing I can do to convince the Court to apply
25 the facts any differently than I would suspect the Court

1 already intends to. I think the facts were established got
2 length. I think there is plenty in front of the Court to
3 make the determination as to how those facts should be
4 applied to the circumstances.

5 We would contend, however, we do contend that
6 Mr. and Mrs. Dorrell are in the same situation as Mr. and
7 Mrs. -- excuse me, as Mr. Branscum in that they received a
8 78th District, excuse me, a 79 District ballot but they are
9 only qualified to vote in the 78 District but not even, not
10 even in this district but that's really not within our
11 province. We believe that the 78 supports a 79 District
12 ballot and cast it for Mr. Jones and that those two votes
13 just like in Branscum should be deducted from Mr. Jones'
14 total.

15 Mary Lenix, Your Honor, changed residences more
16 than 30 days from the election, failed to reregister and
17 was not a qualified voter and yet cast a ballot that was
18 challenged but that has since been counted and that that
19 ballot was cast for Danny P. Jones. Again, he's in exactly
20 the same circumstances as many of the others the Court has
21 already ruled on. We would ask that that vote be deducted
22 from Mr. Jones' total.

23 In fact, Your Honor, she filled out an affidavit
24 that actually supported all those reasons not to count her
25 ballot and that's why it slipped through, because when the

1 clerk reviewed the records, she simply looked at it and saw
2 there was an affidavit and assumed it was correct. In
3 fact, if you read the affidavit that she filled out got
4 election time, it supports the notion that it would have --
5 should have been counted.

6 THE COURT: What exhibit is that?

7 MR. MILLER: That's part of her --
8 whatever number voter she is, it's part of that packet.
9 It's a form, Your Honor, that resembles, resembles this.
10 It's a green and white form I believe.

11 THE COURT: All right. For the record,
12 counsel is referring to Contestee's Exhibit 16B.

13 MR. MILLER: I haven't gotten to Phillip
14 Coplen. No. 8?

15 THE COURT: Yes, No. 8.

16 MR. MILLER: Phillip Coplen's sister who
17 testified as to living got 315 -- excuse me, 314 Virginia
18 testified that Mr. Coplen is her brother and that at no
19 time did he ever live with herself and her family and most
20 particularly at the time he registered to vote on
21 September 25th, 1992. Even if he had been a proper
22 resident, a valid resident of that address, his vote when
23 he cast it in the 1994 election suffered several
24 infirmities most specifically that he too had not removed
25 himself within 30 days of the election from his previous

1 residence and was qualified to vote on that day.

2 He needed to reregister prior to the close of
3 registration for him to even cast a vote in the '94 general
4 election. His affidavit, Your Honor, supports that fact as
5 well as the fact of who he cast his vote for, that being
6 Danny P. Jones. We again would ask that because he cast an
7 illegal vote, he cast it for Mr. Jones, that be stricken
8 from Mr. Jones' total.

9 THE COURT: That's Exhibit No. 8?

10 MR. MILLER: Yes, Your Honor. The
11 Weigands, Your Honor -- I'll speak -- I'll need to speak to
12 independently. There is absolutely no evidence to indicate
13 that Mr. Weigand reregistered got any time so as to be able
14 to cast a vote in the November election. Based on his
15 existing residence got 1210 North Seventh, he had moved
16 approximately two years ago. There is no evidence that he
17 registered got any time since the time he moved.

18 There is evidence he may have been allowed to
19 vote but that is another story and whether this was a legal
20 vote is another story. The clerk's office -- as the
21 clerk's office attested to and made a diligent search of
22 their records, the only evidence of Mr. Weigand's
23 registration is 1974. I believe it is registration.

24 If you did everything as he contended he did, he
25 would not today be validly registered because he didn't

1 follow any process that is allowed under Kansas law for
2 registering to vote.

3 What it sounds -- taking the testimony in the
4 best light advanced by the contestee, what it sounds like
5 he did was he put his name on some kind of list for
6 somebody to follow up on and he didn't do it -- he
7 described it as an 8 1/2 by 11 sheet. He did not divest
8 himself of the responsibility of voting simply because
9 someone else said they would take care of it, if indeed
10 that is what occurred.

11 The polling place, Your Honor, is a cluttered
12 place. A lot of important happenings occur on election day
13 and the gravity of any one vote cannot be more clearly
14 demonstrated by what's occurring in these chambers today.
15 That is why it is so important for voters to take
16 responsibility to insure that they are properly registered
17 and not trying to cast off through speculation. I might
18 address where the shortcomings might be.

19 And again, even if Mr. Weigand had filled out a
20 registration card to which is no supporting documentation
21 in the August primary, that's not a valid way to register
22 to vote because the polling place is not designed to be a
23 voter registration outlet. It's principally a polling
24 place to collect votes in a very limited number of
25 exceptions because in such a complex task the law does

1 allow certain voters to register.

2 In these circumstances Mr. Weigand would not be
3 one of them either in the August primary or in the November
4 general election. The same comments can be advanced as it
5 relates to Mrs. Weigand. The only additional evidence we
6 have with Mrs. Weigand is it appears that if she did make
7 an attempt to register, it was a mistake on her part.

8 To have listed her previous residence as her
9 correct residence for purposes of registration, that's the
10 only address, Your Honor, listed on the computer screen. I
11 think it's marked in evidence as being where she's
12 registered to vote. That's 315 North Second which is her
13 previous residence.

14 THE COURT: It's a different precinct.

15 MR. MILLER: Absolutely. And again,
16 there is no documentation to support the claim she's making
17 about filling out a registration card, but even if there
18 was, that is not -- she couldn't have properly registered
19 in that fashion. And had the clerk's office had the hard
20 copy documentation of such a card, they would have needed
21 to inform her that she needed to reregister because that is
22 not an acceptable process for people who have moved out of
23 precinct more than 30 days prior to the election.

24 There is a million and one stories, Your Honor,
25 that you haven't heard in these proceedings about how it is

1 that a voter failed to complete the process of registering
2 to vote. We didn't hear those stories, Your Honor, because
3 those people aren't advancing the argument that they don't
4 have to comply with the law and still have their vote
5 counted nor should they nor should we select two
6 individuals to make an exception for because that
7 disenfranchises the will of the electorate.

8 And I harken the Court's attention to the case
9 cited earlier by counsel. It talks about technical errors
10 and the application of that principle only applying in
11 cases of legally qualified voters. No evidence whatsoever
12 that either Mr. or Mrs. Weigand were such.

13 Now, that may be unfortunate. It is unfortunate
14 any time a voter wishes to have their vote counted when
15 they didn't complete the process but there are not a lot of
16 instances, Your Honor, hundreds that we can't get into
17 where something was let down. The responsibility to see
18 that you are properly registered remains in the hands of
19 the voter. I think I completed my list, Your Honor.

20 THE COURT: That would be 9 and 10?

21 MR. MILLER: Yes, Your Honor.

22 THE COURT: Counsel, do you wish to
23 respond?

24 MR. WITTEMAN: I do, Your Honor. If I
25 might indulge the Court, there is an exhibit that I'd like

1 to look got that you have in front of you relating to
2 Mr. Coplen. I just draw that to your attention and then
3 I'll again --

4 THE COURT: Okay.

5 MR. WITTEMAN: Your Honor, let me state
6 once again, certainly the Court made it ruling in regard to
7 the hearsay exception. Whether it agrees aside from the
8 facts, let me say I understand that's the Court's ruling.
9 However, the issue at this time is how much weight does
10 that Court give to that evidence, and that certainly is
11 nothing that's been precluded by considering those
12 affidavits that have come before the Court, and I think
13 that's the issue that the Court has to decide now.

14 In regard to the underlying facts of the move and
15 where Mr. Branscum is registered, I won't dispute that in
16 this closing argument, but once again, I would go to the
17 point of the affidavit. What testimony does that Court
18 have on how he voted?

19 If the Court were to determine that that was an
20 illegal vote, all we have is an affidavit, and if I could
21 draw the Court's attention to the fact that affidavits
22 aren't always what they say depends on who drafts them,
23 depends perhaps on what options one person might be given.

24 There are a lot of things it can depend upon, and
25 I think you understand the circumstances that was so

1 ably -- I won't say that. What I'll say is that's
2 demonstrated by the testimony of witnesses here today.
3 There are problems with affidavits, whether that's what it
4 means or if that's not quite what it means, and I think the
5 Court needs to consider that in that respect with all of
6 the affidavits presented to the Court. I think the
7 appropriate weight should be given which I think is very
8 little. The Court has now had the opportunity to weigh the
9 truth of the matter stated therein.

10 Now, I would essentially just forward the same
11 arguments in regard to the ballot of Mary Lenix, certainly
12 no dispute with the underlying facts, with the moves and
13 that sort of thing in this argument. However, does the
14 Court have competent evidence in front of it if it
15 should -- if the Court should determine that was an illegal
16 vote? How that voter voted, do we know? The same argument
17 is to be made but I think more forcefully so on this basis.

18 Mr. Phillip Coplen, I'd like to draw the Court's
19 attention to Exhibit 15B, which I think should be laid out
20 for the Court to look at and thereon it indicates that
21 Mr. Coplen moved on November 7, and I hope, Your Honor, I'm
22 referring to the appropriate exhibit, the challenged ballot
23 envelope.

24 THE COURT: 15B.

25 MR. WITTEMAN: And it indicates that

1 Mr. Coplen moved on 11-7 of this year. That's evidence
2 this Court has before it in that regard. Now, let's look
3 at the affidavit. Indicating approximately four months
4 ago -- well, I'm not sure that's right. I know that
5 Mr. Coplen has obviously made a statement if nothing else
6 to a poll worker that wrote on that ballot that he moved on
7 November the 7th of 1994.

8 And got this point I don't know what controverts
9 that other than this affidavit and particularly I think and
10 will counsel so I'm am so ably to point out this was sworn,
11 has been notarized. Did he understand the extent of what
12 this meant? I don't know. Did he rethink his position
13 from wherever this information came about about four months
14 ago before he executed it? Is that what he really means
15 now?

16 I think it was objected to by counsel when I
17 stated the introduction of affidavits here today. While we
18 agree and are welcome to subpoena these people in and have
19 them in, we've never spoken to Phillip Coplen. I have no
20 idea what the underlying facts are, none whatsoever, what
21 he's written in there and what's in this affidavit. The
22 Court will recall we were given a list of names they felt
23 were illegal votes on this trial. That was December 27th
24 of this year. The Court can take note of that.

25 THE COURT: Is that when he filed his

1 answer to your amended notice?

2 MR. WITTEMAN: That is correct. That's
3 the first indication we had, and like I said, we never
4 talked to Mr. Coplen. The Court can take note that this
5 affidavit was signed on Christmas Day of this year. I
6 think the Court will also take note of Mr. Wilson's
7 testimony that Mr. Coplen was flying out to Houston that
8 day.

9 No, we didn't have the opportunity to subpoena
10 this individual to get him in here and see what's right,
11 what is written down on that envelope or what's in this
12 affidavit. I don't know. I've never had the chance to
13 talk to him and I couldn't subpoena him in this Court. As
14 far as I know, he's in Houston, Texas.

15 Now, with that said, I don't know if his vote is
16 illegal and I don't know how he voted the ballot. There is
17 conflicting evidence on both points. I believe if the
18 Court looks at the case of Lambeth versus Levens, it
19 indicates that there is a presumption that a vote cast, a
20 ballot cast is legal. And until that presumption is
21 overcome, that's when he had the opportunity to find out
22 how somebody voted, first have to overcome that
23 presumption.

24 All we have is conflicting evidence in regard to
25 whether that ballot was legal or illegal. And certainly

1 how he might have voted that ballot. We don't wish to
2 disenfranchise him. I don't know how he voted the ballot.
3 I don't have an affidavit in front of me. I haven't had
4 the opportunity to examine him to find out if that's what
5 he meant at all.

6 Let's move to the Weigands. The Court knows the
7 dates that the Weigands made their efforts to reregister as
8 offered to them by poll workers. They followed the
9 instructions. Now, the question arises in regard to
10 Mr. Weigand, we have no documentary evidence to prove that
11 that happened or what he filled out. We know by their
12 testimony, uncontroverted testimony that he and
13 Mrs. Weigand took the same actions at the same time at the
14 same polling place.

15 We know in regard to Mrs. Weigand, we can go to
16 the exhibits in front of the Court, and I don't have them
17 in front of me as to the exact exhibit number, but you can
18 look at the computer printout. There is an indication, and
19 the computer printout being on the bottom, that, in fact,
20 it shows that she was an actively registered voter
21 effective August 2nd, 1994.

22 I'll take a moment and give the Court a chance to
23 review it. Exhibit 13E, the computer printout indicates in
24 the judgment of the Cowley County election office, Miss
25 Weigand was an active voter. Her registration was active

1 8-2-94. That doesn't just appear for no reason. We don't
2 have the registration card.

3 You've heard the testimony of Ms. Warren that
4 they don't just sit down at the computer and make somebody
5 active on a whim. There has got to be some documentation
6 to cause that to happen. The registration occurred at the
7 instructions of the state, at the instruction of the poll
8 workers, at the instruction of the government, fill this
9 out. This will take care of it.

10 Obviously, that information found its way back to
11 the Cowley County clerk's office and they noted her as
12 being an actively registered voter at the time they ran
13 that printout on 8-10, or excuse me, on 11-10. It shows at
14 that time as of August 2nd, '94 she was an active voter.
15 This was not their imagination. They filled out forms to
16 register.

17 You heard it from Ms. Warren that, yes, in fact,
18 registration cards can get misfiled. They can get
19 misplaced. They have -- on occasion they have 13 and
20 14-year olds on occasion assisting in the duties of getting
21 cards filed. I don't know why there isn't a card, but I
22 don't think there can be any question that documentation
23 came to the Cowley County clerk's office indicating a
24 registration.

25 I wish we had that card. I wish it was available

1 because that computer printout and that information was not
2 entered into the computer out of thin air. It is
3 absolutely consistent with the testimony we've had from the
4 Weigands. I probably said that in as many different ways
5 as I can and I'll stop.

6 The Weigands are long-time voters as cocounsel
7 has noted to the Court. This is -- their voting franchise
8 is very important to them. They took the action that, in
9 fact, the government workers told them they needed to take
10 to be registered. They took that action. They filled out
11 the cards. Now, if there is something technically wrong
12 with that, perhaps as a legal argument and I think it is
13 valid in this state, the government can be collaterally
14 stopped and can say something and do something the
15 opposite.

16 They said they'd take care of it, this will do
17 it. They filled out the cards. Obviously it got back to
18 the clerk's office obviously or I wouldn't have some
19 computer printout. This Court should not disenfranchise
20 them as they have done -- as they were directed by the
21 people in charge of this. Their votes are valid and should
22 count as they have counted.

23 Now, let's get down to the Dorrells. The
24 evidence is this: If the precinct which I believe is at
25 the Elks Lodge wherein the Dorrells voted, it's obvious

1 that two different precincts were voted got that polling
2 place, one is 78th District, one is 79.

3 I understand why the red flags went up from
4 Contestee's counsel in looking got those poll books. I
5 understand why they went up. You look at the poll book
6 that has the challenged voters in it for the 79 District,
7 you a discover there is a couple names on there that are
8 78th District voters.

9 The flag should go up, but what we heard today
10 was this: That the poll workers at that site wrote all of
11 the challenged ballots in that book. They didn't write in
12 any other book. Rather right or wrong, that's how they did
13 it. The ones that came in, they wrote them in that book
14 whether 78 or 79 precinct voters. They were all written in
15 the book for the 79 District precinct.

16 There is no evidence, no evidence that the
17 Dorrells voted as 79 District ballots. The fact that their
18 name was in the back of that poll book means nothing.
19 That's where they put everybody that came in was in the
20 back of that 79 District poll book. That's where they
21 wrote the challenged votes in. There were none in the poll
22 book at the other precinct that was voted there. Should
23 have been done differently now I'm sure, but it doesn't
24 have any affect on that. We're not arguing technical error
25 here. It's just that that is not indicative that they

1 voted 79 District ballot.

2 In fact, the testimony of the two poll workers
3 was they were very careful. They don't have any doubts
4 that they gave 79 District ballots to any 78th District
5 voter. That didn't happen. That's not -- their testimony
6 was they were careful. They did their job. One would call
7 out the name, the other would give the ballot out.

8 Now beyond all that, there is no evidence that
9 they voted a 79th District ballot. I asked each of the
10 them and respective of what this affidavit said, I
11 said -- I don't want to pound that in. The Court's well
12 aware of what that testimony was, what the affidavit means
13 and what it doesn't mean.

14 Did he go in there with the intention of voting
15 for Danny Jones? Barely heard of him, heard of Joe
16 Shriver. That was not their intention to go in and vote
17 that. They were Republicans and they voted a Republican
18 ticket. Did either of them recall seeing the name of Joe
19 Shriver on that ballot? No, no recollection whatsoever.

20 Did either of them recall seeing the name of
21 Danny P. Jones on that ballot? No, no recollection of that
22 whatsoever, and as far as that goes, I asked them did they
23 recall seeing Greta Goodwin who was the 78th District
24 Representative, the Democrat where there was no Republican
25 to vote on the 78th District ballot? They indicated yes.

1 In fact, they went in to vote and if they went in
2 to vote for Republican and there was no Republican
3 candidate running for office. I believe Mr. Dorrell's
4 testimony was that if he happened to know the Democrat, he
5 might vote for them if there was some reason he felt that
6 was appropriate but most likely they would just skip that
7 box. They just wouldn't vote that race.

8 I'm not going to try to restate what the problem
9 was with that affidavit. They signed it in good faith. I
10 have no doubt of that when it was suggested to them one of
11 the two candidates was Mr. Shriver and one Mr. Jones.
12 Well, who is the Republican? Well, that's who we voted
13 for.

14 If, in fact, we knew they had that ballot, maybe
15 that would have some weight but we don't got all and that's
16 all the evidence there is. There is absolutely no evidence
17 that he got a 79th District ballot.

18 THE COURT: Thank you, counsel. Do you
19 wish to rebut? Do you wish to rebut?

20 MR. MILLER: Yes, Your Honor. I don't
21 take very good notes but I took particular time to write
22 down what counsel just said with regard to the Weigands,
23 that they took the action the poll workers told them to
24 take. Your Honor, there is no evidence as to what was told
25 to them. There was no board worker's testimony offered nor

1 any names given of any board worker who would have told
2 them what actions to take.

3 I object strenuously to any reference to that as
4 being hearsay. If it was being offered to prove the truth
5 of the matter asserted, and if the matter asserted is that
6 they were instructed to take particular actions, then that
7 evidence, that testimony is being offered to prove the
8 truth of the matter asserted and it is hearsay inadmissible
9 if it somehow slipped into the testimony.

10 As to the Dorrells, Your Honor, I would call the
11 Court's attention -- I don't have the numbers, but the
12 print screen on each of those voters under party indicates
13 U, not R, has the letter U, not the letter R which stands
14 for unaffiliated, not Republican. They were not registered
15 Republicans as counsel just contended.

16 And lastly, Your Honor, counsel repeated or in
17 his closing remarks repeated the testimony that the
18 Dorrells were advancing that it was suggested to them by
19 Mr. Wilson as to who the two candidates were for the 79th
20 District State Representative race.

21 Your Honor, the independent testimony of
22 Mr. Wilson on that point and his wife, Mr. Wilson being an
23 attorney, an officer of this Court, his wife being an
24 employee of this Court, was that there was no questions
25 asked before the affidavits were signed, and yes, Your

1 Honor, sworn testimony does not make it fact, but I would
2 ask the Court to evaluate the sworn testimony of the
3 Dorrells today versus their sworn affidavits, and I would
4 also ask when the Court considers that to measure it
5 against the sworn testimony of Mr. and Mrs. Wilson. Two of
6 them are wrong. Thank you, Your Honor.

7 THE COURT: Counsel, I might tell you
8 that what I intend to do is make my findings and rulings
9 with respect to these seven votes this evening. There are
10 other issues that have been raised concerning costs and
11 fees and that sort of thing, and I intend to take that
12 under advisement, but I think the best procedure for me to
13 follow today is to announce my rulings with respect to
14 that, and then the ultimate conclusion I think takes some
15 arithmetic and some double-checking on my part in order to
16 make sure that the anonymity of a couple of votes is
17 preserved, so that's what I intend to do unless there is
18 some objection to that procedure.

19 MR. MILLER: Your Honor, I'm getting very
20 deaf. What did you say to the issue on costs and fees?

21 THE COURT: I'm going to take that under
22 advisement.

23 MR. MILLER: May I make one brief
24 statement?

25 THE COURT: Well, I basically want you to

1 put it in a memo to me in Paola. I'm not going to rule on
2 that this evening.

3 MR. MILLER: I would say on behalf of the
4 contestant -- I understand the word I'm using.

5 THE COURT: Well, it used to come from
6 the contestee. Don't you --

7 MR. MILLER: But in advancing argument on
8 behalf of the contestant, I would urge the Court not to
9 assess under this complicated set of facts costs or fees
10 against the contestant. There is another option and I
11 think it is appropriate here that all costs, all fees
12 associated with this action be assessed against the State.

13 THE COURT: All right. Well, you have
14 once again changed your position with respect to that, have
15 you not?

16 MR. MILLER: That's based on the evidence
17 that I heard this week, Your Honor.

18 THE COURT: All right.

19 MR. WITTEMAN: We appreciate that comment
20 from counsel, and I think if there is anything to be said,
21 there was good faith going forward in a contest.

22 THE COURT: All right. Well, there is a
23 legal question now that exists there that all three of you
24 may have to submit to the Court and that's concerning
25 attorneys' fees. If you are asking me to assess attorneys'

1 fees and appointed costs this evening, you are going to
2 have to cite me some authorities with respect to that.

3 The other routine costs of witness fees, all of
4 that sort of thing, I don't think there is any dispute
5 about the question I have about attorneys' fees and that's
6 what I was making reference to. Do you have any objection
7 to me proceeding though as I previously stated?

8 MR. WITTEMAN: No, I don't, if the
9 assumption is with the stipulation from contestee that
10 based under the statutory language that it would not serve
11 justice to have costs to anybody in this case which I think
12 is the language.

13 MR. MILLER: Either party.

14 MR. WITTEMAN: Excuse me?

15 MR. MILLER: Either party.

16 MR. WITTEMAN: Either party.

17 MR. MILLER: I think the costs should be
18 paid by the State, not by the parties.

19 MR. WITTEMAN: I think we can agree on
20 that issue.

21 THE COURT: But the State says -- does
22 that statute contemplate attorneys' fees? If so,
23 attorneys' fees for both parties or the prevailing party?

24 MR. MILLER: I won't worry about mine.

25 THE COURT: Well, I have to make a ruling

1 on all costs, counsel. Well, let's go through this list,
2 and I think I'm going to take it in this order. First of
3 all, with respect to the challenged ballot of Mary Lenix.
4 She filled out an affidavit that clearly shows in 16B that
5 she moved much more than 30 days preceding the election.

6 In fact, it says 10-8 of '93, and in her
7 affidavit which has been admitted here into evidence, she
8 stated that she is a resident of Cowley County, Kansas
9 residing at PO Box 1754, Lakewynds Estates, and that's
10 W-Y-N-D-S, Arkansas City, Kansas and she resided at that
11 address since October 8th, 1993, and November 8th, 1994
12 general election she voted for Danny P. Jones, the
13 Republican candidate for State Representative. That is a
14 Jones -- is a vote cast for Jones. It was counted for
15 Jones. I believe that was not a legal vote and should be
16 deducted.

17 And with respect to Norman and Gladys -- well, I
18 think I'll do Kirk Branscum and it's B-R-A-S-C-U-M.

19 MR. MILLER: Your Honor, if I may correct
20 the Court, it's B-R-A-N.

21 THE COURT: B-R-A-N. I'm sorry, couldn't
22 read the writing. In his affidavit he stated that he was a
23 resident got 406 Cedar Lane and had been in Winfield and
24 had been there for approximately one year. He voted in the
25 November 8th general election and he voted for the

1 Republican candidate for State Representative, Danny P.
2 Jones. This was challenged and counted. I find no
3 registration for Mr. Branscum got that address. I
4 therefore find that he voted for Mr. Jones and it was not a
5 legal vote and it should be deducted.

6 Norman and Gladys --

7 MR. MILLER: Your Honor?

8 THE COURT: Yes.

9 MR. MILLER: I apologize for
10 interrupting. I want to make the record clear. I think
11 the Court heard Mr. -- and maybe I misheard, Mr. Branscum
12 was validly registered to vote at the appropriate address,
13 406 Cedar Lane Drive. It's just that that's not in the 79
14 District.

15 THE COURT: That is correct. I did
16 misspeak myself. I have lots of notes up here, counsel.
17 He's a qualified elector but not in the 79th District.

18 With respect to Norman and Gladys Weigand, I'm
19 going to be consistent in my rulings here. They are not
20 registered. They voted for Danny P. Jones and those two
21 votes, both of them should not have been counted, are not
22 legal votes and that would be my ruling.

23 Now, the final two are Michael and Penny Dorrell.

24 MR. MILLER: Phillip Coplen, Your Honor.

25 THE COURT: Ah, Phillip Coplen, Phillip

1 Coplen. Okay. I see him. Why, Phillip Coplen. There is
2 no affidavit that is attached to show that he moved 11-7 to
3 203 1/2 East Madison. His affidavit that's been presented
4 here upon which I must rule is that he has resided got 203
5 1/2 East Madison for approximately four months. That is in
6 excess of 30 days next preceding the general election. He
7 should have reregistered.

8 MR. WITTEMAN: Your Honor?

9 THE COURT: Yes.

10 MR. WITTEMAN: I apologize for
11 interrupting, but I believe on the ballot envelope itself
12 there is an affidavit that he moved within 30 days. It's
13 on top of the ballot envelope.

14 THE COURT: I see where that is signed
15 but I see no election board judge and no authenticate -- no
16 authenticating signature there.

17 MR. WITTEMAN: Very well.

18 THE COURT: So I'm more persuaded by
19 Exhibit Contestee's 8 than I am by this signature. As an
20 election court, I'm going to rule that he voted for
21 Danny P. Jones. It should not have been counted.

22 Now, I believe that gets me to Michael and Penny
23 Dorrell. These two I think out of all of these series are
24 the most interesting. There are two points I would make
25 with respect to these voters. I'm not convinced that they

1 voted in the 79th District, and secondly, I'm not convinced
2 for whom they voted other than I think they wanted to vote
3 for the Republican. I think they both made that abundantly
4 clear for me from the witness stand.

5 And based upon their testimony here I find that
6 persuasive evidence that I'm not sure that they cast an
7 illegal vote. I'm not sure that those two should be
8 deducted and I'm going to rule that they should not be.
9 Had they wanted -- had they voted somewhere, they would
10 have voted I think for the Republican, and I know in their
11 affidavit they stated that they voted for Danny P. Jones,
12 but from their testimony it looked like to me that they
13 couldn't think -- they might know Mr. Jones but they
14 certainly didn't seem to and they didn't know his name
15 other than through the suggestion, so I'm not going to find
16 that those are votes for Jones. I'm not going to find that
17 they are illegal votes. I just don't think I'm persuaded
18 by the evidence that that is so.

19 Now counsel, have I ruled upon all of your
20 allegations of votes cast illegally?

21 MR. WITTEMAN: To the best of our
22 knowledge, Your Honor. Perhaps one last summary to make
23 sure we didn't miss it.

24 THE COURT: Well, I was referring to were
25 there any of your allegations of any illegal votes that I

1 didn't cover?

2 MR. MILLER: I would agree with counsel.
3 Can we take a brief recess to go over this?

4 THE COURT: I would say if you want to
5 put it along with your brief with the others because I've
6 made my ruling.

7 MR. MILLER: I feel as good as I can
8 then, Your Honor.

9 THE COURT: I'll suggest to you though
10 now you have a record of my rulings, I would ask that a
11 journal entry be prepared that shows what I am required to
12 find for the House of Representatives which I believe I've
13 already done for the record here, so that's I think
14 sufficient but I think a vote total needs to be
15 determined. I have my unofficial one here, but I would
16 appreciate you double-checking to make sure that my
17 arithmetic is correct.

18 MR. MILLER: Your Honor, are you
19 intending to, other than the journal entry, are you --
20 excuse me, other than the transcript, are you intending to
21 incorporate your findings of facts in an order, and if you
22 are, I have an excellent document to which you can refer to
23 and it was written by Judge Wheeler four years ago to which
24 he goes through -- he did just as the Court did today in
25 terms of his oral findings. Then he went through and

1 documented in writing himself the written expressions of
2 his rulings.

3 THE COURT: Well, I intend to do that,
4 but what I'm suggesting is a short very brief one or
5 two-page document showing the vote totals. These other
6 findings I can do.

7 MR. MILLER: Well, I'll get out a paper
8 and give you a copy.

9 MR. WITTEMAN: Can I suggest to the Court
10 perhaps even a bench conference? I think Mr. Millers knows
11 where we are. I know where we are. Perhaps we ought to
12 come up and talk with you so we don't get some strange
13 number.

14 THE COURT: We'll retire to the chambers
15 then as far as I'm concerned though. Is anybody from the
16 clerk's office here? I'm going to turn all of these
17 exhibits over to you. I'm not going to hold anymore
18 hearing today on this.

19 MR. MILLER: What about the one, Your
20 Honor, is it back in Mr. Gaston's custody or is it still up
21 here?

22 THE COURT: Everything that was marked is
23 still up here.

24 MR. MILLER: That was Contestee's 3.

25 THE COURT: Everything that's been marked

1 is up here.

2 MR. MILLER: I'm just saying I don't want
3 that as part of the record because I'd like to return it to
4 Mr. Gaston.

5 THE COURT: Counsel, do you want a record
6 on this? He wishes to return Contestant's Exhibit 3.

7 MR. MILLER: Contestee's --

8 THE COURT: Contestee's Exhibit 3 to
9 Mr. Gaston. This is the poll book of November 3rd, 1992.

10 MR. WITTEMAN: I don't particularly care
11 where it goes.

12 THE COURT: So returned. Well, if you
13 both want to stand back. To the contestant and the
14 contestee, good luck to both of you. That's about the best
15 I can do from the bench today. I want to do this so both
16 of you could know this evening what my thoughts were on
17 this, and I hope you understand now all of this will be
18 packaged up and sent to the House of Representatives with
19 my order to await their pleasure because being I'm in a
20 separate but equal body of government, it is up to the
21 legislature to decide upon this ultimate membership.

22 Counsel, I know it's been a long few days for
23 you. I want to state to all three of you that it's been a
24 hard fought job on both sides and I know all of you have
25 been working hard on it and I appreciate the many

1 courtesies that you have extended to the Court.

2 MR. WITTEMAN: Thank you, Your Honor.

3 THE COURT: We'll be adjourned.

4 (Court was hereby adjourned at 7:05 p.m.)

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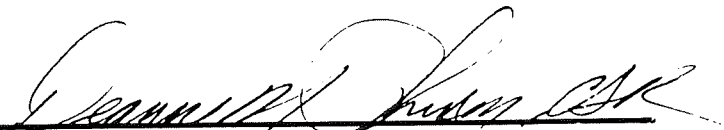
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STATE OF KANSAS)
) ss.
COUNTY OF COWLEY)

I, Deanne M. Johnson, Certified Shorthand Reporter within and for the State of Kansas, do certify that the witnesses in the foregoing proceedings were duly sworn to testify the truth, the whole truth, and nothing but the truth, in the within-entitled cause; that said proceedings were taken at the time and place herein named; that the proceedings are a true record of the witnesses' testimony as reported by me and thereafter transcribed into typewriting by computer.

I do further certify that I am not counsel, attorney or relative of either party, or clerk or stenographer of either party or of the attorney of either party, or otherwise interested in the event of this suit.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal at my office in Winfield, Cowley County, Kansas this 18th day of January, 1995.


Deanne M. Johnson, C.S.R.
COWLEY COUNTY DISTRICT COURT
PO Box 472
Winfield, Kansas 67156