

INDIANA STATE RECOUNT COMMISSION

MINUTES OF THE JUNE 10-11, 2004 MEETING

MEMBERS PRESENT: Todd Rokita, Chair of the Indiana State Recount Commission (“the commission”); Gordon Durnil, Member; John Griffin, Member

MEMBERS ABSENT: None

STAFF ATTENDING: Heather Willis, Recount Director; J. Bradley King, Majority Counsel; Kristi Robertson, Minority Counsel; Phil McGovern, State Board of Accounts; and Lt. Colonel Michael Medler, Indiana State Police.

1. CALL TO ORDER AND DOCUMENTATION OF MEETING NOTICE:

The chair called the June 10, 2004 meeting of the Indiana State Recount Commission to order at 8:00 a.m. in the Wright Building Auditorium, 80 S. Jackson Street, Franklin, Indiana. The chair reviewed the agenda and recognized Mr. King who acknowledged that documentation of the meeting notice had been given.

2. APPROVAL OF MINUTES OF MAY 21, 2004 MEETING

The chair presented the minutes for the May 21, 2004 meeting. Mr. Durnil motioned to accept the minutes and was seconded by Mr. Griffin. With three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

3. MOTION TO DISMISS/MOTION FOR SUMMARY JUDGEMENT

The chair recognized Respondent’s attorney, Mr. Jim Bopp, who argued that the petition for recount had a fatal defect due to failure to strictly comply with statutory requirements in noting the names exactly as they appeared on the ballot. Ind. Code 3-12-11-3(a) lists the requirements for a recount petition using the mandatory language “shall,” and Indiana law requires strict compliance. Mr. Bopp noted that the candidates' names as they appeared on the ballot were “Lawrence M. Borst” and “Brent Waltz.” The names as listed in the petition were “Lawrence M. Borst, Jr.” and “Darryl Brent Waltz, Jr.” Mr. Bopp concluded that the petition should be dismissed or that in the alternative summary judgment should be granted.

Petitioner’s attorney, Mr. David Brooks, responded by summarizing the work that had taken place by the various parties to date. Mr. Brooks argued that the names are identical to the names as listed on the declaration of candidacy. The statute requires the names as they appeared on the ballot. The petitioner complied with the statute and simply provided additional information. Furthermore, the purpose of the statute is to specifically identify with no confusion who the candidates are. The addition of “Jr.” does not violate the statute, and Mr. Brooks asked that the motion to dismiss be denied.

In reply Mr. Bopp stated that in order for Mr. Borst to succeed there must be invalidation of votes submitted in the election. Again referring to IC 3-12-11-12(d), the commission must rule before continuing with the recount. Mr. Bopp stressed that any time wasted on preparation for the

recount was due to the error of the petitioner and that Indiana required strict compliance with the statute.

Mr. Griffin asked Mr. Brooks why the petitioner was arguing against strict compliance when the petitioner had previously argued for it in regard to the motion to dismiss the cross petition. Mr. Brooks stated that the petitioner had strictly complied with the statute and simply provided additional specificity for the purpose of correctly identifying the candidates.

Mr. Durnil moved to deny the respondent's motion to dismiss the recount petition based upon the fact that there were no objections to the petition at the previous recount commission meeting of May 21, 2004. The motion was seconded by Chairman Rokita. The chair opened the floor for discussion and stated that the taxpayer money that has been spent, the time spent, and the substantive issues presented required the commission to proceed with the recount. Furthermore, Chairman Rokita noted that the respondent knew or should have known of the disparity between the names on the petition and the ballot at the previous meeting.

There being no further discussion, the chair called the question and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion to deny the motion to dismiss was adopted.

4. MOTION TO CONSIDER AND REJECT VOTES CAST IN PERRY 23

The chair recognized Mr. Brooks, who stated that despite an increase of 17 votes for the petitioner if the votes for Senate District 36 cast in Perry 23 were counted, the petitioner asked that the votes cast in Perry 23 for candidates in Senate District 36 be rejected. Mr. Bopp agreed that the votes should not be counted.

The chair recognized that both parties agreed that the votes cast in Perry 23 should be rejected. Mr. Griffin moved and Mr. Durnil seconded that the votes cast in Perry 23 be rejected. There being no discussion, the chair called the question and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

5. ORDER 2004-07 CONFIRMING DISMISSAL OF CROSS-PETITION CONCERNING PERRY 23

The chair recognized Mr. King, who presented order 2004-07 documenting the dismissal of the Cross-Petition for Perry 23.

Mr. Durnil moved to adopt the proposal and was seconded by Mr. Griffin. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

6. REPORT OF RECOUNT DIRECTOR

The chair recognized the recount director, Ms. Willis. Ms. Willis reported that she had issued an order for impoundment of the Perry 23 election material pending the decision of the board. Ms. Willis listed all motions and filings received since the previous recount commission meeting: On May 24 at 3:21pm Petitioner filed a motion to reject votes cast in Perry 23. On June 7 at 11:23am Respondent filed a motion to dismiss/motion for summary judgment. On June 7 at 11:58am Respondent filed an exhibit list, witness list, and brief in support of factual challenges. On June 7

at 4:46pm, Petitioner filed exhibit and witness lists. On June 8 at 11:28am Petitioner filed a motion to include inadvertently admitted witness and exhibit lists. On June 9 at 8:47, the petitioner filed a response brief. On June 9 at 6:31pm Petitioner filed a motion for issuance of subpoenas. On June 10 at 7:55am Respondent filed a motion for issuance of subpoenas. Ms. Willis indicated that during the pre-conference hearing, three motions were made. First, Respondent's motion to compel Petitioner to provide copies of affidavits was denied on the advice of counsel. Second, Respondent's motion to strike the second item on Petitioner's exhibit list was denied on the advice of counsel. Finally, the respondent's motion to amend Respondent's exhibit list to include an additional item (identical to the second item on the petitioner's exhibit list) was granted.

Ms. Willis concluded with a progress report summarizing completion of the recounts in Marion and Johnson Counties. The pre-recount inspection was conducted on May 24th in both counties. The examination of the ballots in Marion County was conducted on May 25th and 26th and in Johnson County on May 27th and June 1st.

7. REPORT OF INDIANA STATE POLICE

The chair recognized Lt. Col. Medler, who gave a report that the Indiana State Police conducted the impoundment pursuant to Order 2004-01 and to the subsequent order regarding Perry 23 and that all material had been secured by Indiana State Police until this time.

8. REPORT OF STATE BOARD OF ACCOUNTS

The chair recognized Mr. McGovern, who noted the hard work by the State Board of Accounts and reported that the recount proceeded without incident.

The chair opened the floor for discussion and recognized Mr. Marion Redstone, attorney for the petitioner, who requested that an affidavit be accepted that reflected a scrivener's error. Mr. Redstone disagreed with the State Board of Accounts report for two reasons. First, the numbers are wrong and second, he suggested that minor but important changes be made to the data. Mr. Rokita asked that the discrepancies be addressed as the affected precincts are addressed.

9. THE RECOUNT FOR THE REPUBLICAN PARTY NOMINATION FOR INDIANA SENATE DISTRICT 36

The chair requested that parties identify possible witnesses and asked for them to stand for administration of the oath. Mr. King administered the oath to the witnesses and to counsel.

(1) Opening Statements

The chair asked for opening statements and limited time for each statement to three minutes.

The chair recognized the petitioner to make an opening statement. Mr. Brooks stated that often it is said that the goal of a recount is to never disenfranchise voters. Yet counsel is often led to do the opposite, to find technicalities through which to challenge votes. Respondent says that the ballots should not be opened and that an entire precinct should not be counted. Petitioner will offer no technical arguments to disenfranchise voters. Petitioner will show that the proper remedy is a special election because of the following: the provisional and absentee ballots; the missing ballots; and the ballot shortages. The evidence will show that there were ballot

shortages, that precincts ran out, that voters left because precincts ran out, that news media reported shortages, and that the news media reports would and did have a negative effect on voter turnout during one of the busiest times of the day for voting. Petitioner will ask the commission to count all ballots and order a special election.

The chair recognized the respondent to make an opening statement. Mr. Bopp stated that it can only be inferred from Petitioner's argument and objections that there are three principle issues. They are the following: This is a recount and not a contest. In a recount the commission considers whether the "votes cast" "were not correctly counted and returned" (Ind. Code 3-12-11-3(a)(5)). A contest is different in the evidence which it examines, as it requires consideration as to whether a "mistake in printing or distributing ballots" occurred that makes it impossible to determine the winner. The petitioner chose a recount and not a contest. Petitioner's request would invalidate every single one of the cast and counted votes. The evidence will show the following: 1) one precinct was without ballots for approximately 30 minutes; 2) the precinct received an adequate number of ballots to provide to every voter in that precinct by 6:00; and 3) all voters who showed up during the time when the precinct was without ballots were told that if they would wait they would be able to vote as long as they were inside the building before 6:00 p.m. when the precinct closed.

The chair stopped Respondent for expiration of time.

(2) Presentation of State Board of Accounts report

The chair recognized Ms. Willis who began listing the 51 precincts that the State Board of Accounts listed as having no disputed ballots.

Marion County

Ward 13 Precinct 5	16 for Borst	11 for Waltz
Ward 13 Precinct 6	8 for Borst	12 for Waltz
Ward 13 Precinct 8	39 for Borst	26 for Waltz
Ward 13 Precinct 9	16 for Borst	21 for Waltz

Mr. Bopp questioned the numbers for Ward 13 Precinct 9. Mr. Redstone stated that there was one disputed ballot. Mr. Brooks said that he did not challenge the numbers stated but did not want to close the precinct when there was an unopened ballot. Mr. Redstone questioned what the proper procedure is to address unopened ballots that may not be classified as disputed ballots. He said that there is no procedure to accommodate the unopened ballots.

Mr. Bopp said that he believed that the presentations scheduled for later were to address the ballots not counted and improperly counted.

The chair suggested creating a procedure to handle this new situation and asked advice from counsel. Mr. King said that the guidelines do address the presentation of precincts with undisputed ballots and the proper procedure is to have the director read all the precincts that are listed as undisputed. He suggested that at the close of reading the numbers for the undisputed precincts, if either party has identified any of those precincts as disputed, they will then list them and the commission will not accept those precincts as precincts with no disputed ballots. Mr. King explained that this would mean taking them out of the undisputed column.

Ms. Willis continued listing the precincts with no disputed ballots.

Ward 13 Precinct 10	32 for Borst	20 for Waltz
Ward 13 Precinct 11	18 for Borst	7 for Waltz
Ward 13 Precinct 12	11 for Borst	11 for Waltz
Ward 16 Precinct 4	15 for Borst	13 for Waltz
Ward 17 Precinct 3	8 for Borst	0 for Waltz
Ward 17 Precinct 4	15 for Borst	4 for Waltz
Ward 17 Precinct 6	19 for Borst	14 for Waltz
Ward 17 Precinct 9	6 for Borst	6 for Waltz
Ward 17 Precinct 10	16 for Borst	10 for Waltz
Ward 26 Precinct 1	8 for Borst	10 for Waltz
Ward 26 Precinct 2	23 for Borst	17 for Waltz
Ward 26 Precinct 8	3 for Borst	3 for Waltz
Ward 30 Precinct 2	21 for Borst	17 for Waltz
Ward 30 Precinct 3	9 for Borst	2 for Waltz
Ward 30 Precinct 5	14 for Borst	10 for Waltz
Ward 30 Precinct 7	22 for Borst	12 for Waltz
Ward 30 Precinct 10	24 for Borst	35 for Waltz
Ward 30 Precinct 11	27 for Borst	18 for Waltz
Perry 3	24 for Borst	18 for Waltz
Perry 10	46 for Borst	40 for Waltz
Perry 13	33 for Borst	35 for Waltz
Perry 17	59 for Borst	68 for Waltz
Perry 20	77 for Borst	31for Waltz
Perry 21	72 for Borst	43for Waltz
Perry 26	89 for Borst	73for Waltz
Perry 29	43 for Borst	26 for Waltz
Perry 35	16 for Borst	7 for Waltz
Perry 36	32 for Borst	25 for Waltz
Perry 37	33 for Borst	14 for Waltz
Perry 39	52 for Borst	50 for Waltz
Perry 40	80 for Borst	70 for Waltz
Perry 41	20 for Borst	17 for Waltz
Perry 43	79 for Borst	77 for Waltz
Perry 52	35 for Borst	36 for Waltz
Perry 54	8 for Borst	18 for Waltz
Perry 55	101 for Borst	82 for Waltz
Perry 61	23 for Borst	16 for Waltz
Perry 62	52 for Borst	61 for Waltz
Perry 64	16 for Borst	17 for Waltz
Perry 65	71 for Borst	93 for Waltz
Perry 66	21 for Borst	17 for Waltz
Perry 69	70 for Borst	76 for Waltz
Perry 70	41 for Borst	29 for Waltz
Perry 79	81 for Borst	77 for Waltz
Perry 82	0 for Borst	0 for Waltz
Perry 84	38 for Borst	48 for Waltz

Ms. Willis noted that Johnson County had no precincts listed with no disputed ballots.

The chair recognized the parties for discussion of undisputed precincts.

Mr. Redstone said that Petitioner believes that there are disputed ballots in Marion County Ward 13 Precinct 9, Marion County Ward 16 Precinct 4, and Marion County Ward 26 Precinct 5.

Mr. Brooks asked for a short recess to consult with opposing counsel and Ms. Willis to come up with a revised list of undisputed precincts. The commission recessed five minutes for counsel to make the list.

Mr. Redstone respectfully disagreed with the recount director's inclusion of the following precincts in the list of undisputed precincts.

Ward 13 Precinct 5
Ward 13 Precinct 9
Ward 13 Precinct 10
Ward 13 Precinct 11
Ward 16 Precinct 4
Ward 17 Precinct 3
Ward 17 Precinct 4
Ward 17 Precinct 9
Ward 26 Precinct 5
Ward 30 Precinct 3
Ward 30 Precinct 10
Perry 17
Perry 35
Perry 37
Perry 40

Mr. Brooks asked the Commission whether counsel needed to distinguish between whether a precinct was disputed because of an exhibit or because they disagreed with the State Board of Accounts numbers. The Chair indicated there was no need to distinguish.

Mr. Redstone continued Petitioner's list of precincts to be removed from the undisputed category.

Perry 55
Perry 62
Perry 64
Perry 66
Perry 70
Perry 79

The chair noted that the commission recognized those precincts listed by Petitioner as disputed and he moved those precincts from the undisputed list. Mr. Bopp responded that he did not have a problem with the precincts being added to the disputed column as long as all of the previous rules had been followed as far as properly providing the exhibit process. The chair moved that those precincts that the recount director listed as undisputed and not listed by Mr. Redstone as disputed to be taken as tallied by the State Board of Accounts. Mr. Durnil seconded. The motion was adopted unanimously, with three members voting aye (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay."

Ms. Willis read the list of precincts taken as tallied by the State Board of Accounts.

Ward 13 Precinct 6	8 for Borst	12 for Waltz
Ward 13 Precinct 8	39 for Borst	26 for Waltz
Ward 13 Precinct 12	11 for Borst	11 for Waltz
Ward 17 Precinct 6	19 for Borst	14 for Waltz
Ward 17 Precinct 10	16 for Borst	10 for Waltz
Ward 26 Precinct 1	8 for Borst	10 for Waltz
Ward 26 Precinct 8	3 for Borst	3 for Waltz
Ward 30 Precinct 2	21 for Borst	17 for Waltz
Ward 30 Precinct 5	14 for Borst	10 for Waltz
Ward 30 Precinct 7	22 for Borst	12 for Waltz
Ward 30 Precinct 11	27 for Borst	18 for Waltz
Perry 3	24 for Borst	18 for Waltz
Perry 10	46 for Borst	40 for Waltz
Perry 13	33 for Borst	35 for Waltz
Perry 20	77 for Borst	31 for Waltz
Perry 21	72 for Borst	43 for Waltz
Perry 26	89 for Borst	73 for Waltz
Perry 29	43 for Borst	26 for Waltz
Perry 36	32 for Borst	25 for Waltz
Perry 39	52 for Borst	50 for Waltz
Perry 41	20 for Borst	17 for Waltz
Perry 43	79 for Borst	77 for Waltz
Perry 52	35 for Borst	36 for Waltz
Perry 54	8 for Borst	18 for Waltz
Perry 61	23 for Borst	16 for Waltz
Perry 65	71 for Borst	93 for Waltz
Perry 69	70 for Borst	76 for Waltz
Perry 82 (non-voting precinct)	0 for Borst	0 for Waltz
Perry 84	38 for Borst	48 for Waltz

The chair asked the parties to confirm. Mr. Redstone indicated that they had a disputed provisional ballot listed for Perry 84. The chair moved Perry 84 into the disputed category.

The chair, seconded by Mr. Durnil, remade the motion that these undisputed precincts be counted in the official tally of votes by the State Board of Accounts. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Ms. Willis said that absent another agreement by the parties, the commission would consider the precincts with disputed ballots in alphanumeric order starting with Marion County. She indicated she would note which party disputed any ballots and that only ballots disputed by Petitioner would be argued at this point while he makes his case in chief. The respondent's disputes will be reserved if he chooses, and he will have the opportunity to discuss them during his case in chief.

Ward 13 Precinct 4 9 for Borst 11 for Waltz 1 disputed by Respondent

Mr. Brooks said that it was actually disputed by Petitioner. Mr. Brooks withdrew the dispute.

The chair moved that Ward 13 Precinct 4 be changed to 9 for Borst and 12 for Waltz, and counted in final tally. Mr. Durnil seconded. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no

member voting “nay,” the motion was adopted.

Ward 13 Precinct 5 16 for Borst 11 for Waltz No disputed ballots

Petitioner had previously requested that this precinct be moved from the undisputed list.

Mr. Brooks withdrew all disputes by Petitioner. Mr. Bopp withdrew all disputes by Respondent. The chair noted that both parties withdrew all disputes and moved to add the totals to the final vote tally. Mr. Durnil seconded. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted. The tally recorded for Ward 13 Precinct 5 was 16 for Borst and 11 for Waltz.

Ward 13 Precinct 9 16 for Borst 21 for Waltz 1 dispute by Petitioner

Mr. Brooks said that on page 4 of the State Board of Accounts tally sheet was an indication that both parties agree that there was a missing ballot. Petitioner argued that this was an absentee ballot. Mr. Brooks said that the numbers in the tally sheet from the precinct differ from the tally taken by the State Board of Accounts. The State Board of Accounts attributed the discrepancy to the missing absentee ballot.

Mr. Brooks asked to introduce into evidence as an exhibit the affidavit of Inspector John Kroger. Essentially, the affidavit said that Kroger was the inspector, received the paperwork, opened the envelope, and put the ballot into the machine with the hope that it would count the vote.

Mr. Brooks stated that this is covered by Ind. Code 3-12-11-12, which says that you cannot discount a vote because of failure to act by an election officer. Somewhere between election day and the recount that ballot was lost. Mr. Brooks moved that the number of votes for the petitioner be increased from 16 to 17 to account for the missing ballot.

Mr. Bopp objected to the introduction of the affidavit on the grounds that while certain rules of evidence do not govern this commission, the right to cross examine is a central one and Respondent did not have that opportunity. The respondent asked for copies of these affidavits and did not receive a copy and was not given the opportunity to verify them by calling or cross examining. Respondent also felt that they were given unnecessary affidavits.

Mr. Brooks said that the Rules of Evidence do not govern the commission. Mr. Brooks said the Petitioner complied with the rules as given to him by Ms. Willis and listed on his exhibit and witness lists that the affidavits were by inspectors. Petitioner provided ample information for the respondent to investigate. Mr. Bopp objected, saying that if the commission does not know what the ballot said because it is missing, it you cannot count it for Borst. It could have been for either candidate.

The chair asked for discussion of the affidavit.

Mr. Brooks referred to Ind. Code 3-12-1-12 that addresses missing ballot criteria. The affidavit said that there was a ballot and the inspector actually cast that vote, so the vote was cast and therefore the vote must be counted unless there is evidence of fraud. The chair questioned the affidavit's lack of notarization and that there was no mention of it being under oath. Mr. Brooks indicated that the penalty of perjury is indicated on the document. Mr. Brooks said that there did not need to be notarization of the affidavit and the statements made under the penalty of perjury is

all that is required. The chair asked for advice from commission counsel regarding the requirements for the affidavit.

Mr. King said that by statute the Administrative Orders and Procedures Act does not apply to work of the commission, nor do the Trial Rules. Only the constitutional due process standards apply. Whether the commission accepts the affidavit is solely up to the commission. Mr. Durnil stated that he had no objection to the affidavits.

The chair asked whether furnishing affidavits to the other party is a uniform practice. Mr. King said that it has not been a uniform practice.

The chair indicated that an affidavit without an oath would be under a different standard than all the present witnesses who stood and took an oath. Furthermore, since the respondent was not provided the affidavit before this meeting, it could possibly violate the respondent's constitutional due process rights. The chair asked for discussion. The chair moved to not consider the document an affidavit because of the lack of the oath and because it did not allow the committee to cross examine the affiant. Mr. Griffin seconded. There being no further discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

The chair asked whether there was an argument that needed to be considered about whether this missing ballot was the absentee ballot referred to by the petitioner. Mr. Durnil said that a discussion may be appropriate as to how the commission could know that the missing ballot is the absentee ballot. Mr. Brooks said that the State Board of Accounts concluded that it was an absentee ballot. Mr. Durnil asked how they knew for whom the vote was cast. Mr. Brooks said that the missing ballot was the one that was counted by the machine on election day and that it was a vote for Borst. Mr. Brooks argued that the affidavit should be reconsidered because he was sworn in that morning, and he was the one who had the conversation and could testify under oath about the statement's contents. Mr. Bopp argued that this constituted hearsay.

Chairman Rokita concluded that since Mr. Brooks is an attorney under oath in front of the commission, the commission can give whatever weight it feels appropriate to counsel's statements. The chair moved to not count the disputed ballot and have the final tally for Center Ward 13 Precinct 9 counted as 16 for Borst and 21 for Waltz as tallied by the State Board of Accounts. Mr. Durnil seconded. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Center Ward 13 Precinct 10 32 for Borst 20 for Waltz No disputes

Petitioner had previously asked that this precinct be moved from the undisputed column. Petitioner withdrew the dispute.

The chair motioned for the commission to amend the final tally to include Ward 13 Precinct 10 as 32 for Borst and 20 for Waltz. Seconded by Mr. Durnil. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Center Ward 13 Ward 11 18 for Borst 7 for Waltz

Petitioner and Respondent each had one dispute.

Petitioner withdrew his dispute. Respondent withdrew his dispute.

The chair motioned for the commission to amend the final tally to include Ward 13 Precinct 11 as 18 for Borst and 7 for Waltz. Seconded by Mr. Durnil. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Center Ward 13 Precinct 13 13 for Borst 6 for Waltz

Mr. Brooks noted that Petitioner had a dispute in this precinct, but there is no ballot for the dispute. It is the absence of ballots that is the basis for Petitioner's dispute in this precinct and one reason that Petitioner will ask for a special election at the end of the count.

The chair clarified that Mr. Brooks will be raising the special election argument at the end of the Marion County recount and not at the end of the entire recount proceeding.

Mr. Brooks said that they have two unopened provisional ballots, Exhibits 1 and 2. Mr. Bopp objected to opening the ballots, but he did not object to presenting the exhibits.

Mr. Brooks provided the name and address of the voter of Exhibit 1 and said that the voter should have been allowed to vote by regular ballot and not provisional ballot. Petitioner indicated he would provide testimony to discuss these issues at the end of the day. Only 1 out of 25 provisional ballots were opened and counted in Senator Borst's district because the election inspectors were unsure as to what they were supposed to do with the ballots because this was a new procedure. The election officials were supposed to fill out an affidavit indicating the reason they thought that the voter should be voting by a provisional ballot. The voter was then supposed to sign a counter affidavit and then sign and fill out the envelope. There were very few instances where the first and second forms were completed.

Mr. Brooks called Sherry Beck, the Republican board member at the Marion County voter registration office, who has access to and keeps record of registered voters in Marion County. She reviewed records of several voters for Mr. Brooks. Ms. Beck indicated that the current voter lived at a specific address and was registered to vote in Ward 13 Precinct 11. Ms. Beck explained that if she had moved from that address and moved prior to the last voter registration date, but still resided in the same congressional district, she could go back to her old her precinct and be allowed to vote. Ms. Beck indicated that the voter's new address is in precinct 13.

Mr. Brooks asked that the commission take notice that the precinct is located in Senator Borst's district. Mr. Brooks asked the commission to open the ballot and add it to the tally because the voter was registered to vote in the district and voted on the right ballot but voted with a provisional ballot due to confusion about the new laws instead of being notified that she was at the wrong precinct.

Mr. Bopp said that the facts show that she could have voted in her old precinct, precinct 11, but tried to vote in precinct 13 and that it was not lawful for her to do. She was not on the poll list in precinct 13, so the election officials knew that she should not lawfully vote there. The relevant statute is Ind. Code 3-11.7-5-2. The petitioner provided no testimony as to why she chose to cast an invalid vote in this precinct rather than a valid one in the precinct where she was registered.

Mr. Brooks called Paul Ricketts. Mr. King administered the oath to Mr. Ricketts. Through questioning by Mr. Brooks, Mr. Ricketts said that he is the Lawrence Township Assessor and has

been involved in elections for several years. His current position is chairman of the Marion County Election Task Force. The goal of this task force has been to evaluate the situations that have arisen in recent elections and take information from inspectors to find a way to streamline the process and address the ballot shortages and provisional ballot issues. Mr. Ricketts indicated he thought that the provisional ballot process was not well understood by local officials. He indicated that the election workers thought that anyone who showed up at a precinct with whom they did not know what to do should be given a provisional ballot and let it be sorted out later. They did this rather than calling the clerk's office and finding out what to do. The actual process should have included the filing of affidavits along with the provisional ballot which would help determine whether the ballot should be counted.

Mr. Brooks said that the testimony of Mr. Ricketts shows that election officials did not know the appropriate procedure and the substituted procedure disenfranchised voters. The chair asked whether VRG 4/12 form has relevance and should be discussed.

Ms. Robertson said that under the National Voter Registration Act, if you move within 30 days of the election and go back to your old precinct to vote, you can do so if you fill out an affidavit. That affidavit serves as a transfer of your registration so that you can vote one last time in your former precinct. The Act also says that if voters move within the same congressional district, they can go back to their old precincts and vote even if it is not within the 30 days. Mr. King added that he thinks a critical component to this is that with both situations the voter must return to the precinct where his/her name appears on the poll list. Ms. Robertson added that if the procedure works correctly, the voter should vote on a regular ballot.

Mr. Brooks explained that this situation is not one where a voter has moved, but rather the voter went to the neighboring precinct and was told by the election official to go ahead and vote but on a provisional ballot.

Mr. Bopp called Doris Anne Sadler, the Marion County Clerk.

Ms. Sadler attended the training sessions for election officials for Marion County townships for mail-in, first time registrants and provisional ballots. These sessions taught that the provisional ballots were only to be used after election officials called voter registration and found out whether there was a possible error by the voter's selection of the precinct. On cross examination, Ms. Sadler said that the number of returned provisional ballots and the small percentage of those opened because of improper paperwork leads her to conclude that they need more training.

Mr. Bopp stated that it was noted that this was an invalid ballot because it was in the wrong precinct. No testimony was provided about what the voter was told, but testimony did show what the workers were told. It is not known why the voter used a provisional ballot and did not go to the correct precinct. Misconduct or negligence by election officials should not be inferred.

Mr. Brooks said that he is not alleging misconduct. A logical conclusion can be drawn from the fact that precincts 13-13 and 13-11 are adjacent to one another. The voter should not be disenfranchised because the election officials did not understand the rules.

The chair raised the public policy argument that if you allow people to vote by provisional ballot in the wrong precinct, it could lead to the situation where a person could vote in a wrong precinct which could affect elections in which the voter was not eligible to vote.

Mr. Brooks noted that in this situation the overall public policy would not be fair to this particular

voter who would be disenfranchised.

Mr. Durnil moved to sustain the objection to Mr. Brooks' motion to open the ballot.

The chair agreed to sustain the motion because he thinks that it is dangerous to count votes not filed in the proper precinct. With three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Mr. Brooks withdrew any further disputes in that precinct. Ms. Willis listed the count for Center Ward 13 Precinct 13 as 13 for Borst and 6 for Waltz.

The chair, seconded by Mr. Durnil, made the motion that the precinct be added to the official tally of votes by the State Board of Accounts. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Ms. Willis said that the tally sheet indicates 14 for Borst and 8 for Waltz, but the official tally by State Board of Accounts was 13 for Borst and 6 for Waltz. Discussion showed that the appropriate total should be 14 for Borst and 8 for Waltz. All agreed that because of an error the total should be adjusted to 14 for Borst and 8 for Waltz.

Center Ward 16 Precinct 2 6 for Borst 3 for Waltz
10 disputed by Borst; 7 disputed by Waltz

Petitioner withdrew all disputes. Respondent reserved disputes for his case in chief.

Center Ward 16 Precinct 4 15 for Borst 13 for Waltz
Petitioner withdrew disputes.

The chair, seconded by Mr. Durnil, moved that the precinct be added to the official tally of votes by the State Board of Accounts. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Center Ward 16 Ward 8 14 for Borst 10 for Waltz
1 disputed by Respondent. Respondent withdrew his dispute.

Mr. Brooks said that Exhibit 2 is an opened absentee ballot. Even though it was marked by Respondent, Petitioner would like to argue it. Mr. Bopp objected because Petitioner did not mark the exhibit for dispute. Mr. Brooks responded that Petitioner made it clear that they planned to challenge all unopened absentee ballots, and that this exhibit was already disputed and Petitioner just did not re-dispute it.

The chair asked for advice of counsel. After advice from counsel, the chair said that the commission has the right to look at evidence in its own right, and because there was a potential vote, he moved to hear the evidence.

There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Mr. Brooks said that the commission should have five documents. The issue is that the signature did not match the one in the poll book. The affidavit on the application shows that the voter was blind and required assistance to fill out her registration and the VRG-12, which she properly filled out. Therefore her ballot should be counted.

Mr. Bopp said that he had a copy of the poll book and the form for the voter. His assumption is that the ballot was not cast because the signatures are quite different and this was a judgment call by the election officials and is proper procedure.

Mr. Brooks said that there is a specific form for voter assistance and that the voter must have had some assistance to fill it out. He thinks that the voter's disability explains the inconsistency in the signatures.

Seconded by the chair, Mr. Durnil moved that the commission should open the ballot. Mr. Griffin noted that there is a clear difference between the signatures.

The chair posed the question of the signature to counsel. Ms. Robertson noted that the ballot was not marked as rejected. Statutes dictates that a substantial change in signature is grounds to not count the vote, but age or disability may account for the change in signature. Mr. King said he feels that the critical element is that there is no indication that this factor has caused an official to make a determination to reject the ballot.

The chair asked when the signature was made and when the voter registered.

Mr. Brooks offered to call the voter and ask her what procedures were used.

Ms. Beck said that after someone is originally registered, they do not rescan signatures in the poll books. Most signatures do not match because many people's signatures change over years. She cannot tell when the signature was originally taken because of the rescanning.

The chair called the question, and declared that with two members voting "aye" (Mr. Rokita; Mr. Durnil), and one member voting "nay"(Mr. Griffin), the motion (to open the ballot) was adopted.

The ballot indicated a vote cast for Waltz. Ms. Willis indicated the tally for Center Ward 16 Precinct 8 was 14 for Borst and 11 for Waltz. The chair, seconded by Mr. Durnil, moved to add the count to the State Board of Accounts tally. There being no further discussion, the chair called the question and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Center Ward 16 Precinct 10 0 for Borst 0 for Waltz
7 disputed by Petitioner; 20 disputed by Respondent

Mr. Brooks withdrew objections to Exhibits 2, 3, 9, 20, 22, 25, and 27 in Ward 16 Precinct 10. Respondent reserved disputes. Ms. Willis noted that Petitioner had not withdrawn his dispute to Exhibit 10. Mr. Brooks withdrew Exhibit 10.

Center Ward 17 Precinct 1 18 for Borst 13 for Waltz
1 disputed by Respondent. Respondent reserved dispute.

Ms. Willis stated that the tally sheet by State Board of Accounts lists 19 for Borst and 13 for Waltz with one for Borst disputed.

Mr. Bopp stated that on page 4 of the report is an indication that there were 19 ballots cast in the affected race. Mr. Brooks said that as long as there are fewer votes than there are signatures, then it is okay. The chair said that it appears to be a scrivener's error on the tally sheet. Mr. Brooks said that he does not see any basis to determine in whose favor the scrivener's error falls. He does not see any way to know which of the two numbers is correct and which is wrong. Mr. Bopp said that the State Board of Accounts picked one number over the other and that the petitioner has the burden to prove otherwise. The chair asked for clarification from the State Board of Accounts.

Mr. King administered the oath to Phil McGovern, General Counsel for the State Board of Accounts. He indicated that he would lean toward the blue book number. Mr. Brooks said that the number had to come from the tally sheet. The chair adjourned for lunch so that the ballots for the precinct could be retrieved and counted after the recess.

The chair reconvened at 1:05, fifteen minutes late because of Respondent's counsel's late arrival.

After the commission counted the ballots, the recount director announced the count as 19 for Borst and 13 for Waltz with 1 disputed by Respondent.

Ward 17 Precinct 2 13 for Borst 2 for Waltz Respondent disputed 1 ballot.
Respondent reserved the dispute.

Ward 17 Precinct 3 8 for Borst 0 for Waltz
Petitioner had asked that this precinct be moved from undisputed to disputed category.
Petitioner withdrew disputes.

The chair, seconded by Mr. Durnil, made the motion that the precinct be added to the official tally of votes by the State Board of Accounts. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Ward 17 Precinct 4 15 for Borst 4 for Waltz
Petitioner had asked previously that this precinct be moved from undisputed list.
Mr. Brooks said that there are 2 exhibits -- 1 is a sealed provisional ballot, and 1 is a missing ballot.

Mr. Brooks said that with Exhibit 1, the sealed provisional ballot, the voter lives at a specified address. He called Ms. Beck. After being shown the name and address of the provisional ballot voter, Ms. Beck said that the voter was registered and eligible to vote by regular ballot. After being shown the exemplar, the ballot, and the registration signatures, Ms. Beck said that the signature appeared to be the same one.

Mr. Brooks asked, given the testimony about the confusion of provisional ballots and the lack of training, whether the commission could conclude the provisional ballot was overused. In this particular case, the voter was registered and eligible to use a regular ballot but forced to use a provisional ballot. He requested that the ballot be opened and counted.

The chair asked whether the voter was in the poll book. Mr. Brooks replied that he does not have a whole poll book, but the testimony was that the voter was registered to vote in that precinct. The commission checked the poll book, and the voter's name was included therein.

Mr. Bopp made no argument.

The chair made a motion to open the ballot. Mr. Durnil seconded the motion. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

The chair indicated that the vote was clearly cast for Borst. Both clerks' initials were shown on the back of the ballot.

Mr. Brooks said that Exhibit 2 is a missing ballot case. He referred to Page 1 of the State Board of Accounts tally sheet where there was an indication that the precinct was missing one absentee ballot. The State Board of Accounts found that there were three absentee ballots missing, one of which was Republican. He therefore knew what voter cast the missing ballot. He provided two affidavits, one from the inspector from the precinct. Mr. Brooks requested that the sworn affidavit be accepted into evidence similar to a trial court proceeding under Rule 11b which does not require notarization. In the affidavit, the inspector said that she did not believe that the absentee ballots were to be run through the machine, so she put the Republican ballot with the two Democratic ballots in the envelope. Mr. Brooks referenced Ind. Code 3-12-1-12. The voter did all that he was supposed to do. The ballot was missing because of an act or failure to act by an election official, and the vote should count. Mr. Brooks asked that the vote be counted as intended and shown in affidavit. Mr. Bopp objected to accepting the affidavit. He outlined the procedure for courts accepting affidavits and stated that it was inappropriate for the affidavit to be accepted. He acknowledged that the trial rules do not govern the commission. He said that the affidavit's validity is lessened by the lack of notarization.

Mr. Bopp expressed that he was troubled by how this proceeding affected the secrecy of the ballot.

Mr. Brooks responded by saying that the recount director's order that set forth the requirements of the proceeding did not require an exchange of exhibits. Furthermore, Petitioner did not receive a list of names and phone numbers to the respondent's witnesses. The respondent could have found the inspector's names and addresses the same way that Mr. Brooks did.

The chair asked Mr. Brooks to prove to him using the document that the person alleged to exist by the affidavit does in fact exist. The chair said that absent a third-party notary verification that the person is who he says he is, the document's meaning is lessened. The chair made the motion not to consider the affidavit because it was not properly executed under oath. Mr. Brooks said that it was under oath and was sworn testimony but not notarized.

The chair said that they have no evidence that shows that the person is in fact who the affidavit says it is and made the motion to sustain the respondent's objection to the petitioner's motion to enter the affidavit as an exhibit.

There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted. Mr. Brooks asked the commission to clarify how the board was viewing the affidavit. The chair indicated that it is not to be accepted as evidence.

Mr. Bopp objected to the other affidavit as well. The chair made the same motion for the second affidavit.

There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

The chair, seconded by Mr. Durnil, made the motion not to count the missing ballot. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted. Ms. Willis listed the final tally for Ward 17 Precinct 4 as 16 for Borst and 4 for Waltz.

The chair, seconded by Mr. Durnil, made the motion that the precinct be added to the official tally of votes by the State Board of Accounts. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Ward 17 Precinct 5 10 for Borst 8 for Waltz Respondent disputed 1 ballot.
Respondent withdrew the dispute.

Ms. Willis listed the tally as 11 for Borst and 8 for Waltz.

The chair, seconded by Mr. Durnil, made the motion that the precinct be added to the official tally of votes by the State Board of Accounts. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Ward 17 Precinct 9 6 for Borst 6 for Waltz
Petitioner had asked previously that this be moved from the undisputed list.
Petitioner withdrew any disputes.

The chair, seconded by Mr. Durnil, made the motion that the precinct be added to the official tally of votes by the State Board of Accounts. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Ward 26 Precinct 2 23 for Borst 17 for Waltz
Petitioner had asked previously that this be moved from the undisputed list.
Petitioner withdrew any dispute.

The chair, seconded by Mr. Durnil, made the motion that the precinct be added to the official tally of votes by the State Board of Accounts. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Ward 26 Precinct 3 6 for Borst 11 for Waltz
7 were disputed by Respondent; 6 were disputed by Petitioner
Petitioner withdrew disputes. Respondent withdrew disputes.

The chair, seconded by Mr. Durnil, made the motion that the precinct be added to the official tally of votes by the State Board of Accounts. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted. Ms. Willis reported the tally for Ward 26

Precinct 3 as 13 for Borst and 17 for Waltz.

Ward 26 Precinct 4 47 for Borst 35 for Waltz
Petitioner withdrew any disputes. Respondent reserved disputes.

Ward 26 precinct 5 51 for Borst 52 for Waltz Petitioner disputed 1 ballot

Mr. Brooks called Ms. Beck again. After her testimony, Mr. Bopp said that he had no objection to Exhibits 1 and 3, unopened absentee ballots.

The chair stated that, at hearing no objection from either party, the commission has jurisdiction to open Exhibits 1 and 3, two unopened absentee ballots. The chair opened Exhibit 1, which clearly indicated no vote for either candidate. The chair opened Exhibit 3, and indicated the ballot was clearly marked for Borst.

Mr. Bopp stated that he has no objection to Exhibits 2 and 4, two unopened absentee ballots. The chair stated that, at hearing no objection from either party, the commission has jurisdiction to open Exhibits 2 and 4. Opening Exhibit 2, the chair found an official ballot of the Democratic primary election, which showed no votes for either candidate. Opening Exhibit 4, the chair found an official ballot, properly initialed, for the Democratic primary election with no votes for either party.

Mr. Brooks withdrew the remaining disputes. Mr. Brooks noted that there remained a dispute by the State Board of Accounts. Mr. King said that the dispute by State Board of Accounts is not a ballot and therefore does not have to be resolved before a final tally. Mr. Bopp withdrew any disputes.

Ms. Willis reported the final tally for Ward 26 Precinct 5 as 52 for Borst and 53 for Waltz.

The chair, seconded by Mr. Durnil, made the motion that the precinct be added to the official tally of votes by the State Board of Accounts. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Ward 26 Precinct 6 20 for Borst 32 for Waltz Petitioner disputed 2 ballots.
Mr. Redstone withdrew the disputes.

The chair, seconded by Mr. Durnil, made the motion that the precinct be added to the official tally of votes by the State Board of Accounts. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Ms. Willis reported the final tally for Ward 26 Precinct 6 as 20 for Borst and 34 for Waltz.

Ward 26 Precinct 7 13 for Borst 6 for Waltz Respondent disputed 1 ballot
Mr. Bopp withdrew the dispute.

The chair, seconded by Mr. Durnil, made the motion that the precinct be added to the official tally of votes by the State Board of Accounts. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted. Ms. Willis reported final tally as 13 for Borst

and 7 for Waltz.

Ward 30 Precinct 3 9 for Borst 2 for Waltz
Petitioner previously asked that the precinct be moved to disputed column.
Mr. Redstone withdrew all disputes.

The chair, seconded by Mr. Durnil, made the motion that the precinct be added to the official tally of votes by the State Board of Accounts. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Ward 30 Precinct 4 13 for Borst 10 for Waltz Respondent disputed one ballot.
Respondent reserved the dispute.

Ward 30 Precinct 6 28 for Borst 29 for Waltz Petitioner disputed 1 ballot.
Mr. Redstone withdrew the dispute.

The chair, seconded by Mr. Durnil, made the motion that the precinct be added to the official tally of votes by the State Board of Accounts. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Ms. Willis stated the final tally as 28 for Borst and 30 for Waltz.

Ward 30 Precinct 8 37 for Borst 17 for Waltz
Respondent disputed 3; Petitioner disputed 1. Mr. Redstone withdrew the disputes. Ms. Willis noted that this leaves no votes disputed, but there were absentee ballots that may have needed to be discussed.

Mr. Redstone said that eight Republican absentee ballots were not counted and there was no indication of a dispute or rejection of the ballots. Petitioner asked that the commission to consider each of these and open and count each of these ballots that are Exhibits 5-22.

Mr. Bopp requested to look at all of the exhibits.

The chair noted that the committee would go through the ballots one by one and open them not withstanding any objections. Exhibit 5 was opened and was an official ballot for the Republican primary, with two separate initials. The ballot clearly indicated a vote for Borst. The chair noted that Exhibit 6 was just a signature. Exhibit 7 was opened and was a ballot for the Democratic primary. Exhibit 9 was opened and was also a ballot for the Democratic primary. Exhibit 11 was opened and the chair announced the vote was for Borst. Exhibit 13 was opened and the chair announced the vote was for Borst. Exhibit 15 was opened and was for Borst. The chair announced that Exhibit 17 was opened and was a Democratic ballot for the primary. Exhibit 19 was opened and the chair announced that the vote was for Borst. Exhibit 21 was opened and the chair announced that the vote was for Borst.

Ms. Willis announced that all the disputes for this precinct had been presented. Ms. Willis noted that the final vote for Marion County Ward 30 Precinct 8 was 46 for Borst and 18 for Waltz. The chair noted that Respondent waived his right to reserve any disputes. The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three

members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Center Ward 30 Precinct 10 24 for Borst 35 for Waltz No disputes remaining.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Perry 4 18 for Borst 18 for Waltz
2 disputed by Respondent; 1 disputed by Petitioner. Petitioner withdrew dispute regarding Exhibit 2. Petitioner asked the commission to open exhibit 1, a provisional ballot. Respondent had no objection.

The ballot was opened and was for the Democratic primary. Petitioner had no more disputes.

Mr. Bopp waived Respondent’s dispute. Ms. Willis noted that this made the final tally for Perry 4 as 20 votes for Borst and 19 votes for Waltz.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Mr. Bopp then noted for the record that he wanted to reserve his right to dispute Perry 4. The chair moved, seconded by Mr. Griffin, to take Perry 4 out of the final tally and allow the respondents to reserve his right. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Perry 5 70 for Borst 57 for Waltz Respondent disputed 3 ballots.
Respondent reserved his disputes.

Perry 6 336 for Borst 279 for Waltz
1 disputed by Petitioner; 2 disputed by Respondent. Mr. Brooks withdrew Petitioner’s dispute, but indicated he did not want to close out the precinct because it relates to Petitioner’s special election argument. Mr. Bopp reserved Respondent’s disputes.

Perry 7 89 for Borst 54 for Waltz Respondent disputed 3 ballots.
Mr. Bopp waived Respondent’s disputes. The tally was then reflected as 92 votes for Borst and 54 for Waltz.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Perry 8 53 for Borst 69 for Waltz Petitioner disputed four ballots.
All disputes were withdrawn. The tally was then changed to 53 for Borst and 73 for Waltz.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Perry 9 66 for Borst 68 for Waltz Petitioner disputed 2 ballots.
Petitioner withdrew his disputes. The final tally was then reflected as 66 votes for Borst and 70 votes for Waltz.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Perry 14 37 for Borst 46 for Waltz
Petitioner disputed 1 ballot; Respondent disputed 2 ballots
Petitioner withdrew his dispute. Mr. Bopp reserved his dispute.

Perry 15 94 for Borst 56 votes for Waltz
Petitioner disputed 4 ballots; Respondent disputed 1 ballot. Mr. Redstone withdrew Exhibits 1,2,4,5, and 6 for Petitioner.

Petitioner called Ms. Beck. After asked by Mr. Redstone, Ms. Beck said that the voter who voted on the provisional ballot that was Exhibit 8 was an active voter. She said that she knew of no reason why that the voter should not have been a regular voter.

Mr. Bopp said that he had no objection to opening the ballot.

The commission opened Exhibit 8, which was a provisional ballot for the Republican primary. The ballot was cast for Waltz. Mr. Bopp reserved Respondent's dispute.

Perry 17 59 for Borst 68 for Waltz

Petitioner had previously moved this to a disputed precinct. Petitioner withdrew any disputes. The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Perry 18 24 for Borst 25 for Waltz
Respondent disputed 1 ballot; Petitioner disputed 2 ballots
Petitioners withdrew disputes. Respondent withdrew disputes. Ms. Willis noted that the final tally for Perry 18 was 25 for Borst and 27 for Waltz.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Perry 19 42 for Borst 50 for Waltz

Petitioner disputed 2 ballots; Respondent disputed 1 ballot. Counsel for both parties withdrew all disputes. The final tally for Perry 19 was noted as 43 for Borst and 52 for Waltz.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Perry 22 90 for Borst 77 for Waltz Petitioner disputed 3 ballots
Petitioner withdrew disputes. Ms. Willis noted the final tally for Perry 22 was 90 for Borst and 80 for Waltz.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Perry 27 38 for Borst 73 for Waltz Petitioner disputed 2 ballots
Petitioner withdrew disputes. Ms. Willis noted the final tally for Perry 27 was 38 for Borst and 75 for Waltz.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Perry 28 46 for Borst 59 for Waltz
Petitioner disputed 2 ballots; Respondent disputed 1 ballot. Mr. Brooks withdrew Petitioner's disputes, and Mr. Bopp reserved Respondent's dispute. Given this change, Ms. Willis changed the tally for Waltz to 61 votes.

Perry 30 80 for Borst 114 for Waltz Petitioner disputed 2 ballots
Mr. Brooks withdrew disputes for Petitioner. Mr. Bopp withdrew disputes. Ms. Willis updated the final tally for Perry 30 as 80 for Borst and 116 for Waltz.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Perry 33 0 for Borst 0 for Waltz
Petitioner disputed 60 ballots; Respondent disputed 67 ballots

Counsel for Petitioner indicated that they do not believe any of the ballots should be excluded because they feel that one can tell the difference between absentee ballots and election day provisional ballots in this precinct by the folding of the ballot, or absence thereof, that would occur to an absentee ballot when it is put into a security envelope. Both sides agreed to withdraw their disputes. Ms. Willis noted that this made the vote tally for Perry 33 67 for Borst and 60 for Waltz.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Perry 34 69 for Borst 58 for Waltz
Petitioner disputed 2 ballots; Respondent disputed 6 ballots. Petitioner withdrew disputes.
Respondent reserved his disputes.

Perry 35 16 for Borst 7 for Waltz
Petitioner had previously asked that this precinct be moved from the undisputed list.
A State Board of Accounts exhibit was the only exhibit. Neither party had any disputes. Ms. Willis listed the final tally as 16 for Borst and 7 for Waltz.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Perry 37 33 for Borst 14 for Waltz
Petitioner had previously asked that this precinct be moved from the undisputed list.
Petitioner withdrew disputes with Exhibits 1, 2, 3, and 4. Respondent had no disputes.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Perry 40 80 for Borst 70 for Waltz
Petitioner had previously asked that this be moved from undisputed list.

Petitioner withdrew disputes. With neither party having any disputes, the chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Perry 41 20 for Borst 17 for Waltz.
Petitioner had previously asked that this be moved from undisputed list.

Mr. Brooks explained that the issue involved with Exhibit 4 was a lack of signature on the envelope. The signature on the poll book matched that on the application, but there was no signature on the envelope. Mr. Brooks called Robert Vane, Marion County Election Administrator.

Mr. Vane testified about the procedure used when an envelope is received without a signature that included sending letters or going in person to every person possible who turned in an absentee ballot without a signature. Mr. Vane stated that he could not testify that every person who sent in an absentee ballot without a signature on the envelope was reached.

Mr. Brooks provided an affidavit by the voter and said that the commission could verify that the affiant was the voter by matching the signature on the affidavit to that on voter poll.

Mr. Brooks then cited the commission to *Austin v. Sanders*, 492 N.E. 2d 8, which is an Indiana Supreme Court case and a recount case. He quoted, “The central purpose of a verification is that the statements be made under penalty of perjury . . . permits this to be done in most situations including special statutory proceeding without the aid of a notary or other officer authorized to administer votes.” Mr. Brooks submitted to the commission that the Indiana Supreme Court case indicated that one does not have to have a notary for a valid affidavit in terms of sworn testimony. Mr. Brooks asked to call his secretary Rebecca Maddox.

Mr. Bopp objected to calling the witness because she was not on the witness list; therefore, Petitioner denied the respondent the opportunity to prepare. Mr. Brooks responded that Mr. Bopp would have opportunity to cross-examine the witness. The chair asked counsel whether there are any prohibitions from hearing testimony from someone not on the witness list. Mr. King stated that it was not precluded subject to the consent of the commission. Ms. Robertson stated that she had the same understanding. The chair asked for consent from the commission to hear the witness. All agreed.

Mr. King administered the oath to Ms. Maddox. She stated that in the course of her employment in the office of Mr. Brooks she had contacted the affiant for purposes of signing the affidavit. Mr. Brooks asked whether the affiant represented that she was in fact who she said that she was.

Mr. Bopp objected to the testimony as hearsay and noted his awareness that the strict rules of evidence do not apply to the commission’s rules, but in chapter 2 section 23 [of the Indiana State Recount Commission Guidelines], after noting that the commission may accept evidence even that is not admissible in judicial proceedings, there exists the condition, “in accepting the evidence described in this section the commission shall ensure that the commission’s proceedings are conducted with the decorum required to protect the rights of the parties, the proceedings, and other individuals.” Mr. Bopp said that Petitioner did not provide the affidavits to the respondent, did not allow Respondent to do any discovery regarding it, did not list the witness, and did not allow the respondent to call her ahead of time to ask about testimony. Allowing her testify about hearsay on top of this undermines the due process rights of Brent Waltz.

Mr. Brooks replied that the respondent’s claim that Petitioner has violated the respondent’s due process right is without foundation. The petitioner is the party who has been denied getting admitted sworn testimony on key issues. The petitioner is simply trying to get admitted evidence about what happened during the election so that the commission can make an informed decision. All that has happened here is the denial of allowing the commission to consider sworn testimony, and that is not a denial of Respondent’s due process rights.

The chair asked Mr. Bopp whether he would have the chance to cross-examine the witness.

Mr. Bopp replied yes, but he expressed that his problem was in the fact that he could not cross-examine the hearsay declarant. Mr. Brooks said that the hearsay declarant is on the witness list, and the respondent did have the opportunity to talk to the affiant.

The chair clarified that the testimony that Petitioner was trying to admit was for the purpose of saying that the affiant actually exists and not about the truth of anything that the affiant said. The chair further indicated that the commission simply did not yet know whether this person actually exists or not because there is not independent third party verification.

Mr. Bopp said that if that had been the question then he would not have an objection.

Durnil moved, seconded by the chair, that the witness be heard. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Ms. Maddox testified that she called the number listed for the affiant, that the affiant identified herself, and that she observed her signing the document. Mr. Bopp asked Ms. Maddox whether she had any independent recollection of the affiant’s address. Ms. Maddox did not. Mr. Bopp asked Ms. Maddox whether she had any independent recollection of the affiant’s precinct in which she was registered. Ms. Maddox stated that she placed the affidavits on a clipboard so that she could look at the addresses and numbers and then after meeting with an affiant she put them away without memorizing any of the information. Mr. Bopp asked Ms. Maddox whether she asked for identification. Ms. Maddox did not.

Mr. Brooks asked Ms. Maddox whether she followed the same procedure of contacting all of the affiants (except two of them) and watched them all sign the affidavits. Ms. Maddox stated that she did.

The chair asked Ms. Maddox why she thought that the affiant was the person whose name was listed on the affidavit. Ms. Maddox said that when she called the affiant, she answered the phone and identified herself. The affiant also remembered the details from prior conversations with Mr. Brooks.

The chair asked for the poll book.

Mr. Durnil said that when the commission decided to hear the witness’s testimony, the affidavit became irrelevant.

Mr. Durnil moved, seconded by Griffin, to uphold the respondent’s objection to accepting the affidavit as evidence. The chair noted that the signatures from the poll book, the absentee ballot application, and the affidavit appear similar so that it is possible that the signatures belong to the same person. The chair then asked whether there was any reason to not accept the document but to determine how much weight to give it.

The chair called the question to uphold Respondent’s objection, and declared that with one member voting “aye” (Mr. Griffin), and two members voting “nay” (Mr. Rokita; Mr. Durnil), the motion was rejected.

The chair moved, seconded by Mr. Durnil, to accept the document that is framed as an affidavit as a piece of evidence. Mr. Griffin stated that even if the document is accepted into evidence, the committee still has not determined the validity of the ballot. The chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil), and one member voting “nay” (Mr. Griffin), the motion was adopted.

Mr. Brooks said that the voter is registered and referenced that Mr. Vane testified that they tried to contact everyone and give them an opportunity to remedy an absentee ballot defect. Mr. Brooks said that an absentee voter is really discriminated against in two ways: 1) he/she does not have the same opportunity to cure a defect as a live voter; and 2) regardless of the fact that the election board tries, the board is not able to uniformly contact each absentee voter who did not sign the outside of the envelope. Mr. Brooks said that the sworn testimony says that the election

board did not contact her about the defect in her ballot; therefore, the voter did not have the same opportunity as other voters to remedy the defect. As a result she has provided a cure for the defect which is what she would have done had she been alerted of the defect. Mr. Brooks requested that the absentee ballot be opened.

Mr. Bopp stated that there is no proof that the ballot is the one that the affiant sent in because there is no signature on it, which is a legal requirement for the purpose of preventing fraud.

Mr. Brooks said that there are three signatures to compare and that the only issues are whether they match and whether the commission believes that the voter had less opportunity to meet the statutory requirement; she must have the same opportunity to meet equal protection.

Mr. Durnil moved, seconded by the chair, that the committee not accept the ballot. Mr. Griffin said that there was really no way to know to whom the ballot belongs. The envelope had been opened, and the ballot was beside it. Ms. Robertson said that it was not clear whether the ballot had been counted. Mr. Bopp said that Page 3 of the State Board of Accounts tally sheet indicates that the absentee ballots were not counted.

The chair asked Mr. McGovern from State Board of Accounts whether he had any clarifications. Mr. McGovern said that it could be clarified by looking at the poll list.

Mr. Brooks said that the ballot showed no sign of rejection, and that as far as he understood the process, the inspector's job is to accept or reject absentee ballots. Mr. Vane confirmed that it is up to the precinct election board, the inspectors and two judges, to accept or reject ballots.

Mr. King said that Ind. Code 3-11-10-15 and 3-11-10-17 say that it is up to the inspector to make an initial determination regarding the sufficiency of the absentee ballot while it remains in the envelope, and section 17 sets the grounds that permits the inspector to reject the ballot. Ms. Robertson said that section 18 states how to mark a ballot if rejected and in this case it would have been to write "Rejected" on the envelope. Mr. King said that Ind. Code 3-11-10-4 also specifies that the county election board should properly note its question on the absentee ballot affidavit to bring it to the attention of the inspector.

Mr. Vane said that they teach inspectors to separate absentee ballots that have problems.

Mr. Bopp said that the tally sheet said they opened all non-empty envelopes and that the provisional vote was not opened, and then it says on Page 3 of the tally sheet that the absentee ballot was not counted. So it looks like the recount auditors opened the absentee ballot and not the inspector.

Mr. Brooks said that he disagreed. He thought that they were referring to other envelopes because it was very clear that the recount auditors were not to open envelopes. He believed that the ballot was opened by an investigator, not rejected, and had not been run through the machine.

Mr. Bopp said that page 4 indicated that the ballot was not counted because the signature was contested. Both parties agreed that the ballot has not been counted.

The chair clarified that there was a motion on the floor that had been seconded that is to not accept the ballot and the commission is in discussion. There being no more discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted to not accept the ballot.

The petitioner withdrew any further disputes. The respondent withdrew any disputes. Ms. Willis stated that the count for Perry 41 was 20 for Borst and 17 for Waltz.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Perry 44 53 for Borst 40 for Waltz
Petitioner disputed 2 ballots; Respondent disputed 1 ballot. The petitioner withdrew disputes. The respondent reserved disputes.

Perry 47 4 for Borst 5 for Waltz
Petitioner and Respondent each had one disputed ballot. Petitioner withdrew his dispute. Respondent withdrew his dispute.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted. Ms. Willis gave the final tally as 5 for Borst and 6 for Waltz.

Perry 48 62 for Borst 73 for Waltz Petitioner disputed 2 ballots; Respondent
disputed 1 ballot
Petitioner withdrew his disputes. The respondent withdrew his dispute. Ms. Willis gave final tally as 63 for Borst and 75 for Waltz.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Perry 51 31 for Borst 45 for Waltz
Respondent disputed 2 ballots; the State Board of Accounts tally sheet indicated Petitioner had disputes as well. Petitioner withdrew any disputes. Respondent withdrew any disputes. Ms. Willis read the final tally as 33 for Borst and 45 for Waltz.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Perry 55 101 for Borst 82 for Waltz
Petitioner had previously asked to have this moved from undisputed list. Petitioner withdrew any disputes. Respondent had no disputes.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Perry 56 59 for Borst 78 for Waltz
Petitioner and Respondent each disputed one ballot. Petitioner withdrew any dispute.
Respondent reserved any dispute.

Perry 57 0 for Borst 0 for Waltz
Petitioner disputed 74 ballots; Respondent disputed 93 ballots.

Petitioner withdrew Exhibit 169. Mr. Brooks said that in this precinct the clerks initialed all the votes on the front instead of the back. He indicated that the petitioner does not want to disenfranchise voters based on technicalities and withdrew remaining disputes. Respondent withdrew disputes. Ms. Willis gave final tally as 93 for Borst and 74 for Waltz.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Perry 58 103 for Borst 72 for Waltz
Petitioner and Respondent each disputed one ballot. Petitioner withdrew any disputes.
Respondent reserved his dispute.

Perry 59 34 for Borst 25 for Waltz
Petitioner had previously asked that this be moved from undisputed list. There were three exhibits; two were marked by Borst and one was marked by Waltz. Mr. Brooks explained that they are all three unopened absentees. Mr. Bopp requested to see a copy of the poll list. The respondent viewed the poll list and indicated no objection to opening the ballots.

Upon opening Exhibit 1, the chair found an official ballot of the Republican primary, with two clerks’ initials, clearly indicating a vote for Borst. Upon opening Exhibit 2, the chair found an official ballot of the Republican primary, with two clerks’ initials, clearly indicating a vote for Borst. Upon opening Exhibit 3, the chair found an official ballot of the Republican primary, with two clerks’ initials, clearly indicating a vote for Waltz.

Ms. Willis stated the tally as 36 for Borst and 26 for Waltz. The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Perry 62 52 for Borst 61 for Waltz
Petitioner had previously asked that this be moved from the undisputed list. Petitioner withdrew any dispute. The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Perry 63 36 for Borst 16 for Waltz Respondent disputed one ballot.
Respondent withdrew any disputes.
Mr. Brooks said that there were twelve absentee votes and the recount auditors only found five, so there were seven absentee ballots missing. These were votes that were cast and disappeared.

He argued that the proper remedy here according to Ind. Code 3-12-1-12 would be to cast those ballots. Mr. Brooks handed the commission an affidavit that was covered by the testimony given by Ms. Maddox. The affidavit established that the inspector received the absentee ballots for both Republicans and Democrats, reviewed all the paperwork, opened all the envelopes, placed them into the voting machine, and the votes were included in the machine totals. Mr. Brooks said that the testimony establishes that the votes were actually cast, and under Ind. Code 3-12-1-12 a vote that has been marked and cast must be counted unless there is a showing of fraud.

Mr. Bopp objected because the ballots are missing and could not be manually counted to validate during the recount.

The chair moved, seconded by Durnil, not to count the ballots. The chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted. Ms. Willis gave the final tally for Perry 63 as 36 for Borst and 16 for Waltz.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Perry 64 16 for Borst 17 for Waltz
Petitioner had previously asked that it be moved from undisputed list.

Mr. Brooks said that there were two Waltz ballots in the provisional envelope that were separate from the other votes and were segregated for a reason, and that counting the two ballots causes there to be two more votes than there were eligible voters in the poll. There were actually three votes that were in the provisional envelope, but one was a no vote so it was not counted as an exhibit. There were four unopened provisional ballots and only four provisional ballots in the precinct, so these were not provisional ballots.

Mr. Bopp objected, arguing that the votes were valid.

The chair clarified that there were more ballots than there were people who signed in the poll book.

The chair moved, seconded by Durnil, to count the Exhibits 1 and 2. The chair moved for discussion.

Mr. Brooks said that it is important that the inspector made the decision to segregate the ballots that exceed the number of signatures in the poll book. The chair asked counsel whether there is a reason why there would be more votes than signatures. Ms. Robertson said that sometimes people do not sign the poll list. Mr. King said that there is a specific statutory requirement that a person must sign the poll book before voting. There is also a requirement that any spoiled ballot must be clearly marked.

Mr. Griffin asked whether there is any reason to conclude that the two segregated ballots correspond with the ballots that are beyond the number of names on the poll list. Mr. Brooks said that he was asking the commission to conclude that the ballots were segregated for a reason, and that the reason was because the voters did not sign the poll book.

The chair moved, seconded by Durnil, to count the ballots. Mr. Griffin said that the votes looked valid, and that he can think of no reason to not count them. The chair agreed saying that with the absence of a reason as to why they were segregated, he must count them.

Ms. Robertson said that she was told that some precincts gave people two ballots because the school board was on the back, and some officials did not know that the school board was on the back, so they thought that they had to give them two ballots. Mr. King confirmed Ms. Robertson's recollection but said that no precinct was specified.

Mr. Bopp said that Mr. Brooks did not offer specific evidence and only presented speculation. There are valid reasons why the discrepancy could exist, and the votes should be counted.

There being no more discussion, the chair called the question that the votes be included for the State Board of Accounts final tally of votes, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

The petitioner withdrew any other disputes. The respondent had no disputes. Ms. Willis stated the tally as 16 for Borst and 17 for Waltz.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Perry 66 21 for Borst 17 for Waltz
Petitioner had previously asked that this be moved from undisputed list.

Mr. Brooks said that the ballot at issue is indicated to be spoiled but actually the official put it into the machine and the machine told her that it was a no vote, and rather than run it through again she took it out and spoiled it. The State Board of Accounts concluded that the reason that it was spoiled was an overvote in the state convention delegate race and thought that it should be counted. Mr. Bopp said that the State Board of Accounts counted the vote and Waltz challenged it. Mr. Bopp reserved the dispute.

Perry 68 0 for Borst 0 for Waltz
Petitioner disputed 28 ballots; Respondent disputed 50 ballots. Both parties waived their disputes. Ms. Willis indicated the final total should reflect 50 for Borst and 28 for Waltz.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Perry 70 0 for Borst 0 for Waltz
Petitioner disputed 29 ballots; Respondent disputed 41 ballots.

After discussion with State Board of Accounts, the discrepancy between the tally sheet and the State Board of Accounts Report (blue book) was resolved as all the votes being disputed.

Mr. Brooks withdrew all disputes past Exhibit 4, but wanted to argue Exhibits 1 and 2. Exhibit 1 was an unopened absentee ballot.

Mr. King clarified that the petitioner withdrew Exhibits 46-74.

After a brief discussion, the commission decided to continue with the recount Friday at 8:00am, recognizing that Friday had been declared a National Day of Mourning in honor of President Reagan's funeral.

Mr. Bopp said that the issue with Exhibit 1 is that the ballot was found in the envelope unsealed and therefore was not counted. It is not clear whether it arrived at the precinct unsealed.

The chair noted that the envelope physically and visibly looked like it had been sealed at one point and that there was no indication of rejection from the inspector, and one reason for rejection is lack of seal. The chair further indicated that it was sealed or else there would have been a rejection on there.

The chair moved, seconded by Mr. Durnil, to count the ballot. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Upon opening the ballot, the chair found an official ballot of the Republican primary, with two clerks' initials, clearly indicating a vote for Borst. The new tally was noted as 42 for Borst and 29 for Waltz. The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes.

There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Perry 74 24 for Borst 23for Waltz
Petitioner disputed 1 ballot; Respondent disputed 4 ballots
Mr. Brooks withdrew Exhibit 3. Exhibits 6 through 9 were absentee ballots, and Petitioner argued that they should be counted.

Mr. Bopp had no objection to opening Exhibits 6 and 7 but objected to 8 and 9 because they were not listed on poll book and there was no evidence that they were registered voters. Upon opening Exhibit 6, the chair found an official ballot of the Republican primary, with two clerks' initials on the back, clearly indicating a vote for neither Borst nor Waltz. Upon opening Exhibit 7, the chair found an official ballot of the Republican primary, with two clerks' initials on the back, clearly indicating a vote for Borst.

After discovering that the individuals who submitted the ballots were registered voters in the precinct, Mr. Bopp said that he had no objection to opening exhibits 8 and 9. Upon opening Exhibit 8, the chair found an official ballot of the Republican primary, with two clerks' initials on the back, clearly indicating a vote for Borst. Upon opening Exhibit 9, the chair found an official ballot of the Republican primary, with two clerks' initials on the back, clearly indicating a vote for Borst. Mr. Bopp reserved Respondent's disputes.

Perry 75 135 for Borst 107 for Waltz
Petitioner disputed 4 ballots; Respondent disputed 1 ballot. Petitioner withdrew his disputes.
Respondent withdrew his dispute.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted. Ms. Willis stated the final count was 136 Borst and 111 for Waltz.

Perry 76 80 for Borst 102 for Waltz
Petitioner disputed 2 ballots; Respondent disputed 1 ballot. Petitioner withdrew his disputes.
Respondent withdrew his disputes.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted. Ms. Willis stated the final count as 81 Borst and 104 for Waltz.

Perry 78 103 for Borst 67 for Waltz Respondent disputed 5 ballots
The petitioner withdrew disputes for Exhibits 1-4.

After discussion, it was decided that Exhibits 5-21 were disputed by Respondent. The respondent waived his challenges. Ms. Willis stated the final tally was 108 for Borst and 67 for Waltz.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Perry 79 81 for Borst 77 for Waltz
Petitioner had previously asked that this be moved from the undisputed list.

Exhibits 1-4 were listed as disputed by "all." Mr. Brooks said that the ballot at issue is one that was actually opened and counted the day following Election Day, and that is why the certified count was 82 for Borst. Petitioner argued that it should be counted. The undisputed total was 81, and the certified total was 82. Ms. Willis stated that State Board of Accounts did not list it on the tally sheet as a disputed ballot. Mr. Bopp reserved his dispute.

Mr. Brooks stated that this is a counting issue and not an exhibit issue. They did not count it, but it has already been certified.

Mr. Bopp requested to see the poll book for Perry 79. Mr. Rokita noticed that a square that was off-center on this exhibit was not filled out which makes it unclear whether the ballot was counted.

Mr. Brooks called Ms. Beck again. Ms. Beck reviewed the name and address of the voter of the exhibit and stated that the voter was properly registered in Perry 79. Ms. Beck said that the name was not included in the poll book because the voter submitted the address on the old style of the voter registration form and for every old form that was received, a new letter was sent out requesting that either two questions be answered or a new registration be filled out. The registration was completed after the poll book was created, but the voter was properly registered.

Mr. Bopp clarified that the name of the voter at the proper address was in her records, and that the voter had not moved anywhere else.

Mr. Brooks called Mr. Vane again. Mr. Brooks asked Mr. Vane about a form generated by his office. Mr. Vane explained that the form is produced by his office and it requires that his office provide a reason to voters if their provisional votes are not counted. The office produced a spreadsheet to show the results. A specific query for Perry 36 shows that the vote was counted but gives no reason for counting the ballot; reasons were given only when ballots were not counted. The chair asked whether Mr. Vane could explain why the box on the ballot was not filled out. Mr. Vane said he could not.

The chair then stated that the ballot will be counted. Upon opening the exhibit, the chair found an official ballot of the Republican primary, with two clerks' initials on the back, clearly indicating a vote for Borst. Ms. Willis stated the new total as 82 for Borst and 77 for Waltz.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Perry 80 122 for Borst 67 for Waltz
Petitioner disputed 2 ballots; Respondent disputed 1 ballot. Petitioner withdrew disputes.
Respondent reserved disputes. Ms. Willis stated the updated total as 122 for Borst and 68 for Waltz.

Perry 84 38 for Borst 48 for Waltz
Petitioner had previously asked that this precinct be moved from undisputed list.
Petitioner withdrew any disputes.

The chair moved, seconded by Mr. Durnil, that the votes for this precinct be added to the State Board of Accounts final tally of votes. There being no discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted. Ms. Willis gave the final tally as 38 for Borst and 48 for Waltz.

Perry 86 7 for Borst 20 for Waltz Respondent disputed 2 ballots
Respondent reserved the disputes.

At 7:00pm, the chair recessed until 8:00am the following day.

Friday, June 11, 2004 8:00am

Mr. Brooks asked for time for an opening statement regarding Petitioner's request for a special election, and the chair set a time limit of three minutes per side.

Mr. Brooks reiterated Petitioner's desire to not disenfranchise any voter, wanting to count all votes cast on Election Day. Mr. Brooks expressed serious concern about the weight given to sworn testimony from those present on election day. The chair called time. Mr. Brooks noted that he was attempting to frame issues, and the three-minute time limit was insufficient and that he had requested more time. The chair recognized Mr. Bopp for his opening statement.

Mr. Bopp stated that the people of Senate District 36 were entitled to a fair election, not a perfect election. As part of a human process there are errors for many reasons, but the election was fair. Mr. Bopp noted that a special election would also disenfranchise voters who were able to vote on election day but would not be able to vote in a special election. There are rules to elections that prevent fraud; they are minimal and they are justified.

Mr. Brooks called Paul Ricketts, Lawrence Township Assessor. The Chair reminded Mr. Ricketts that he was still under oath from Thursday. Mr. Ricketts reviewed his election history and involvement in previous recounts. He indicated he currently serves as chairman of the Marion County Election Review Task Force. Mr. Ricketts explained various concerns of the task force, including having sufficient ballots at the polls. He noted that 11 precincts in Marion County had confirmed ballot shortages.

Mr. Brooks asked Mr. Ricketts to describe conclusions based on information gathered regarding provisional ballot training, at which point Mr. Bopp objected as to relevance to a special election or recount. Mr. Durnil moved, and the chair seconded, to overrule the objection. There being no discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was adopted.

Mr. Ricketts stated that the training was not understood by all; many of the ballots did not have proper documentation, and provisional ballots were used as a “catch all” when workers did not know what to do with a voter. A majority of the provisional ballots did not have the affidavit attached and therefore were not counted as valid ballots. In regard to the ballot shortages, Mr. Ricketts concluded that the shortages were typically due to human error. He stated that of the precincts that responded to a survey currently being conducted by his task force, 11 reported ballot shortages. Approximately 61 precincts called in to the election board on election day believing that they were going to run out of ballots; however, only about a third got into the reserve ballots, and about 20 ran out before they received the reserve ballots from the election board. The geographical distribution of the affected precincts was well scattered throughout the county. In regard to media coverage of the ballot shortages, Mr. Ricketts noted that various news organizations reported the ballot shortages during the evening of election day. He specifically noted knowledge of Perry 6 running out of ballots.

Mr. Bopp asked who appointed the task force. Mr. Ricketts was asked by the county Republican chairman to serve. Mr. Ricketts answered questions regarding the number of precincts, the number of workers and number of registered voters. Mr. Bopp asked how many elections have been perfect elections. Mr. Ricketts acknowledged that workers occasionally oversleep causing the polls to open one half hour late, polls have been shut down for 15 minutes to let school children get on the school bus, janitors have been late to open the doors to a precinct, and there could be other reasons that the polls may be shut down for a period. Mr. Ricketts was not aware of any special elections being held due to the temporary closing of the polls because of these interruptions at the polls.

Mr. Brooks asked Mr. Ricketts to compare the number of voters that typically appear between 6:00 and 6:30 am to those who show up at 5:15 to 6:00pm on Election Day. Mr. Ricketts acknowledged that his experience indicates that a greater number of voters typically appear in the evening hours and that polls being closed during the evening allows less opportunity for voting later in the day. He does not recall any elections where the ballots ran out but did recall elections where the machines required repair.

Mr. Durnil asked Mr. Ricketts whether any specific voters contacted him stating that they were not able to vote. Mr. Ricketts said that he had spoken with a few voters but did not have specific names.

Mr. Griffin asked how many people were on the task force, and Mr. Ricketts responded that there were six. Mr. Ricketts acknowledged that most of the conclusions were his personal conclusions, however, things such as running out of ballots were facts. He also acknowledged that he did not have a hard number of the people who were not able to vote. Mr. Ricketts said that he had eleven letters from precincts that had run out of ballots, with one for as long as three hours.

Mr. Bopp asked which of the eleven precincts were in Senate District 36. Mr. Ricketts stated that Perry 6 was one of the precincts within Senate District 36 and that there were others not within Senate District 36.

Mr. Brooks presented an affidavit from an inspector who stated that the precinct was running out of ballots at 1:30pm and asked for 100 ballots. At 3:00pm they received 50 ballots by taxi, and at 3:30pm the precinct called asking for additional ballots and ran out of ballots at 5:20pm. The affidavit further indicated that fifteen people left the polls due to the shortage in ballots, voter turnout was low, and they did not receive additional ballots until 5:57pm, three minutes before the polls closed.

Mr. Bopp objected to the affidavit because he did not receive it prior to the hearing and was not able to cross-examine the witness. Mr. Bopp stated that allowing the testimony would not be fair under the circumstances. Mr. Bopp did agree to waive his objection to this affidavit but would not waive his objection to any other affidavits.

Mr. Brooks called John Hammond regarding the authenticity of the affidavit by Joe W. McAtee. Mr. Hammond acknowledged that he knew Joe McAtee and witnessed him signing the affidavit. Mr. Bopp asked if Mr. Hammond delivered the affidavit to counsel, to which he answered that he had.

Mr. Griffin moved, and Mr. Durnil seconded, that the affidavit be accepted as evidence. Discussion ensued as to why Joe McAtee was not able to personally appear before the commission. The chair agreed that the evidence should be admitted but noted that he believed that it should be given very little weight and that the affidavit should have been submitted during the pleading stage to allow opportunity for cross-examination. The chair indicated that he did not think the Indiana Supreme Court case submitted to the commission the prior day applied in this matter.

Mr. Brooks responded that the chair was misreading the previously submitted Indiana Supreme Court case and that Rule 11b applies to recount commissions and applies to a verified pleading. Mr. Brooks argued that the commission does not have the authority to disregard sworn testimony. Furthermore, the petitioner argued that there has been full compliance with the recount guidelines as set forth by the recount director at the pre-hearing conference call.

The chair concluded the discussion and called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion to accept the affidavit was accepted.

Mr. Brooks presented an affidavit from Ms. Peggy Holt, a volunteer at Perry 6, indicating that she observed a group of people leave the polls in an angry state and not return to vote, and that an

additional group arrived after 6:00pm that was not allowed to vote. Mr. Bopp waived his objection to this affidavit but indicated his intent not to waive his objection to any additional affidavits.

Mr. Rokita moved to accept the affidavit and was seconded by Mr. Durnil. Discussion prompted by the chair ensued as to the how the identity of Peggy Holt was authenticated. There being no further discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion to accept the affidavit was accepted.

Mr. Brooks presented an affidavit by Debra Rightmyer which said that there was light voter turnout and that she was not surprised to hear about the reports on radio that indicated ballot shortages.

Mr. Bopp objected since the witness was not on the respondent’s witness list, there was no testimony for why she was not present at the recount commission meeting, there was no notarization, and Petitioner had the affidavit for four days and had not presented it to the respondent.

The chair moved, seconded by Mr. Durnil, that the affidavit be accepted. The chair noted his intention that the affidavit be given little weight and called the question. There being no further discussion, the chair called the question, and declared that with two members voting “aye” (Mr. Rokita; Mr. Durnil), and one member voting “nay” (Mr. Griffin), the motion to accept the affidavit was accepted. Mr. Brooks noted that the commission had established a procedure for accepting affidavits with the testimony of the person who witnessed the signature. He referenced the testimony of Rebecca Maddox in which she indicated she had followed the same procedure for all the affiants.

Mr. Brooks presented an affidavit from an inspector in Center Ward 16 Precinct 2, indicating that voter turnout was very light between 5:00pm and 6:00pm.

Mr. Bopp objected since the witness was not on the respondent’s witness list, there was no testimony for why she was not present at the recount commission meeting, there was no notarization, and Petitioner had the affidavit for four days and had not presented it to the respondent. Furthermore the witness could have been subpoenaed to appear before the commission.

The chair moved to accept the affidavit and was seconded by Mr. Durnil. The chair noted that the affidavit should be given very little weight. There being no further discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion to accept the affidavit was accepted.

Mr. Brooks asked to call the recount director, Heather Willis, to clarify that Petitioner followed the guidelines as set by the recount director. The chair noted that the affidavits were being accepted and that Petitioner had the opportunity to present his case.

Mr. Brooks presented an affidavit by Justin Sprinkle that indicated that there was an unusually low turnout during the prime voting hours. Mr. Bopp objected to the affidavit on the same grounds as stated previously.

The chair moved, and Mr. Durnil seconded, that the affidavit be accepted. There being no further discussion, the chair called the question, and declared that with two members voting “aye” (Mr. Rokita; Mr. Durnil), and one member voting “nay” (Mr. Griffin), the motion to accept the affidavit was accepted. Mr. Griffin noted that he was not voting to accept the affidavit based upon the lack of notarization. He wanted to make sure his decisions whether to accept or not accept an affidavit were consistent.

Mr. Brooks presented an affidavit by an inspector in Perry 75 indicating that the precinct ran short of ballots around 4:00pm, called again at 4:30pm, and at 4:50pm was directed to use U17 (17-year-old) ballots. The affiant also stated that there was little turnout between 5:00pm and 6:00pm. Mr. Brooks indicated that the affidavit was notarized. Mr. Bopp objected, noting that the affidavit was notarized on the previous day and that the witness could have been present before the commission.

The chair moved to accept the affidavit and was seconded by Mr. Durnil. The chair noted that the affidavit should be given very little weight. There being no further discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion to accept the affidavit was accepted.

At the request of Mr. Durnil, Mr. Brooks explained that a U17 is a provision in state law that indicates that if a person is going to be 18 by the general election that person may vote in the primary. However, the school board election is final, so these voters cannot vote in it.

Mr. Brooks called Mr. Vane again. Mr. Vane testified that there are 3172 voters in Perry 6.

The chair said that at 10:00am the State of Indiana would be taking a moment of silence in honor of the memory of President Reagan. He indicated the commission would do the same and then take a short break at that time. .

Mr. Bopp called Doris Anne Sadler again. She confirmed her understanding that she was still under oath from the previous day. She explained that the task force for election review was put together at her behest at the recommendation of various people in the parties. She said that the last three elections have presented special challenges. She said that the Marion County Election Board and she, as a clerk, have been doing everything that they can to make the election go as smoothly as possible and the task force is part of that effort. She said that there have been circumstances when voters could not vote at polls at the time they wanted.

Mr. Bopp asked about the mechanism by which Marion County records calls received regarding the election. Ms. Sadler explained the procedure for election machine trouble calls. Each individual who works at the service center kept a log sheet and records what the problem was and how it was resolved. All the problems were then compiled into a master spreadsheet. Ms. Sadler confirmed that the document about which Mr. Bopp asked was the master spreadsheet for this district, that the document is regularly kept as part of business, and that the document is under her control.

Mr. Brooks asked whether the chart records the ballot shortage calls. Ms. Sadler explained that it only recorded a couple such calls because those calls went to the election board itself. This sheet primarily records machine trouble calls.

Mr. Brooks noted that the document is not on the respondent’s exhibit list and asked for an explanation about how it is relevant before deciding whether to object. Mr. Bopp said that it is

relevant because there are human problems that occur in elections and some of those result in voters heading to polls and not being able to vote, and that is relevant if the commission is going to consider a special election motion.

Mr. Bopp asked Ms. Sadler whether the document was presented at the Marion County Election Review Task Force and whether it was part of the minutes for May 26 and June 3 which included attachments. Ms. Sadler affirmed that it was. Mr. Bopp then said that included in the exhibit list are the minutes from the May 26 and June 3 Marion County Election Review Task Force and then concluded that Respondent had answered both of Petitioner's objections.

Mr. Brooks said that he had no further objections.

The chair moved, seconded by Durnil, to accept the evidence. The chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted.

Mr. Bopp asked whether, based on that record, any of the problems could result in a voter showing up and not being able to vote. Ms. Sadler said yes and referenced examples discussed earlier including an inspector oversleeping.

Upon question from Mr. Bopp, Ms. Sadler said that only Perry 6 ran out of ballots in Senate District 36. She then referenced a spreadsheet that showed how many ballots were sent to each precinct and the number of ballots cast. Ms. Sadler said that Mr. Woo, the election center supervisor, held back 20 ballots for each precinct for testing purposes. Those 20 ballots were available right away for each precinct at first call about ballot shortages. Mr. Woo was responsible for calculating how many ballots each precinct received. He did the calculations by referencing voter turnout from 2002 and then he rounded to nearest 50 and added 50 to that. The laws that apply to the new optical scan voting machines require that the election committee meet 100% of voter turnout from the last general election. They actually printed nearly twice, county wide, of what was used in the last general election. Therefore, they printed 176,000 more countywide than statute required. The only two precincts that really came close to running out were Perry 65 and Perry 79, but they had plenty of unofficial ballots. Ms. Sadler said that her opinion as to why Perry 6 ran out was because it, being the largest precinct in Indianapolis with 3100 voters, grew by 700 registered voters since 2002 and Mr. Woo used past turnout figures and did not take into account new registrations. Ms. Sadler said that they are now trying to deal with the problem with proposals to print 100% of registered voters and maybe more. Ms. Sadler noted that they also had ballot shortages in 2003 mostly because of spoilage. When they received initial phone calls about shortages, they delivered the first 20 ballots that had been reserved. The time problem was from printing because of particular ink and paper that must be used and not from delivery. She could not say what time Perry 6 called about the ballot shortage or when they received ballots. However, she did talk to the inspector who said that they ran out at about 5:20pm and they received the ballots at about 5:50pm.

Mr. Brooks asked Ms. Sadler whether in Exhibit 1 there were any examples where a voter was disenfranchised because of a machine being down. Ms. Sadler replied that there was one particular precinct where the inspector overslept significantly, and they had to send out someone from the office to open the poll, but the person sent did not have the poll list so the voters could not vote until the inspector got there. After questions from Mr. Brooks about Exhibit 1, Ms. Sadler said that the document was not created for the purpose of recording ballot shortages. She said that recorded on this document were the calls that the election board received at the warehouse. It was generated from another spreadsheet that was generated from a handwritten list.

She said that she supposed that it was possible that there were shortages not recorded on the list, but as far as she knew that this was an exhaustive list. The first time that the optical scan machines were used was in the Primary of 2003. She said that she was familiar with the machines before that election, and that with those they could use paper ballots if the machine broke down. She was unaware of a time when they had ran out of ballots such that voters could not vote. Perry 65 and 79 used the ballots that were sent and were very close, but she does not know whether they had to use other ballots. She was aware of some of the press coverage about the shortages. She agreed that it was a negative story about the shortages, but she told each media person with whom she spoke that every voter in line at 6:00pm was guaranteed the opportunity to vote. She was familiar with the special election in Hancock County (Cumberland) and explained that it occurred because the ballots did not distinguish between the races and so the poll workers did not know which ballots to give voters. She agreed that a special election in that instance was proper.

Mr. Brooks asked whether there was any substantive difference between receiving a ballot that did not have Lawrence Borst or Brent Waltz on it and not receiving a ballot at all. She said that there was a difference. In Cumberland, there was never an opportunity for the person to get the right ballot. The shortage of ballots in this case inconvenienced voters but they were assured the opportunity to vote as the election board continued to deliver votes. Mr. Brooks then asked whether it would be different if a person arrived at 5:45pm and had an appointment at 6:15pm. Ms. Sadler said that this is what happened with the old lever machines that created lines and caused some people to have to wait, and some left and some stayed.

Mr. Brooks said that his point is that if a person planned his day so that he planned to get there before 6:00pm and could not stay past that time, there would be no functional difference between that and the Cumberland election where they received wrong ballots. He indicated that the effect on the race is the same whether it is a no vote or a wrong vote. Ms. Sadler disagreed. Mr. Brooks asked whether Ms. Sadler disputed the testimony that people left because of the ballot shortages. She said that she could only testify as to what the inspector told her, which was that about ten people chose not to stay and wait at Perry 6. Mr. Brooks asked what remedy existed for those people who had the misfortune of hearing the news stories or showing up and hearing about the ballot shortages. She said that not many existed, but a special election was not appropriate. Mr. Brooks asked whether there was any other remedy other than a special election that would allow those people to vote. She said that the only thing that she could say is that in every election there are people who do not get to vote because of things like an inspector oversleeping and people have to go to work and work until 8:00pm and therefore cannot return to the poll, and she does not think that a special election is the appropriate remedy in such cases. Mr. Brooks said that those examples are not caused by the failure to distribute ballots. Ms. Sadler said that she did not see any difference because they are caused by election personnel mistakes. Mr. Brooks asked whether there is any other remedy other than a special election that would allow people to vote. She said no.

Mr. Griffin asked Ms. Sadler to characterize the turnout of this election. Ms. Sadler said that it is a tough question because some places were very high and some were very low, and it did not completely correlate to intense campaigns. It was both. Under further questioning, Ms. Sadler said that she had not spoken with any individual voter who had not been able to vote. Ms. Sadler said that there was no legal problem in the printing of the ballots, as they were compliant with the statute, but there was a practical problem in the printing of ballots.

Mr. Durnil asked about the Cumberland special election. Ms. Sadler explained that the ballots had the correct candidates, but the poll book had no designation about what ballot particular persons were to receive and this caused a situation where people did not receive the correct ballot.

After questioning by Mr. Brooks, Ms. Sadler agreed that the legal standard did not help to meet ballot needs.

Mr. Bopp called Rebecca Shoppe. Mr. King administered the oath to her.

Ms. Shoppe gave her address and said that she was a registered voter in Perry 6. She arrived at approximately 5:15pm or 5:20pm. After arriving she found out that the precinct had run out of ballots. She was told that they did not know when they would receive ballots, but if she was inside at 6:00pm she would be able to vote. She chose to wait outside with some friends and then went inside before 6:00pm. Several people chose to wait, enough that they had to form lines. She observed other voters receive the same instructions that she received, but she spent most of her wait outside. She noticed about 5-10 people leaving and did not notice whether they came back. She said that it was raining outside but that she stood under a covered roof.

Mr. Brooks asked her whether she was a student. She said yes. He asked how many people she saw leave. She estimated about 5-10 left unable to vote and about 30 chose to stay.

Mr. Griffin asked whether she heard any news programming about the shortages. She said that she heard none even though she was listening to the radio.

Mr. Brooks verified that she was not saying that 30 people showed up at 5:15pm and chose to stay. Ms. Shoppe said that she was not, and that there was a steady stream of people who arrived until 6:00pm.

Mr. Bopp called Gary Wombles. Mr. King administered the oath to him.

Mr. Wombles stated his address and said that he is a voter in Perry 6. After questioning, he said that he appeared to vote at about 5:30pm. After saying that he was a Republican, he was told that they ran out of ballots and as long as he was in the building before 6:00pm he would be able to vote. He observed other voters being advised the same as he was. He said that ballots arrived at about 5:55pm. He said that about 40 people stayed and voted. He said that he saw about 5-10 people leave without voting.

Mr. Redstone said the petitioner had no further questions.

Mr. Griffin asked if he knew whether those who had left were Democrat or Republican. Mr. Wombles said that the people that he saw leave left because they were Republican and could not receive a ballot at that time. Mr. Griffin then asked whether Mr. Wombles had heard any news media coverage about the ballot shortages. Mr. Wombles said that he had heard about shortages, but that it did not deter him from going.

Mr. Bopp called Larry Reuben. Mr. King administered the oath to Mr. Reuben.

After questioning by Mr. Bopp, Mr. Reuben said that he was an attorney for Mr. Waltz. He said that he had spoken with Peggy Holt, whose affidavit the petitioner had previously offered into evidence. Mr. King clarified that the exhibit in question is special election exhibit 2-p.

Mr. Reuben said that Ms. Holt told him that she did get the affidavit, made appropriate changes, and signed it. She said that she did not sign the document in front of a notary. She said that the document that she signed was two pages long, and she signed it in the parking lot of Lee Robbins' office. Mr. Reuben said that she was willing to come and testify before the commission. Mr. Reuben said that Ms. Holt had told him that she had met a woman from Mr. Brooks's office who did not identify herself as a notary. Ms. Holt said that she signed the document on June 9th.

Mr. Brooks asked Mr. Rueben whether Ms. Holt agreed that she signed in front of a woman from his office. Mr. Reuben said yes.

The chair asked the committee members whether they had any questions. None did.

Mr. Bopp moved for the commission to reconsider the admission of the affidavit of Mildred "Peggy" Holt, and that they withdraw it from evidence.

The chair, seconded by Durnil, motioned to withdraw the affidavit.

Mr. Brooks asked to respond to the motion. He stated that the events occurred just as Mr. Rueben said. His assistant, who was also a notary, took the document down as two pages and then Ms. Holt signed in front of her. Yesterday the commission indicated that they wanted the affidavits to be notarized, so Mr. Brooks asked his assistant whether she watched Ms. Holt sign, and after she said that she had, he asked her to notarize it. The day that she notarized it was the next day, June 10th. The notarization states that she watched Ms. Holt sign the day before, and that is true. The notarization was attached to the original two page document making it then total three pages.

Mr. Bopp said that the notarization stated June 9th and said that it seemed fraudulent. Mr. Brooks said that June 9th refers to the day that the notary witnessed the signing and not the date that it was notarized. The chair asked for a motion from the commission in response to the respondent's motion to withdraw.

Mr. Durnil said that he would like to bring the witnesses in and provide testimony as to her notarization.

Mr. Durnil, seconded by the chair, made a motion to withdraw the affidavit.

The chair called for discussion and Mr. Durnil said that he would not mind hearing from the affiant and notary public. The chair agreed and said that until the commission heard from them then he would vote to remove it.

Mr. Brooks said that he agreed with Ms. Holt's testimony as related by Mr. Reuben, and that it was unnecessary for her to have to come and testify because he would stipulate to her story. He indicated his willingness to bring his paralegal in to testify.

After discussion, the chair declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted to remove the affidavit from evidence. After withdrawing the affidavit, the chair indicated the commission was ready to hear arguments. Mr. Brooks requested time to have his notary come in and testify about the affidavit. Mr. Bopp said that he did not intend to call Ms. Holt if Mr. Brooks stipulated to her testimony as described by Mr. Rueben. Mr. Brooks wanted an opportunity to clarify to what he was stipulating. He asked Mr. Reuben and Mr. Reuben said that she was not told that the person to whom she was speaking was a notary, and that she signed a two page document. Mr. Brooks

said that it seemed to him the only issue was about the date of signature as opposed to the day of witnessing.

The commission took a break for lunch to allow Mr. Brooks the opportunity to bring his witness before the commission.

After the commission reconvened, Mr. Brooks called Melissa Tharpe. Mr. King administered the oath to Ms. Tharpe.

Mr. Brooks asked Ms. Tharpe if she was familiar with the document in question and if she met Ms. Holt to have her sign it, and she replied yes to both. Ms. Tharpe stated that she saw Ms. Holt sign the document. She said that after Mr. Brooks told her that the affidavit needed notarized, she notarized it and then went to the clerk to get it stamped because she had forgotten to bring her stamp. She filled out the form after she had the affidavit. She said that it was true that Ms. Holt personally appeared before her and signed the document in front of her. Mr. Brooks asked her to describe why the notarization states June 9th. Ms. Tharpe said that she put June 9th on the document because that was the date that she witnessed Ms. Holt sign it even though she did not execute the notary form until June 10th.

Mr. Bopp asked Ms. Tharpe whether she identified herself as a notary to Ms. Holt. She replied that she did not remember because at the time she did not know that it was to be notarized, and it was raining and they were in the car. Mr. Bopp asked whether she asked for identification from Ms. Holt. She replied that she did not. Mr. Bopp asked whether she swore in Ms. Holt to tell the truth. She replied that she did not. After Mr. Bopp asked, she said that she did not execute the notarized document on the 10th. Ms. Tharpe testified that she did not tell Ms. Holt that she was swearing under penalties of perjury, but she did tell her to read it and make sure that it was accurate.

After Mr. Brooks asked, Ms. Tharpe agreed the notary statement does not in any place say that she took an oath and that it only acknowledged her signature. She stated that this is one of the functions of a notary, but another function of a notary is taking an oath. Mr. Durnil asked whether she told Ms. Holt that she would notarize it. She said that she did not because she did not know that she was going to notarize it.

Mr. Durnil asked whether she has before notarized a document without the affiant's knowledge. She said that she did not think so. She usually goes into the conference room and notarizes it right in front of them.

Mr. Rokita asked whether she personally knew Ms. Holt. She said no. Mr. Rokita then asked how she knew that the person with whom she was talking was Ms. Holt. She replied that she did because Ms. Holt walked up to her car and asked her if she was Melissa, and she was not supposed to meet anyone else there.

Mr. Brooks asked that the commission reconsider the affidavit for acceptance as evidence. He said that one of the functions of notary is to acknowledge the signing of a document. Ms. Tharpe testified that she witnessed the signing of the document and that is all that the notary form says. Regarding the confusion with the date, the form says 'personally appeared before me' and Ms. Tharpe said that she thought that the date was to relate back to the date that she saw the signature. Mr. Brooks added that this witness is on the respondent's witness list and was available for questioning.

Mr. King clarified that the document to which the petitioner refers is special election exhibit S2.

Mr. Bopp continued to object to the reintroduction of the document. He indicated his belief that the notary was added to mislead the commission. The inclusion of the notary was intended to imply that the notary knew the person and, if not, that she took identification, which she did not do; second, that she took an oath, which she did not do; third, that the person understood that the document was of the solemn nature of one that is notarized. All that Ms. Tharpe has said is what she could have said without notarizing it, which is that she saw it. Further, she wrote the wrong day for the day that she notarized it.

Mr. Brooks said that there is no citation to the requirements that Respondent mentions. According to the handbook created and distributed by the Secretary of State's office, to notarize the document you do not have to administer an oath. Further, there is no requirement that the notarization has to occur on the day that it is witnessed.

Mr. Durnil, seconded by Mr. Griffin, moved to deny the motion to readmit the affidavit. When the chair called for discussion, Mr. Griffin said that he thought that Ms. Tharpe gave a reasonable explanation for why she put the 9th down and he personally did not think that it was intended to mislead the commission. He felt that he should vote not to allow it because his earlier votes for affidavits were based on whether they were notarized.

Mr. King clarified that the motion is to sustain the respondent's motion to remove the affidavit from the evidence.

For purposes of clarity, the chair read from the guidebook the duties and purposes of a notary.

There being no more discussion, the chair called the question, and declared that with three members voting "aye" (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting "nay," the motion was adopted and the affidavit was removed from evidence.

Mr. Brooks began his closing argument. Mr. Brooks said that it was a fact that Perry 6 ran out of ballots, and it was a fact that voters left the polls due to shortages. Mr. Brooks said that it was a fact that voters were disenfranchised. Due to media coverage and some confusion, this election was chaotic and had a chilling effect on voter turnout. Mr. Brooks said that ballot shortages in other precincts created word of mouth that had a multiplying effect on the chilling of voter turnout. Furthermore, Mr. Brooks said that the only remedy was a special election, and that the commission has the power to order one under Ind. Code 3-12-11-18(c). Mr. Brooks said that the statute that Respondent's counsel read in his opening statement pertained to local election contests under a circuit court's jurisdiction, and that does not apply to this case. Mr. Brooks said that the commission can make a finding for a special election in a recount preceding, and that the issue is whether the ballots were distributed properly.

Finally, Mr. Brooks requested the commission to order a special election, because it could enfranchise the people disenfranchised. Mr. Brooks said that one option would to have a special election in all the Marion County precincts in Senate District 36. Alternatively, he felt the commission could pick out all of the precincts with ballot shortages. The final option, and most narrow option, was that the commission could offer a special election in Perry 6. In closing, Mr. Brooks stated that he did not want the commission to make people re-vote, but instead wanted the commission to craft an option that enfranchised the disenfranchised voters.

Mr. Bopp began saying that there was no question that in this election certain voters did not vote. Some did not vote because they had other things planned, some because they were on jury duty, some because the lines were too long, some because an inspector overslept, some because the principal paused voting for the schoolchildren to get on busses, and some because a janitor did not unlock the doors. The election process is a human process and is not perfect because people are involved. It is not fair to call this disenfranchisement. There were adequate ballots for all the voters who showed up to vote by 6:00pm, including in Perry 6. Voters were told that if they waited they would be able to vote. Witnesses did just that, they waited and then voted. Every reasonable step was taken to ensure that every voter got to vote. No voter has the right to vote at the time of their choosing. There was a very generous following of the statute that covers printing ballots, as they printed nearly twice the required ballots. There is no question that there was a mistake made in that they should look at not just the previous voter turnout records as required by statute, but also consider voter registration increases. Sometimes the number of ballots needed not only doubled but tripled from the previous general election.

Mr. Bopp further argued that there is a reason why we have recounts and contests. They are not the same thing and are dramatically different. The remedy that the petitioner requests is available only through a contest. He read Ind. Code 3-12-11-3(a)(5). For a recount, it requires that votes cast were not correctly counted or returned. For a contest, Ind. Code 3-12-11 3(b)(4)(a) requires that a mistake was made in the printing or distribution of ballots that makes it impossible to determine the winner. Mr. Bopp said that this is what the petitioner argues but did not declare a contest, and not seeking a contest was a deliberate decision. The petitioner wanted others to take the political hit for making the charge that a special election was required. He wanted the chairman of the Marion County Republican Party or the chairman of Johnson County Republican Party to make that charge, but they both refused. Therefore, that issue was not before the commission. The votes have been counted and that ends the current task. The petitioner's claim implies that the commission can do whatever it wants regardless of what the petitioner declares. There is no remedy in this case. There is no jurisdiction to make the finding for a special election because a contest was not declared.

Secondly, Mr. Bopp argued that to order a special election the commission would have to make the finding that it was impossible to determine who received more of the votes cast. The only thing that the commission can find on the record is that 5-10 voters left during the time that the precinct was short of ballots. No one testified that those people did not come back or did not return to vote. We also know that the Brent Waltz, even though it was Senator Borst's home precinct, received 46% of the votes, so it is reasonable to assume that half of those who left were Waltz voters. Mr. Bopp argued that it is possible to say that it is equally true that the light turnout was due to the fact that it was raining outside. Further, Mr. Bopp argued that there is a big difference between the evidence that can be presented in a recount versus a contest. In a recount, a party is allowed to show evidence intrinsic to the ballot. In a contest, a party is allowed to show evidence of things that are extrinsic to the ballot.

Mr. Bopp continued by saying that inherent in a special election is the fact that what happened in the election does not count. The 700 people who voted in Perry 6 would have to either go vote again or else be disenfranchised. The petitioner wants to make those votes not count. Some of those voters will not be able to return because they are in the hospital, on vacation, on jury duty, or other various reasons. A special election causes massive disenfranchisement by canceling votes that have already been cast or by only allowing some people to vote and not others. This is why it is a very unusual remedy and only granted in situations that present the most egregious errors.

The chair asked the commission for questions to the parties.

Mr. Griffin asked why the petitioner did not ask for a special election from the beginning.

Mr. Brooks replied that the petitioner did not ask for a contest because Senator Borst believed that there were better suited people to ask for a special election from a political perspective. Senator Borst has not ever said that a special election is not the proper remedy for the problems here. Mr. Brooks also noted that on the local level parties often declare both a recount and a contest and use the recount as a discovery process. Mr. Brooks indicated that the petitioner now has the information and has always had the remedy available and now requests it.

Mr. Durnil asked Respondent if his reading of Ind. Code 3-12-11-18 as amended this year prevents the commission from granting a special election. Mr. Bopp replied yes because the finding that the commission would be required to make is not before the commission because there was no contest filed.

Mr. Durnil asked whether Respondent read the section to only refer to contest. Mr. Bopp replied yes.

Mr. Brooks requested 30 seconds to address this issue. Mr. Brooks said that reference to section 3(b) and looking at section 18(b) indicates that the legislature made the decision to not limit the section to a contest. The chair asked Respondent about the Cumberland special election where the one could actually technically determine the votes cast.

Mr. Bopp said that the special election provision is limited to the votes cast. In Cumberland, votes were cast and the problem was that the ballots were passed out at random because poll officials could not determine which voters were to receive which ballot. The election officials could not determine the winner from the cast ballots because they could not distinguish between votes cast by voters who were supposed to have voted on the ballots and those who were not.

Mr. Brooks responded to Mr. Bopp's discussion by asking the following question: what if we opened the doors at 6am and then closed them at 7:30am and did not open them anymore? You could determine the number votes cast. This is not a contest versus recount question, but it is either because it is the same standard. If the commission would have no remedy in that situation, then that should apply here. He indicated that he believes the commission would find that a proper remedy would be a special election. There is no difference between giving voters the wrong ballot, giving them no ballot, or closing the doors after an hour.

Mr. Brooks said that the petitioner does not want to disenfranchise 700 votes but just wants to provide those disenfranchised with an opportunity to vote.

The chair asked Mr. Brooks if the 10-15 people who left the polls were given the opportunity to vote, if it would then be possible to count the number of the votes cast. Mr. Brooks replied that if they knew that only 10-15 people were not able to vote because of the shortages, they would not be making the argument for a special election.

The chair asked Respondent, referencing that the petitioner suggested that if a special election would not work then you could just call back those who were not able to vote, what would his opinion on disenfranchisement be if that occurred. Mr. Bopp replied that since only 20% of voters in Senate district 36 voted, allowing only those in Perry 6 the opportunity to vote would

disenfranchise all the others who did not vote in the district because they are not allowed the same opportunity.

Mr. Brooks said that the respondent made a persuasive argument for a larger special election but indicated that voters in Johnson County were not affected by ballot shortages. The petitioner asked the commission to craft an appropriate remedy with a solution for where there was a problem.

The chair asked the commission for questions to their attorneys.

Mr. Durnil asked what the constitutional ramifications are when you do not allow all the people to vote at the same time.

Mr. King replied that there are a couple of constitutional ramifications. The most troubling one is where they only allow voters who did not vote on the regular Election Day to vote in the special election. That is because the registration process has reopened. There are people who have registered since May 4 and are constitutionally able to now vote but were not May 4, and there is not any constitutional way to distinguish between those two voters. Regarding the other option, the statute specifically provides that if the commission orders a special election, then they will order it in the specific precincts where the error occurred. It is certainly permissible to order a special election only within a specific precinct, but every voter must be allowed to vote. Ms. Robertson agreed.

Mr. Durnil asked what the other ramifications are when you have a special election in one precinct. He questioned whether you have to close all the bars in the entire district, as one example. Mr. King replied that he recalls that under Indiana Code 7.1, the title on Alcoholic Beverages, the requirement is only to close establishments in the area affected, but the practice has been to close establishments in the entire county.

Mr. Durnil asked what the military ramifications would be.

Mr. King replied that there are a couple of provisions that apply. Military and overseas voters must receive notification ahead of the election. There is also a provision that requires the National Guard to not have any musters on any election day, including a special election.

Mr. Durnil asked about any other civil or economic ramifications. Mr. King said that there might very well be some, but not that are addressed in statute.

The chair asked counsel what their opinion was about whether Ind. Code 3-12-11-18 (c) also applies to recounts.

Mr. King replied that he and Ms. Robertson have discussed this point and asked her to add any corrections that she felt necessary after he explained. In understanding section 18(c) it is important to look back to Ind. Code 3-12-11-3(a), which sets out the requirements for a petition for a recount. That includes subsection 5, that the votes were correctly counted and returned. Subsection (b) goes on to say that the petition for a contest must contain the 3 requirements. Section (b)(4) lists five petition requirements, of which only one is required in the petition for a contest; 4a concerns eligibility; 4b concerns a mistake in the printing or distribution of ballots; 4c concerns mistakes in the programming of the equipment; 4d concerns malfunction; 4e concerns a deliberate act or series of actions, any of 4a-4d, that makes it impossible to determine which candidate received the highest number of votes. So 4a or 4b or 4c etc. must be in the petition.

Section 3 continues in subsection (c) which does not specifically reference either a recount or a contest but refers back to the provision for a recount, subsection (b), so it applies to that. Subsection (d) does not specifically state that it applies to a contest but it references back to the contest. The structure bears a direct relationship to section 18 because in Ind. Code 3-12-11-18 we have the same sort of division by subsection. Subsection (a) of 18 specifically applies to the recount. Subsection (b) of 18 specifically applies to a contest by its terms to the specific situation where a person has been determined to be ineligible. Subsection (c) has been amended to be split into (c) and (d). Subsection (c) of 3-12-11-18 provides a list of the four sections that reference back to the required elements of the contest provision. Each of those are followed by a provision stating ‘that makes it impossible to determine which candidate received the highest number of votes cast then in that case the commission shall order that a special election be conducted.’ The new subsection (d) states that the special election under (c) must be held in precincts mentioned in the brief in which the commission determines 1, 2, 3, or 4. Neither (c) nor (d) specifically state that they only apply to a recount or contest proceeding, but there is a clear relationship back to the contest proceedings that he described earlier.

The chair clarified that the section applies only to contests. Mr. King affirmed. Ms. Robertson agreed.

The chair asked for advice on statutory construction and whether it is permissible to relate things back.

Mr. King said that, though without doing research, there is case law that stands for the statutory construction that related laws must be read concurrently for understanding and not necessarily separately. It is certainly permissible under that line of cases, as far as his understanding goes, to relate things back.

The chair asked for other questions from members.

Mr. Griffin asked about subsection (b) under subsection (c) and the language ‘precincts identified in the petition.’ He inquired whether the word “petition” applied to the generic petition or only to the petition for recount or contest.

Mr. King responded that this was the crux of his discussion, which was that subsection (d) does not specifically state that they only apply to a recount or contest proceeding, but there is a clear relationship back to the contest proceedings that he described earlier where it lists the permissible grounds for a petition for a special election.

Mr. Griffin asked for clarification whether a special election may be the remedy for a recount or a special election or only the remedy only for a contest. Ms. Robertson said that she thought that Mr. Bopp’s mention of an election where all the ballots were uncountable was interesting so far as whether you would allow a special election when you cannot count the ballots to determine the winner.

Mr. King said again that section 18 as amended does not specifically state that they only apply to a recount or contest proceeding, but there is a clear relationship back to the contest proceedings.

There being no more discussion, Griffin motioned, seconded by the chair, to deny the request for a special election. The chair then asked for discussion.

Mr. Durnil said that there had been testimony about those who were denied the opportunity to vote, but there had been no direct testimony from any individual who was denied the opportunity. Without such testimony from actual voters who did get the chance to vote, it was difficult to say that any voter was actually disenfranchised. Mr. Griffin said that he had the same concern.

The chair said that he recognized the comments from the fellow commission members. He noted that they had been discussing just this issue since 8:30am and it was then 1:30pm and it was important that they take this very seriously and try to be as thorough as possible. He noted that elections are not free of error because they are conducted by humans. Since consul had advised that a partial inside the precinct election would be unlawful, he felt that he must deny the request.

There being no further discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion to deny the special election was accepted.

Mr. Redstone called Jill J. Jackson, Johnson County Clerk. Mr. Redstone called her attention to the poll book for Johnson County Pleasant 4 and asked why there were instances where the signature was not scanned. Ms. Jackson replied that there are 80,821 registered voters in Johnson County as of the May 4 election. Up until the time the clerk's office moved to a new computer system, they did not scan signatures of registered voters. They started scanning signatures with the new system. Some poll pages have signatures from original registration applications, but for the majority of the 80,821 voters they do not have the scanned signatures on file because they were registered before the new software was placed in the office. Mr. Redstone asked her when they got the new system. Ms. Jackson replied was not sure. Mr. Redstone asked whether the new software system coincided with the new voting machines. Ms. Jackson replied that the software was received before the new voting machines.

Mr. Bopp had no questions. The commission had no questions.

Mr. Redstone introduced a spreadsheet to the commission of information he had compiled about the number of people who had their name and signature in the computer database. The commission accepted it with the foundation that Mr. Redstone said that he made it himself based on his own counting. Mr. Bopp had no objection. Members of the commission had no objection.

After stating that Ind. Code 3-11-12-17.7 requires that there be fraud, tampering, or misconduct and to his knowledge there is none, Mr. Redstone withdrew all of his disputes. Mr. Bopp had no objection.

The chair asked commission for questions.

Mr. Bopp withdrew all disputes for Pleasant 4. The respondent stated that he had no disputes. Mr. Redstone withdrew the remainder of the petitioner's disputes in Johnson County. The chair confirmed that there were no further disputes in any precinct in Johnson County. Both parties confirmed.

The chair, seconded by Durnil, moved to accept and include the precinct tally of each Johnson county precinct and include those precinct tallies in the State Board of Accounts final tally. There being no further discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was accepted.

The chair recognizes Ms. Willis. Ms. Willis gave the following tallies for all those precincts and moved them from the disputed to the undisputed list.

Pleasant 4	78 for Borst	65 for Waltz
Pleasant 5	49 for Borst	50 for Waltz
Pleasant 6	66 for Borst	83 for Waltz
Pleasant 11	117 for Borst	178 for Waltz
Pleasant 12	79 for Borst	133 for Waltz
Pleasant 13	31 for Borst	43 for Waltz
Pleasant 16	101 for Borst	120 for Waltz
Pleasant 23	33 for Borst	27 for Waltz
Pleasant 26	39 for Borst	80 for Waltz
Pleasant 27	22 for Borst	63 for Waltz
Pleasant 28	73 for Borst	96 for waltz
Pleasant 36	21 for Borst	32 for Waltz
White River 2	33 for Borst	66 for Waltz
White River 5	74 for Borst	61 for Waltz
White River 6	51 for Borst	91 for Waltz
White River 7	59 for Borst	76 for Waltz
White River 11	94 for Borst	147 for Waltz
White River 13	72 for Borst	104 for Waltz
White River 17	49 for Borst	78 for Waltz
White River 18	80 for Borst	76 for Waltz
White River 19	61 for Borst	116 for Waltz
White River 20	54 for Borst	118 for Waltz
White River 21	89 for Borst	69 for Waltz
White River 23	86 for Borst	56 for Waltz
White River 25	65 for Borst	96 for Waltz
White River 27	67 for Borst	82 for Waltz
White River 30	33 for Borst	39 for Waltz
White River 31	41 for Borst	49 for Waltz

The recount director said that there were 20 precincts in Marion County that were reserved by Respondent.

Mr. Bopp withdrew all remaining disputes.

Ms. Willis gave the following tallies for all the remaining Marion County precincts.

Center Ward 16 Precinct 2	16 for Borst	10 for Waltz
Center Ward 16 Precinct 10	20 for Borst	7 for Waltz
Center Ward 17 Precinct 1	19 for Borst	13 for Waltz
Center Ward 17 Precinct 2	14 for Borst	2 for Waltz
Center Ward 26 Precinct 4	48 for Borst	35 for Waltz
Center Ward 30 Precinct 4	26 for Borst	11 for Waltz
Perry 4	20 for Borst	19 for Waltz
Perry 5	70 for Borst	57 for Waltz
Perry 6	336 for Borst	279 for Waltz
Perry 14	39 for Borst	47 for Waltz
Perry 15	95 for Borst	61 for Waltz

Perry 28	47 for Borst	61 for Waltz
Perry 34	75 for Borst	60 for Waltz
Perry 44	54 for Borst	42 for Waltz
Perry 56	60 for Borst	79 for Waltz
Perry 58	104 for Borst	73 for Waltz
Perry 66	21 for Borst	17 for Waltz
Perry 74	31 for Borst	24 for Waltz
Perry 80	124 for Borst	68 for Waltz
Perry 86	9 for Borst	20 for Waltz

The chair, seconded by Mr. Durnil, moved to accept and include those precinct tallies in the State Board of Accounts final tally. There being no further discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was accepted.

The chair recognized Mr. King to present information regarding the remaining issues on the agenda. Mr. King said that Ind. Code 3-12-11-18(a) says that after the recount is completed the commission must sign a certificate stating the number of votes cast for each candidate and the candidate receiving the highest number of votes. There is also a determination of expenses required by the statute and the allocation of expenses against the petitioner’s deposit and the giving of any refund left. If the margin of votes is reduced by a certain percentile, the petitioner may qualify for a refund. There is also an issue about the impoundment orders. In the past the impoundment orders have remained until the parties have indicated that they do not intend to appeal.

The chair asked the parties what their intentions were regarding appeal for the purpose of impoundment issues. Mr. Redstone said that his co-counsel was speaking with Senator Borst about that issue at that time.

Mr. Bopp indicated that Respondent did not intend to appeal.

The chair asked the petitioner to send a letter regarding the impoundment if the petitioner is not able to answer while the commission is in session.

Mr. King said that the recount director can receive notification to appeal or not appeal and then the recount director can rescind the order at that time. Mr. Redstone clarified that he would notify Ms. Willis. With no objections, the chair ordered that the impoundment order continue until further notice. Ms. Willis noted that the materials would be held at a state police facility rather than at the county facilities.

The chair asked for the final tally from the State Board of Accounts.

Ms. Willis gave the final tally as given by the State Board of Accounts and checked against her totals as 6024 for Borst and 6062 for Waltz.

The chair, seconded by Durnil, motioned to adopt the numbers as the final tally. There being no further discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was accepted.

After asked by the chair, Mr. Redstone said that there was no update as to whether the petitioner would consent to rescinding the impoundment order.

Ms. Willis asked about the exhibits for Johnson County. Mr. Redstone said that he had eliminated every dispute in Johnson County and would not appeal that particular part of the recount. The chair, seconded by Durnil, moved to rescind the impoundment order applicable to Johnson County. There being no further discussion, the chair called the question, and declared that with three members voting “aye” (Mr. Rokita; Mr. Durnil; and Mr. Griffin), and no member voting “nay,” the motion was accepted.

The impoundment order for Johnson County materials was rescinded.

There being no further business, the chair adjourned the state recount commission at approximately 3:00pm on June 11.

Approved

Todd Rokita, Chairman