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Meeting Minutes

INDIANA ELECTION COMMISSION

MINUTES MARCH 10, 1998

MEMBERS PRESENT: Dudley Cruea, Chairman of the Indiana Election Commission [IEC]; S. Anthony Long, Vice-Chairman; Butch Morgan; Joseph M. Perkins, Jr.

MEMBERS ABSENT: None.

STAFF ATTENDING: Laurie P. Christie, Co-Director, Election Division, Office of the Indiana Secretary of State ("Election Division"); Mary Ann Tippet, Co-Director; J. Bradley King, Co-General Counsel, IEC and Election Division; Kristi Robertson, Co-General Counsel, IEC and Election Division; Bruce Northern, NVRA and Precincts Coordinator.

ALSO ATTENDING: Mr. Raymond Charles Bowyer, Walton; Mr. Marcus Burgher IV, English; Mr. Bob Kern, Indianapolis; Mr. Stephen Laudig, Indianapolis; Mr. Bill Massey, Eckerty; Mr. Richard A. Maughmer, Logansport; Ms. Suzanne McBride, Indianapolis; Mr. Scott D. Pelath, Michigan City; Ms. Andrea Roberts, Indianapolis; Candias Scott, Marion County Democratic Party; Mr. Brent Welke, English.

1. CALL TO ORDER AND OPENING REMARKS BY THE CHAIR:

The chair called the **March 10, 1998 meeting** of the Indiana Election Commission to order at 1:40 p.m. in Conference Center Room 1, Indiana Government Center South, 302 West Washington Street, Indianapolis, Indiana, stating that proper notice of the meeting had been given as required by state law, and that a quorum of Commission members was present.

2. APPROVAL OF DECEMBER 23, 1997 MINUTES:

The chair noted that copies of these minutes had been distributed to members before the meeting.

Mr. Long moved that the **December 23, 1997** Commission minutes be approved as submitted. Mr. Perkins seconded the motion. There being no further discussion, the chair called the question, and declared that with four members (Mr. Cruea, Mr. Long, Mr. Morgan, and Mr. Perkins) voting "aye", and no member voting "nay", the motion was adopted.

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3. APPROVAL OF JANUARY 13, 1998 MINUTES:

The chair noted that copies of these minutes had been distributed to members shortly before the meeting was called to order.

Mr. Perkins moved that the **January 13, 1998** Commission minutes be approved as submitted. Mr. Morgan seconded the motion. There being no further discussion, the chair called the question, and declared that with four members (Mr. Cruea, Mr. Long, Mr. Morgan, and Mr. Perkins) voting "aye", and no member voting "nay", the motion was adopted.

4. APPROVAL OF JANUARY 20, 1998 MINUTES:

The chair noted that copies of these minutes had been distributed to members before the meeting.

Mr. Morgan moved that the **January 20, 1998** Commission minutes be approved as submitted. Mr. Cruea seconded the motion. Mr. Long stated that he would abstain on this motion since he had not been present at this meeting. There being no further discussion, the chair called the question, and declared that with three members (Mr. Cruea, Mr. Long, Mr. Morgan, and Mr. Perkins) voting "aye", no member voting "nay", and one member (Mr. Long) abstaining, the motion was adopted.

5. DETERMINATION OF CANDIDATE ELIGIBILITY:

The chair stated that he would like to set a few ground rules before the Commission began its consideration of these matters. He indicated that those testifying should limit their remarks to five minutes, with rebuttals being limited to three minutes. The chair stated that those testifying are to address the Commission and not each other. He stated that all comments should be made to the chair and that bickering between parties would not be tolerated.

The chair asked Mr. King and Ms. Robertson to keep the time for the Commission's proceedings and

to present the cases. The chair recognized Ms. Robertson, who stated that she and Mr. King wished to call the Commission's attention to some of the statutes that the Commission would be operating under. She noted that a new statute had been enacted in 1997 that would alter the Commission's procedure. Ms. Robertson said that Indiana Code 3-8-1-2, as amended, established the procedures for today's hearing. She stated that a registered voter of the election district in which a candidate sought office must file a sworn statement with the Election Division setting forth the facts and law applicable to a candidate's questioned eligibility before the Commission had jurisdiction to consider whether the candidate was eligible. Ms. Robertson said that subsection (e) of this Code section now contains language providing that the Commission "shall" (rather than "may") order a candidate to be removed from the ballot if the Commission determines that a candidate does not comply with the United States or Indiana Constitutions, or the Indiana Election Code's requirements concerning candidate eligibility.

Ms. Robertson noted that Indiana Code 3-8-2-18 requires the Commission to act regarding questioned declarations of candidacy no later than the fifty-fourth day before an election, which would be March 12, 1998 in the case of the primary election. She added that the Election Division is required to give the best possible notice of its hearing to any interested party, such as the challenged candidates.

In response to a question from Mr. Long, Ms. Robertson and Mr. King indicated that since today was March 10, 1998, the Commission could continue its consideration of a candidate challenge until March 12, but could not adjourn its meeting and still meet the forty-eight hour notice requirement for scheduling a subsequent meeting before the deadline.

The chair recognized Mr. King, who stated that on March 4, 1998, the co-directors of the Indiana Election Division had acted under Indiana Code 3-8-2-17 to certify to the appropriate county election boards the list of candidates who had filed for nomination at the May 1998 primary for state level offices, judicial offices, and for prosecuting attorney. He noted that entire certification was an approximately three hundred page document separately bound and available for the Commission's proceedings today. Mr. King stated that the staff requested that the certification be entered into the record of today's meeting so that either candidates or challengers could refer to it. Mr. Perkins moved that the certification as presented be admitted into the record of the Commission's proceedings today. Mr. Long seconded the motion. There being no further discussion, the chair called the question, and declared that with four members (Mr. Cruea, Mr. Long, Mr. Morgan, and Mr. Perkins) voting "aye", and no member voting "nay", the motion was adopted. The document was incorporated by reference into these minutes. *[Copies of all documents incorporated by reference are available for public inspection and copying in the Election Division office.]*

Mr. King stated that the process of certifying primary election candidates to the counties will also reflect any decision made by the Commission today regarding candidates. He noted that under IC 3-8-2-19, the Election Division is required to immediately certify any amendment that should be made to the certification. Mr. King stated that at this time, the list shows all candidates who have filed with the Election Division. He said that if the Commission ruled that a candidate was ineligible, an amendment to the

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certification would be sent to the appropriate counties. Mr. King said that, as with other administrative determination made by the Commission, an interested party who objected to the actions of the Commission would be required to bring litigation to pursue their appeal.

The chair then requested that all those who intended to testify stand for the administration of the oath. Mr. King administered the oath to the witnesses.

Mr. Long requested that staff present a summation of the issues involved in each of the cases for the benefit of both the Commission and others in attendance. The chair recognized Mr. King, who stated that the causes appeared on the agenda in the order that the Election Division received the required sworn statement regarding the candidate. He indicated that he and Ms. Robertson could provide in a sentence or two the basic issues raised regarding the candidates, with those in attendance making the arguments for or against the eligibility of the candidate in each case.

A. CAUSE 98-01: THE DECLARATION OF CANDIDACY OF MARCUS M. BURGHER, IV, FOR PROSECUTING ATTORNEY FOR CRAWFORD COUNTY:

The chair recognized Ms. Robertson, who called the abovenamed cause. Ms. Robertson noted that this challenge focused on the residency requirements applicable to a candidate for Prosecuting Attorney. The chair asked if any one present wished to testify regarding this matter.

The chair recognized Mr. Brent Welke, who stated that he was both counsel for Mr. William H. Massey, and a co-challenger in this matter. He noted that Mr. Massey and Mr. Vernon Blair had each filed an affidavit in this cause.

Mr. Welke stated that there are five candidates for Prosecuting Attorney in Crawford County, including Mr. Burgher, Mr. Blair, and himself. He added that a deputy prosecuting attorney was running for Prosecuting Attorney on the Democratic ticket, while the incumbent Prosecuting Attorney is seeking reelection on the Republican ticket. However, Mr. Welke noted that he understood that the incumbent had been recently suspended by the Indiana Supreme Court. He indicated that the deputy and incumbent Prosecuting Attorney had declined to join the other candidates in this challenge due a potential conflict of interest.

Mr. Welke requested that Mr. Massey's affidavit be incorporated by reference in this proceeding. The Commission consented, and the affidavit was labeled "Exhibit A-1" in this cause. Mr. Welke then presented a twenty-seven page extract from the certified primary election candidate list presented earlier, and requested that this document be incorporated by reference in this proceeding. The

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Commission consented, and the document was labeled "Exhibit A-2" in this cause. Mr. Welke stated that the certification listed 525 candidates, and that 524 of these candidates had listed a street address with a number, or a rural route with a box number. He noted that Mr. Burgher instead had listed "Highway 64, English". Mr. Welke stated that Highway 64 was a very lengthy road which runs the entire length of Crawford County, and that the address contained no number. Mr. Welke stated that Crawford County has a 911 address system, and that if a man lived there, he should find out his address number, but that Mr. Burgher had not.

Mr. Welke requested that Mr. Burgher's voter registration application be incorporated by reference in this proceeding. The Commission consented, and the application was labeled "Exhibit A-3" in this cause. Mr. Welke stated that the same address "Highway 64 West, English, Indiana" was listed in the voter registration application.

Mr. Welke stated that the Commission could take notice of its own records, particularly Mr. Burgher's declaration of candidacy, which states that he resides in Patoka Township, Precinct 1, at "West Highway 64, English." He added that Precinct 1 is the east half of Patoka Township, which is located in the northwest corner of Crawford County. Mr. Welke noted that in the same document, Mr. Burgher states that he resides in the Town of English, which is located in Sterling Township, not Patoka Township.

Mr. Welke testified that he would defer some of his remarks to Mr. Massey concerning certain causes relating to the Harrison County Prosecuting Attorney's office, but noted that Mr. Burgher and his father were both currently deputy Prosecuting Attorneys in Harrison County. He stated that he understood the statutes as requiring all law enforcement officers, including deputy Prosecuting Attorneys, to be residents of the county in which they work. Mr. Welke said that since there was not aware that Mr. Burgher had resigned from this position, the presumption should therefore be that Mr. Burgher resides in Harrison County.

Mr. Welke requested that Mr. Burgher's address information provided to the Indiana Supreme Court be incorporated by reference in this proceeding. The Commission consented, and the document was labeled "Exhibit A-4" in this cause. Mr. Welke stated that this document indicates that Mr. Burgher's address is in Palmyra, which is located in Harrison County, or Washington County, but not in Crawford County.

Mr. Welke stated that he had made several inquiries, all unsuccessful, regarding the types of things that an individual usually does on moving to a new residence. He indicated that there is no water permit issued to Mr. Burgher by the utility that serves Highway 64, and that since this utility does not provide sewage

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service, an individual must apply to the county for sewer service. He stated that no sewage permit had been issued, and there was no water bill in the name of anyone named "Burgher."

Mr. Welke stated that there are no telephone listings or light service listed for anyone named "Burgher." He referred to paragraphs 36 and 37 in his affidavit, noting that he had contacted telephone directory assistance on February 27, and was advised that Mr. Burgher's residence was in New Salisbury in Harrison County. He added that when he telephoned the number listed for Mr. Burgher, the number was in the "366" exchange, which has no customers in Crawford County. He added that when he called Mr. Burgher's number in the presence of Mr. Massey, a voice answered stating that this was the "Burgher residence." Mr. Welke indicated that this reflected Mr. Burgher's intent to maintain his Harrison County residence.

Mr. Welke testified that even if Mr. Burgher did live at a specific address on State Highway 64, his declaration of candidacy was still defective since it did not contain a complete residence address. He indicated that State Highway 64 was twenty miles long and crossed the four northern townships in Crawford County, and thus stating "Highway 64" did not satisfy this requirement, unless Mr. Burgher was willing to aver to the Commission that he owned the highway and all the property on both sides of the highway.

Mr. Welke stated that Mr. Burgher had not met the requirements of Indiana Code 3-8-2-7(2) by stating contradictory information regarding his residency in Patoka Township and the Town of English.

Mr. Welke testified that a "Sarah Burger", who he believed may be Mr. Burgher's wife, had registered to vote in Crawford County one day before the February 20, 1998 candidacy filing deadline, and had given the New Salisbury address as her former residence. He noted that this was the address for the telephone which an individual had answered stating "Burgher residence." Mr. Welke added that the statutes referred to the spouse's residence as an important factor to be considered in determining residency.

Mr. Welke added that he understood that Mr. Burgher's father owned an interest in a mobile home sales lot on Highway 64. He indicated that there was one mobile home on this lot, but that he had visited the site after business hours and found no one present. Mr. Welke stated that he did not believe Mr. Burgher intended to live in a house with no utilities, no water, and no residence address.

Mr. Welke indicated that he had checked with every source, but there was no evidence, aside from Mr. Burgher's sworn affidavit, that he lives (or ever has lived) in Crawford County, Indiana, and that Mr. Burgher's candidacy is spurious.

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The chair recognized Mr. Massey, who stated that he had lived at his current address for about nine years, and had lived in Crawford County for about twenty-eight years. Mr. Massey said that he knew Mr. Burgher's father very well, but had never seen the candidate until today's meeting. He testified that he had gone to the Eckery post office, and was advised that there was no Burgher receiving mail through that office. Mr. Welke stated that this post office serves Patoka Township.

Mr. Massey stated that he asked Ms. Peggy Bullington, the Crawford County Circuit Court Clerk, if Mr. Burgher had moved to the County, and was told that she did not know. Mr. Massey remarked that he drove on Highway 64 from one end of Crawford County to the other, looking for a trailer that he had been told Mr. Burgher had moved to. He indicated that he found two trailers on Lake Patoka, which were unoccupied, without utilities, and had "for sale" signs. Mr. Massey said that he asked everyone he knew if Mr. Burgher had moved to Crawford County, but no one had any information. Mr. Massey said he had also called the Harrison County Prosecuting Attorney's office, and was advised that Marcus Burgher IV was still working there. Mr. Massey concluded by stating that he is a registered voter of Crawford County, and a member of the Democratic Party.

There being no questions for Mr. Welke or Mr. Massey, the chair recognized Mr. Marcus Burgher, IV. Mr. Burgher stated that he was present to respond to the challenges to his declaration of candidacy filed by Mr. Welke, Mr. Massey, and Mr. Blair. Mr. Burgher said that some of the statements made by Mr. Welke are true, and that he would not deny them.

Mr. Burgher stated that he graduated from law school in 1996, and did not have a home of his own at that time. He said he moved in with his parents after being sworn in to the bar, and remained there until August 9, 1997. He stated that he and his wife then purchased a home in Harrison County since he did not know whether his wife would be working in Louisville, Kentucky. Mr. Burgher said that he and his wife had lived there since that date. Mr. Burgher stated that his wife is currently working in Louisville, Kentucky.

Mr. Burgher testified that in December 1997 he decided he wished to run for Prosecuting Attorney in Crawford County. He added that he was concerned with the length of his wife's commute to her job, and asked if she would be willing to move. He stated that she agreed to do so, and he thereupon decided to move to Crawford County. Mr. Burgher said that since he had a home in Harrison County with an \$800 per month mortgage, he was concerned about how he could make payments for another residence. He added that his father, who is also a deputy prosecuting attorney, also owns Sunset Homes, Inc., which consists of a mobile home sales park lot and a modular home. Mr. Burgher stated that the lot contains approximately three acres, has grass and gravel, the office building that Mr. Welke referred to, and a "pole barn" type building with water and sewer hookup.

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Mr. Burgher said that on January 10, 1998, he left the Sunset lot and made an offer to purchase a 1500 foot home for approximately \$34,000 that would be located in Crawford County. He stated that, notwithstanding Mr. Welke's testimony, he visited the Crawford County Health Department to arrange for soil testing on January 22, obtained a septic system permit on January 27, 1998, and paid for a survey to be done on the property. Mr. Burgher stated that this property was located in James Township, and that he was not registered to vote there. He indicated that he had encountered a problem when the property owner wanted him to install a basement under the house at an added cost, which he could not do. Mr. Burgher said that he had already asked his father if he could buy part of the Sunset lot if he would be unable to purchase land, and set the 1500 foot home on that property. Mr. Burgher stated that his father had told him he could do so.

Mr. Burgher stated that although he now owned property to locate the house on, he did not have an address since until he knew for certain that the house would be staying on the Sunset lot, the lot could not be divided to receive two 911 addresses. He added, however, that the Sunset lot was owned by his family, and he did have the right to put the house there.

Mr. Burgher indicated that after the problem arose with the septic permit, he entered into a two month lease agreement with Sunset Homes since he needed to obtain a residence immediately. He stated that he could park the mobile home next to the pole barn building and hook up to the water, septic, and electric utilities at a cost of \$125 a month.

Mr. Burgher testified that he had contacted Ms. Robertson on several occasions concerning the requirements for residency to ensure that he had done everything proper so that he would be able to be a candidate for Crawford County Prosecuting Attorney. He indicated that he placed his home on the market for sale the week of late December through January 4, and that he had placed a yard sign "for sale by owner" out at that time. Mr. Burgher stated that he had shown the house for sale on numerous occasions, and that he recently completed the paperwork for the house to be listed with Century 21 through his uncle, who is a realtor.

Mr. Burgher said that he registered to vote on January 20, 1998, by appearing before Peggy Bullington, the Crawford County Circuit Court Clerk. He testified that he told her that he was not certain where the final location of the property would be, and that he had his father's permission to set the house on the Sunset lot. He added that she had stated that he could apply to register to vote at that location if he intended to reside there. Mr. Burgher stated that he responded that unless he located some other property, that his intent was to move there.

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Mr. Burgher stated that on February 2, he entered into a purchase agreement for real property, but

that the seller backed out of the agreement because he wanted to add on a basement to the property, and as a result, he encountered a problem with getting the house set in time.

Mr. Burgher remarked that on February 13, 1998, he purchased Lots 85 and 86 in the New Town of English, and that on March 3, 1998 he had made a payment of \$5,000 since they were still working on setting the concrete slab where the house would be placed. Mr. Burgher said that, weather permitting, this work will be completed and the house set and ready to move into during this coming weekend. He indicated that the house is at a different location than the address where he declared to register to vote, and that he did not challenge this fact. He said that he discussed the possibility that he might move the house to a different address, and inquired whether he would need to amend his declaration of candidacy or voter registration. Mr. Burgher stated that he was advised that he would need to amend his voter registration.

Mr. Burgher said that Mr. Welke had remarked that he did not have addresses, and that Mr. Burgher had not demonstrated any intent to move to Crawford County. Mr. Burgher stated that Mr. Welke's testimony that an individual could not have an English address and live in Patoka Township Precinct 1 was not correct since the voter registration list for Crawford County showed several individuals registered in that precinct with addresses in English. Mr. Burgher added that, notwithstanding Mr. Welke's remarks, he also had a receipt for Post Office Box 15 in English, dated January 20, 1998, the same day he registered to vote. Mr. Burgher also stated that his voter registration application receipt, bank account statement, and motor vehicle registration for their cars, and driver licenses for himself and his wife indicated the State Highway 64, English, address. Mr. Burgher added that Mr. Welke is also sending him unsigned interrogatories in civil matters at Post Office Box 15, Tazewell and Post Office Box 12, English. He noted that although this was in violation of Indiana trial rules, Mr. Welke would not have sent the documents to those addresses if he did not believe Mr. Burgher would receive them.

Mr. Burgher stated that he is a part-time deputy Prosecuting Attorney in Harrison County, and has served in that position since January 1, 1997. He added that he has limited duties there, and that there are other deputy Prosecuting Attorneys in Harrison County who work in multiple counties. Mr. Burgher testified that Mr. Welke's comment that a deputy prosecuting attorney must work in the county where the deputy resides is irrelevant to the matter here, did not include any statutory reference, and is an inaccurate statement of the law.

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Mr. Burgher asked the Commission to consider the laws governing residency. He noted that Indiana Code 3-8-1-19 states that a candidate for Prosecuting Attorney must be admitted to the practice of law in Indiana before the general election, and that the evidence submitted by Mr. Welke concerning the Supreme Court's records indicates that he meets this qualification. He added that his address as set forth on the Supreme Court's records is his parents' address where he lived immediately after taking the bar, and that this record has not since been changed.

Mr. Burgher referred the Commission to Indiana Code 3-8-1-1(b), which states that an individual is not qualified to be a candidate for state, state legislative, or local office unless the individual is registered to vote in the election district that the individual seeks to represent no later than the deadline for filing a declaration of candidacy, petition of nomination, or certificate of nomination. He stated that this statute does not refer to residence, but only to being a registered voter. He added that to be a registered voter, Indiana Code 3-7-13-1 provides that an individual must be at least eighteen years of age at the next general, municipal, or special election, is a United States citizen, and resides in a precinct continuously before a general, municipal, or special election for at least thirty days. Mr. Burgher stated that Mr. Welke was mistaken, since Mr. Burgher could register to vote in Indianapolis today if he knew he was going to buy a place just by getting a new driver's license, just as his wife did when she got a driver's license at their new address.

Mr. Burgher cited the case of *In re: Everard*, 333 N.E.2d 765, in which the Indiana Supreme Court set forth the requirements for residence. He noted that in this case, Mr. Everard was living in Virginia, and had listed his address at his parents' home in Perry County. Mr. Burgher said that the court indicated that there were several factors to take into consideration, but found in this case that although Mr. Everard's driver's license and bar registration were still in Virginia, he met the residence requirements.

Mr. Burgher stated that he will have been living in Crawford County, in a home with water and utility hookup, for at least thirty days before the election, and he has declared his intent to reside on this lot at Sunset Homes. He added that the Clerk in Crawford County knew where this was located when she assigned his voter registration to Patoka Precinct 1. He stated that he discussed these residency issues with Ms. Robertson on February 18, and then returned home to provide a copy of his declaration of candidacy with the Crawford County Circuit Court Clerk. Mr. Burgher testified that his wife then took time off of work to register to vote and to get new license plates for their cars. He noted that he then discovered he had made a typographical error on his declaration of candidacy by writing Post Office Box 12, instead of Post Office Box 15. Mr. Burgher stated that he immediately contacted the Election Division, and on the morning of February 20,

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returned to the Election Division and spoke again at length with Ms. Robertson to make certain he had done everything properly regarding his candidacy. He testified that he then amended his declaration of candidacy to show "Post Office Box 15."

Mr. Burgher stated that if he had been told he had done anything wrong, he would have withdrawn his candidacy. He indicated that he was not trying to deceive anyone, and that he was doing what he thought was best for the county and for himself by making an effort to move to Crawford County

to make that his residence. Mr. Burgher stated that he had done more than Judge Everard did in his case, and that Judge Everard had been found to be a registered voter of Perry County and a valid candidate.

Mr. Burgher added that paragraph 15 of Mr. Massey's affidavit indicated that he had not timely filed his application to be a registered voter. He responded that he had applied to register to vote on January 20, 1998, and declared as a candidate on February 18, 1998, and that there was no thirty day requirement for voter registration preceding the declaration of candidacy. He indicated that Mr. Welke had mistaken the law on this point, and that much of his other information concerning Mr. Burgher's utilities was not relevant. Mr. Burgher stated that Mr. Welke was furnishing this information to the local newspaper for political purposes. He added that Mr. Welke had indicated that Mr. Welke had contacted the current Crawford County deputy Prosecuting Attorney, Mr. Lester Shelton, who had refused to join him in this petition to challenge Mr. Burgher's candidacy because of a potential criminal conflict. Mr. Burgher stated that he believed that if Mr. Shelton were contacted, he would indicate that he told Mr. Welke he declined to be associated with him. He added that he had spoken with Mr. Shelton who told him he did not believe Mr. Burgher had done anything wrong.

Mr. Burgher stated that Commission members were welcome to listen to his voice mail message, which does not refer to the "Marcus Burgher residence", but says "you have reached the Burghers." He indicated that this was an example of Mr. Burgher's twisting of the facts. He thanked the Commission for their consideration of this matter.

The chair recognized Mr. King, who stated that with the consent of the Commission, the following documents introduced by Mr. Burgher would be made a part of the record of this proceeding and be designated as follows: (1) Exhibit B-1, Mr. Burgher's voter registration receipt; (2) Exhibit B-2, Mr. Burgher's receipt for soil testing; (3) Exhibit B-3, Mr. Burgher's septic permit; (4) Exhibit B-4, Mr. Burgher's lease agreement with Sunset Homes, Inc. and accompanying document concerning the "Oakview" home model; (5) Exhibit B-5, Mr. Burgher's warranty deed and related documents concerning Lot 85 in the New Town of English; (6) Exhibit B-6, Mr. Burgher's receipt for a Post Office box; (7) Exhibit B-7, Mr.

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Burgher's copy of interrogatories from Mr. Welke; (8) Exhibit B-8, Mr. Burgher's copy of interrogatories from Mr. Welke; (9) Exhibit B-9, Mr. Burgher's bank statement, with account number defaced; (10) Exhibit B-10, the list of registered voters in Patoka Township, Crawford County, dated February 24, 1998; (11) Exhibit B-11, Mr. Burgher's warranty deed for Lot 85, in the new Town of English; (12) Exhibit B-12, Mrs. Burgher's motor vehicle registration; (13) Exhibit B-13, Mr. Burgher's appraisal bill from David B. Nunn; (14) Exhibit B-14, Mr. Burgher's purchase agreement with Opportunity Options, Inc., and related documents concerning the warranty deed and financial disclosure information for the property; (15) Exhibit B-15, Mr. and Mrs. Burgher's driver's licenses. The Commission consented to the introduction of these documents into the record of this cause. The exhibits are incorporated by reference into these minutes.

The chair recognized Mr. Welke for three minutes of rebuttal.

Mr. Welke remarked that Mr. David Everard is a personal friend of his, and he had worked with him on several cases in Crawford County. He added that believed that Mr. Everard had always resided in Perry County, except for a period of time when he had a military address. Mr. Long stated that he believed Mr. Everard had been prosecuted for perjury before the Supreme Court judicial qualifications committee.

Mr. Welke said that the Commission had heard lengthy discussion from Mr. Burgher as to what he intends to do, but according to the statute it is not what he planned to do, but what Mr. Burgher did as of February 20. He added that the statute also clearly indicates that the residence of the spouse of a candidate is an important factor to consider. Mr. Welke stated that Mr. Burgher's testimony always referred to "I", and not to "we", and that there was no reference to any step taken by the spouse to move to Crawford County. He said that maybe the Commission would buy lopping off a part of Mr. Burgher's father's mobile home park, and calling it "land", with the intent that he would live during this four year term in the back of the mobile home sales lot. He stated that he found this incredulous.

Mr. Welke said that if Mr. Burgher's view of the statute prevailed, there would be no point in today's Commission meeting since everyone could move in by April 5 to prevent any successful challenge. He argued that this is not the purpose of the statute, which was to provide that a person must live in a residence first, then run for office, not vice versa.

Mr. Welke then requested that the Commission view Mr. Massey's video. The chair noted that Mr. Welke's rebuttal time was up. In response to questions from Mr. Morgan and Mr. Perkins regarding what was on this video, Mr. Welke stated that this was a short

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video prepared by Mr. Massey showing the small areas lopped off of the mobile home sales lot. Mr. Morgan stated that he was not inclined to view this video. The chair responded that Mr. Welke could move to introduce the video, but since there were not facts in dispute regarding this matter, the Commission would not view the video. Mr. Welke and Mr. Massey stated that the video also shows that on the street in English where Mr. Burgher claims a residence, there are only empty lots on either side of a trailer where persons currently reside. In response to a question from Mr. Morgan, Mr. Welke stated that the video was filmed on February 19 or 20, 1998.

The chair recognized Mr. Burgher, who stated that the video should show the home that he purchased sitting in one corner of the lot, next to an orange and brown building, which was the structure leased for \$125 a month for utility hookups. He added that the home had been placed there since he had discussed with Ms. Robertson whether he had to have something on this site on the day he declared his candidacy. Mr. Burgher remarked that anyone who went to the new Town of English today would see a \$5,000 concrete slab placed last week at the location he described. He added that he had previously represented all of these facts to Ms. Robertson before he declared his candidacy. In response to a question from Mr. Long, Mr. Burgher stated that his house is still for sale, and that he might have to take a loss since the house must be sold.

The chair recognized Mr. Perkins, who stated that he appreciated the extensive amount of information presented by both parties. He indicated that he did have a concern regarding the video offered to the Commission, since this evidence had been offered during rebuttal, which ordinarily is restricted to rebutting Mr. Burgher's presentation, and not to the introduction of new evidence. Mr. Welke responded that part of the video will help define this strange partition of the lot, and will go to the weight of the previous testimony, and not to admissibility. He added that the video will clearly go towards establishing the facts of residency in this case. In response to a question from Mr. Morgan, Mr. Welke stated that he had not shown this video at the beginning of his presentation since he understood he would be allowed rebuttal, and decided to introduce it during the rebuttal phase. Mr. Morgan responded that showing this video then would have made it easier for the Commission to sort things out.

Mr. Perkins moved that videotape offered by Mr. Welke in this cause (designated as "Exhibit A-5") be excluded from the record as an additional piece of evidence that cannot be introduced in the rebuttal stage of the presentation. Mr. Morgan seconded the motion. Mr. Long stated that he would vote for the motion, but for a different reason: he did not believe that the facts of the case were in sufficient dispute since the main issue was Mr. Burgher's intent. He added that the video would not add anything to this matter. There being no further discussion, the chair called the

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question, and declared that with four members (Mr. Cruea, Mr. Long, Mr. Morgan, and Mr. Perkins) voting "aye", and no member voting "nay", the motion was adopted. At the request of Mr. Welke and the direction of the Commission, the video is retained with the minutes of this meeting, but was not considered by the Commission as evidence in this cause.

The chair recognized Mr. Burgher for rebuttal. He stated that Mr. Welke had indicated that Mr. Burgher had stated there was a concrete pad at that location, but that he did not say so. Mr. Burgher stated that the home was sitting there, and would have to be moved. He concluded by stating that he believed he complied with the residence standards established under Indiana statutes.

The chair recognized Mr. Long, who said he believed that the result in this case would depend on one question, which he requested that staff address: may a person register in a county before they move there? He noted that the statutes cited by Mr. Burgher require that a candidate be a registered voter of the county, and this implies that you must be a lawful registered voter in that county. Mr. Long questioned whether if he intends to reside in Marion County at some future date, may he come up to Marion County and register to vote, or whether he must presently reside in the county to register.

The chair recognized Mr. King, who stated that he and Ms. Robertson wished to call the Commission's attention to two provisions that addressed Mr. Long's question: first, Article 2, Section 2 of the Indiana Constitution, which provides that a citizen of the United States who is at least eighteen years of age, and *has been* a resident of a precinct for at least thirty days immediately preceding the election is entitled to vote in that precinct; secondly, Indiana Code 3-5-5, the residency chapter of the election code, which was enacted in 1995 to codify the residency tests previously enunciated in cases decided by the Court of Appeals and the Indiana Supreme Court. Mr. King remarked that IC 3-5-5-1 states that the chapter's rules are to be used to determine the residence of candidates, and added that IC 3-5-5-2(2) provides that a person's residence may be established by: (1) intent; and (2) conduct taken to implement the intent. He stated that mere intent is not sufficient to establish residency, and remarked that honest intent, without action or conduct to implement the intent, is not enough to establish residence under this statute.

Mr. King stated that the statutory presumptions regarding residence alluded to by both sides are also included in this chapter, and called the Commission's attention to IC 3-5-5-12, which addresses the presumption to be derived from the residence of a candidate's immediate family, and to IC 3-5-5-4, which states that a person can only abandon a previously established residence by having both the intent to do so, and undertaking conduct to establish a new residence. He concluded by stating that for an individual to comply

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with the requirements to be a registered voter, as set forth in the Indiana Constitution, both factors under IC 3-5-5-2 must be present: the individual must have the intent to reside in the precinct in which the individual is submitting the application, and must, as of the date of the application, undertaken sufficient conduct to establish this residency. He noted that the question in such cases often involved the *sufficiency* of the conduct undertaken to implement this intent.

There being no further testimony or questions, the chair closed the hearing on this cause.

The chair then recognized Mr. Long, who moved that the Commission deny the challenge in this cause for the stated reason that Mr. Burgher had exhibited sufficient conduct to establish his residency in Crawford County, and not merely the intent to do so. He added that although there

might be a question regarding his intent to reside in the precinct where the mobile home is presently located, he believed that Mr. Burgher's efforts to purchase property in Crawford County and to locate the home there, by changing his voter registration, by establishing a post office box, and entering into the real estate agreements, established sufficient conduct to implement his intent. Mr. Perkins seconded the motion.

There being no further discussion, the chair called the question, and declared that with four members (Mr. Cruea, Mr. Long, Mr. Morgan, and Mr. Perkins) voting "aye", and no member voting "nay", the motion was adopted. Mr. King stated that staff would prepare findings of fact and a final order for Commission approval at the next meeting.

B. CAUSE 98-02: THE DECLARATION OF CANDIDACY OF SCOTT PELATH FOR INDIANA STATE REPRESENTATIVE, DISTRICT 9:

The chair recognized Mr. King, who stated that the challenge concerning this candidate is set forth in an affidavit filed with the Election Division by Mr. Dennis Lee Metheny. He noted that a copy of the affidavit had been provided to Commission members in their packets prior to this meeting.

Mr. King said that the principal issue in this cause also concerned residency, and timing of residency. He noted that additional allegations concerning Mr. Pelath were included in this affidavit. He stated that both he and Ms. Robertson had spoken with Mr. Metheny and advised him that many of these allegations (aside from those concerning residency) do not fall within the jurisdiction of the Commission, and that these must be brought to the attention of a Prosecuting Attorney or other appropriate law enforcement officers. With the consent of the Commission, Mr. Metheny's affidavit of March 3, 1998, along with the affidavit's eight attachments as set forth in the affidavit's index, were designated "Exhibit A-1" in this cause, and incorporated by reference in these

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minutes. The attachments to this affidavit included: (1) a copy of Indiana Code 3-7-13-1; (2) A part of the INFO Indiana 97/98 telephone directory; (3) A part of the Ameritech South Bend/Mishawaka 95/96, 96/97, and 97/98 telephone directories; (4) a part of Polk's City Directories for 1996 and 1997 for South Bend/Mishawaka; (5) Mr. Pelath's application for a marriage license in St. Joseph County; (6) Mr. Pelath's statement of organization and designation of his principal campaign finance committee or exploratory committee (CFA-1), with an amended CFA-1; (7) Mr. Pelath's St. Joseph County and LaPorte County voter registration cards; and (8) the results of an Internet search for Mr. Pelath and an October phone bill. Mr. Long asked if the challenger (Mr. Metheny) was here. There was no response.

The chair then recognized Ms. Andrea Roberts of Bingham Summers Welsh & Spilman, who stated that she had entered her firm's appearance in this matter on behalf of Mr. Pelath. By consent of the Commission, this appearance was designated as "Exhibit B-1" and incorporated by reference in these minutes. Ms. Roberts stated that Mr. John Koenig of her firm was present, as was Mr. Pelath.

Ms. Roberts remarked that Mr. Metheny had filed the sworn statement filed required under Indiana Code 3-8-1-2, but that the statement does not meet the requirements of this statute since it does not question Mr. Pelath's eligibility or set forth facts concerning Mr. Pelath's residency. She stated that instead the affidavit accuses Mr. Pelath of perjury and fraud, allegations beyond the jurisdiction of the Commission, and which in no way relate the eligibility of the candidate.

Ms. Roberts stated that aside from this procedural question, and assuming that Mr. Metheny intends to challenge the residency of Mr. Pelath, Indiana Code 3-8-1-14 sets forth the requirements for residency for candidates for Indiana state representative, namely residing in the state House District for at least one year before the election, meaning by November 3, 1997.

The chair then recognized Mr. Pelath, who stated that he was pleased to address the Commission today despite the inclement weather today. Mr. Pelath stated that he was born in Michigan City, Indiana on July 9, 1970, and moved with his parents to Hazelwood Trail in Michigan City, at the address from which he grew up, graduated from high school and college, and cast his first vote in the May 1988 primary. Mr. Pelath said that he became a commissioned officer through the Reserve Officer Training Corps while in college. Mr. Pelath stated that he subsequently worked for Congressman Tim Roemer, both in Washington and in Indiana's Third Congressional District. He added that in 1993 he performed his military service duty at Fort Knox, Kentucky. Mr. Pelath said that he had the opportunity to work again for Congressman Roemer after performing his military duty.

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Mr. Pelath stated that during all this time he maintained his legal residence in Michigan City and voted there. He noted that while working for Congressman Roemer, he had also taken an apartment in Mishawaka for convenience, since he had a large area in the congressional district to cover. He said that this was the appropriate thing to do for logistical reasons, and added that during this period, he spent extensive time at his Hazelwood Trail residence in Michigan City and voted from there. Mr. Pelath stated that after managing Mr. Roemer's 1996 election campaign, he and his wife set a date for their wedding, and she requested at that time that they reside in St. Joseph County. He remarked that for approximately eight months, his voter registration was in St. Joseph County, although he never voted in that county.

Mr. Pelath stated that when he decided to seek political office, and he and his wife decided to start a family, they returned to Michigan City at 106 Hazelwood Avenue. He testified that on October 31, 1997, he and his wife moved to their current residence at 1030 North Karwick Road in Michigan City, which is located in the same precinct where he grew up and resided for many years.

Mr. Pelath said that regardless of his time in the military or his work in Washington, Michigan City had been his permanent residence, and hoped that his biography as he related it would speak for itself.

The chair then recognized Ms. Roberts, who stated that her presentation was made somewhat more difficult since Mr. Metheny's affidavit did not specify the Indiana Code section under which he was challenging Mr. Pelath. She said that she understood Indiana Code 3-8-1-14 to be at issue, that being the requirement that the candidate reside at least one year before the election in the House District.

Ms. Roberts noted that Indiana Code 3-5-2-42.5 defines "residence" in terms identical to that used in the Indiana Supreme Court's case concerning the residence of former Governor Bayh, meaning the location: (1) where a person's true, fixed, and permanent home; and (2) to which the person has, whenever absent, has the intention of returning. She remarked that the holding in the *Bayh* case indicated the importance of the intent to return in these cases, and noted that the Indiana Supreme Court held that residency does not require a continual, permanent presence at the legal residence. Ms. Roberts stated that the case indicates that a person who temporarily leaves their residence, with the intent to return, has not lost the person's original residence. She added that Mr. Pelath has always had his residence in the Ninth Indiana House District, since the time of his birth, and whenever absent, had the intent to return. She stated that Mr. Pelath's testimony indicated that his residence there had been established by birth in accordance with Indiana Code 3-5-5-2, and that he never relinquished his residency.

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The chair stated that Ms. Roberts's time had expired. She concluded by remarking that a number of exhibits prepared for this matter would provide additional evidence of Mr. Pelath's conduct and intent to maintain his residence in the Ninth House District, and to return to the district despite his absence for military or employment purposes. She added that the purpose of this residence requirement is to ensure that the voters are familiar with the candidate, and that the candidate is familiar with the issues in this district, and that these documents and Mr. Pelath's testimony indicate that he is more than familiar with the issues and voters of the Ninth House District due to his constant presence in, or communication with, the District.

With the consent of the Commission, she introduced the following documents into the record of this cause: (1) Exhibit B-1, Mr. Pelath's birth certificate; (2) Exhibit B-2, Mr. Pelath's high school diploma; (3) Exhibit B-3, Mr. Pelath's voter registration; (4) Exhibit B-4, Mr. Pelath's college transcript; (5) Exhibit B-5, Mr. Pelath's military commission; (6) Exhibit B-6, Mr. Pelath's military order; (7) Exhibit B-7, Mr. Pelath's military order; (8) Exhibit B-8, Mr. Pelath's military order; (9) Exhibit B-9, Mr. Pelath's honorable discharge; (10) Exhibit B-10, Mr. Pelath's voter registration card; (11) Exhibit B-11, a newspaper article; (12) Exhibit B-12, Mr. Pelath's bank record; (13) Exhibit B-13, Mr. Pelath's bank record; (14) Exhibit B-14, Mr. Pelath's mail; (15) Exhibit B-15, Mr. Pelath's mail; (16) Exhibit B-16, Mr. Pelath's mail; (17) Exhibit B-17, Mr. Pelath's mail; (18) Exhibit B-18, Mr. Pelath's mail; (19) Exhibit B-19, Mr. Pelath's mail; (20) Exhibit B-20, Mr. Pelath's library card; (21) Exhibit B-21, Mr. Pelath's bank record; (22) Exhibit B-22, Mr. Pelath's bank records; (23) Exhibit B-23, Mr. Pelath's vehicle registration; (24) Exhibit B-24, Mr. Pelath's affidavit concerning his change in residence to North Karwick Road; (25) Exhibit B-25, Mr. Pelath's apartment lease; (26) Exhibit B-26, Mr. Pelath's electric bill; (27) Exhibit B-27, Mr. Pelath's phone bill; (28) Exhibit B-28, Mr. Pelath's moving truck bill; (29) Exhibit B-29, Mr. Pelath's household items bill; (30) Exhibit B-30, Mr. Pelath's voter registration record; (31) Exhibit B-31, Mr. Pelath's voter registration record; and (32) Exhibit B-32, Mr. Pelath's voter registration record.

The chair recognized Mr. Morgan, who stated that the question had been thoroughly addressed, and was very well documented.

In response to a question from Mr. Perkins, Mr. Pelath stated that he currently lives at 1030 North Karwick Road, Apartment 6, in Michigan City, and had lived there since October 31, 1997. He added that his wife also resides at this address.

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The chair recognized Mr. King to respond to the issue raised by Ms. Roberts in her testimony regarding the sufficiency of Mr. Metheny's affidavit. He stated that he and Ms. Robertson were of the opinion that the affidavit, to the extent that it includes allegations of perjury and campaign finance misstatements, is beyond the purview of the Commission at this hearing, and would advise the Commission that a motion to dismiss those portions of the affidavit would be in order. He added, however, that he and Ms. Robertson also agree that the affidavit, with its attached exhibits, does raise the question of Mr. Pelath's residency, and that this cause can therefore be acted upon by the Commission.

The chair recognized Mr. Long, who stated that he was of the opinion that the Commission, should address these challenges, particularly ones brought by non-lawyers, as broadly and as generously as it can towards those making the challenge. Mr. Long moved, seconded by Mr. Morgan, that the Commission exclude from its consideration of this cause those parts of Mr. Metheny's affidavit alleging criminal conduct by Mr. Pelath, but find the affidavit sufficiently complete for the Commission to rule on whether Mr. Pelath meets the residency requirements in this case. There being no further discussion, the chair called the question, and declared that with four members (Mr. Cruea, Mr. Long, Mr. Morgan, and Mr. Perkins) voting "aye", and no member voting "nay", the motion was adopted.

There being no further testimony or questions, the chair closed the hearing on this cause.

The chair then recognized Mr. Long, who moved that the Commission deny the challenge in this cause for the stated reason that Mr. Pelath had submitted sufficient evidence to demonstrate that he was a resident of the Ninth Indiana House District as of October 31, 1997, and was properly registered to vote in a precinct of the district. Mr. Cruea seconded the motion. There being no further discussion, the chair called the question, and declared that with four members (Mr. Cruea, Mr. Long, Mr. Morgan, and Mr. Perkins) voting "aye", and no member voting "nay", the motion was adopted. Mr. King stated that staff would prepare findings of fact and a final order for Commission approval at the next meeting.

At the request of Mr. Morgan, the chair recessed the Commission meeting at 3:00 p.m. for five minutes. At 3:05 p.m., the chair reconvened the Commission meeting in the same location, with the same members present.

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C. CAUSE 98-03: THE DECLARATION OF CANDIDACY OF RICHARD ALLEN MAUGHMER FOR PROSECUTING ATTORNEY FOR CASS COUNTY:

The chair recognized Mr. King, who stated that the challenge concerning this candidate does not involve residency, but the issue in this instance involves the sufficiency of the name used on the declaration of candidacy due to its contrast with the name appearing on the candidate's voter registration.

The chair recognized Mr. Raymond Charles Bowyer to address the Commission for five minutes regarding this challenge. Mr. Bowyer stated that he is a resident and registered voter of Cass County, and a member of the Republican Party.

Mr. Bowyer stated that he filed a challenge to Mr. Maughmer's candidacy after discovering that Mr. Maughmer had failed to comply with the statute applicable to this case. He noted that in Ms. Robertson's remarks she had noted that use of the word "shall" represented a departure from prior law in Indiana Code 3-8-1-2. He said that "shall" also appears in several statutes related to this cause. Mr. Bowyer remarked that IC 3-8-1-2(e) provides that the Commission or county election board *shall* deny a filing if the Commission or board determines that a candidate has not complied with the applicable requirements set forth in the United States Constitution, the Indiana Constitution, or the Election Code.

Mr. Bowyer stated that Indiana Code 3-10-1-14(b), which, to paraphrase, provides that a candidate's given name and surname as set forth in the candidate's voter registration record *shall* be printed on the primary election ballot. He remarked that under this statute, an individual may use a nickname in addition to a given name set forth on the individual's voter registration, but there is nothing in the statute that says the nickname may appear instead of the given name as set forth on the voter registration. He added that the form for the declaration of candidacy for primary nomination (CAN-2), as set forth as an attachment to his sworn statement and in the *Candidate's Guide* published by the Commission, includes a box in the upper right corner stating that the candidate's name on the declaration must be set forth as the candidate has set forth the candidate's name on the candidate's voter registration record, as required under Indiana Code 3-8-2-7(a)(1). He noted that in this box on the CAN-2 form includes, in both bold and italicized print, the phrase "along with", followed by the phrase "any nickname permitted under Indiana Code 3-10-1-14 that the candidate wishes to appear on the ballot" and an example to illustrate this method.

Mr. Bowyer stated that Mr. Maughmer's given name and surname as set forth on his voter registration record, which is attached as Exhibit B to Mr. Bowyer's affidavit, as "Richard Allen Maughmer."

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Mr. Bowyer stated that he also wished to introduce into evidence in this cause the voter registration record taken from the Cass County computerized voter registration list and dated February 26, 1998, which followed the February 20 deadline date for filing and reflected the status of Mr. Maughmer's voter registration record at that time. He added that this attachment also included a receipt he obtained from the Circuit Court Clerk when he purchased this document yesterday, which indicated that the voter registration record had not subsequently changed.

Mr. Bowyer cited the case of *Wenzel v. Andrews*, 198 N.E.2d 19-21, as authority for the general rule of statutory construction that the word "shall" is to be construed in an imperative sense, rather than directory, and that this presumption will control unless it appears clearly from the context and the manifest purpose of the act as a whole that the legislature intended in a particular instance that a different construction be given to the word.

The chair advised Mr. Bowyer that his time had expired. The chair recognized Mr. King, who stated that, with the consent of the Commission, the documents presented by Mr. Bowyer would be designated as: (1) Exhibit A-1, Mr. Bowyer's affidavit of March 5, 1998, and the attachments described above concerning Mr. Maughmer's declaration of candidacy and Mr. Maughmer's voter registration record; and (2) Exhibit A-2, a copy of a page from the Cass County computerized voter registration list, along with a receipt for this document from the Cass County Circuit Court Clerk. The Commission consented, and these exhibits were incorporated by reference in these minutes. The chair then recognized Mr. Maughmer, who testified he is the elected Prosecuting Attorney of Cass County and is seeking his fourth term for that office. He indicated that Mr. Bowyer's exhibits were accurate, in that he put "Richard A. Maughmer" on his declaration of candidacy, and that his voter registration does read at the top "Richard Allen Maughmer." He noted, however, that he had signed his voter registration form as "Richard A. Maughmer," which was the only writing created by himself on that document, and that this was the name he used when he filed as a candidate for

Prosecuting Attorney.

Mr. Maughmer stated that he believed this case hinges on the construction of Indiana Code 3-8-2-7. He presented copies of this provision to the Commission, and noted that he had highlighted the phrase "as the candidate has set forth the candidate's name in the candidate's voter registration record." Mr. Maughmer indicated that he had set forth his name on his voter registration record in the same form that it appeared on his declaration.

Mr. Maughmer also provided the Commission with a copy of the Indiana Court of Appeals case, *Mason v. Gohmann*, 498 N.E.2d 1344

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(Ind.App.2 Dist.1986), and referred Commission members to the portion of the case in which the court held that "It is the voter's personal or authorized signature upon the initial voter registration affidavit or any subsequent affidavit which controls the name under which a person is registered to vote."

Mr. Maughmer stated that this case is still good law in Indiana, and that this result was necessary since that voter registration records are public records, and any individual can change the name on the top of this form. Mr. Maughmer then concluded his arguments.

The chair recognized Mr. King, who stated that, with the consent of the Commission, the documents presented by Mr. Maughmer would be designated as: (1) Exhibit B-1, the copy of Indiana Code 3-8-2-7; and (2) Exhibit B-2, the copy of *Mason v. Gohmann*. The Commission consented, and these exhibits were incorporated by reference in these minutes.

The chair recognized Mr. Bowyer for rebuttal for three minutes, and noted that no new evidence would be in order. He stated that in the *Town of Merrillville v. Merrillville Conservancy District* case, 649 N.E.2d 645, the court held that when the legislature enacts a statute it is presumed to have intended to change the law. He noted that under prior law, an individual could put something other than his full given name down on a declaration of candidacy, but under the new statute that is not permitted. Mr. Bowyer stated that the documents in this case make it plain that Mr. Maughmer is registered as Richard Allen Maughmer. He indicated that individuals have different ways of signing their names over time, and that he himself had signed his name in a variety of ways. He said that this is not the controlling issue; if any one can sign their name on the declaration of candidacy different from the form appearing on the voter registration form, then the referenced statute would have no meaning. Mr. Bowyer noted that IC 3-10-1-14 requires that a primary candidate's name be printed on the ballot exactly as the name appears on the candidate's declaration of candidacy. He added that this provision precludes the possibility that the name can appear on the ballot in the same form that it appears on Mr. Maughmer's voter registration record.

Mr. Bowyer noted that Mr. Maughmer had the opportunity to amend his CAN-2 form, as Mr. Bowyer had been advised to do by the Commission, but that Mr. Maughmer had failed to avail himself of it. Mr. Bowyer remarked that he was a candidate for the same office as Mr. Maughmer, and had filed a declaration of candidacy using his first name with his middle initial. He added that when he checked with Ms. Robertson, she advised him that the statute very specifically required the declaration of candidacy set forth the candidate's name in full as it appears on the candidate's voter registration record. He stated that he then amended his declaration of candidacy within the time period allowed for filing declarations.

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Mr. Bowyer stated that in view of the specific "shall" language in the statute, and the cases cited in the challenge itself, the Commission should deny Mr. Maughmer's candidacy. Mr. Bowyer concluded his remarks.

The chair asked if the current voter registration requested a middle name or initial from the applicant in the same manner as Mr. Maughmer's twenty-year-old registration form. Mr. Northern referred to the new registration form introduced in Cause 98-01, and noted that the form provided a space for a middle name. In response to a question from Mr. Bowyer, Mr. Northern indicated that this registration form had been prescribed by the Election Commission under the National Voter Registration Act. The chair stated that the old form called for the voter to include a middle name.

The chair stated that in his opinion, this candidacy should not have been challenged. He noted that the candidate signed the voter registration form as "Richard A" and that the registration form reads "Richard Allen" along the top. He indicated that he did not think a case should be brought before the Commission to remove a candidate for writing "A" instead of "Allen."

There being no further testimony or questions, the chair closed the hearing on this cause.

Mr. Cruea moved that the Commission deny the challenge in this cause for the reasons set forth above by the chair. Mr. Morgan seconded the motion.

Mr. Bowyer requested that the Commission consult with counsel regarding this issue. The chair responded that he did not believe it was necessary to do so in this case, since he believed that individuals should be placed on the ballot unless they were disqualified due to a felony conviction, or had clearly not followed applicable statutes.

There being no further discussion, the chair called the question, and declared that with four members (Mr. Cruea, Mr. Long, Mr. Morgan, and Mr. Perkins) voting "aye", and no member voting "nay", the motion was adopted. Mr. King stated that staff would prepare findings of fact and a final order for Commission approval at the next meeting.

D. CAUSE 98-04: THE DECLARATION OF CANDIDACY OF GWENDOLYN MARIE SPICE FOR INDIANA STATE REPRESENTATIVE, DISTRICT 60:

The chair recognized Ms. Robertson, who stated that the principal issue in this case involved the residency of the candidate and her voter registration. She stated that the Election Division had received a challenge to this candidacy on March 6 from Mr. Julio

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Alonso, chairman of the Monroe County Democratic Party. Ms. Robertson noted that the affidavit alleged that Ms. Spice was not a registered voter in House District 60, the district for which she filed a declaration of candidacy, but was instead a registered voter in House District 61. She noted that a copy of Ms. Spice's voter registration record was attached to Mr. Alonso's affidavit.

In response to a question from Mr. Long, Ms. Robertson stated that she and Mr. King had examined the relevant provisions in Indiana Code Title 2, and determined that all of Bloomington Township is located in House District 61. She added that the precinct in which Ms. Spice registered to vote is not located in House District 60.

Mr. Long asked if the challenger was present. There was no response. Ms. Robertson stated that the staff had given notice of this meeting to all candidates, including Ms. Spice, by overnight mail on Friday to delivered last Saturday by Federal Express.

The chair recognized Mr. King, who stated that, with the consent of the Commission, the documents filed by Mr. Alonso would be designated as: (1) Exhibit A-1, the copy of his sworn challenge to Ms. Spice, with attached copies of Ms. Spice's voter registration record. The Commission consented, and these exhibits were incorporated by reference in these minutes.

Mr. Long remarked that the information presented by staff and the affidavit filed in this matter provided sufficient evidence that Ms. Spice was not a registered voter of House District 60, and that her candidacy should be denied as a result.

There being no further testimony or questions, the chair closed the hearing on this cause.

Mr. Long then moved, seconded by Mr. Morgan, that the challenge to Ms. Spice's candidacy be upheld, and that her candidacy for Indiana House District 60 be denied.
There being no further discussion, the chair called the question, and declared that with four members (Mr. Cruza, Mr. Long, Mr. Morgan, and Mr. Perkins) voting "aye", and no member voting "nay", the motion was adopted. Mr. King stated that staff would prepare findings of fact and a final order for Commission approval at the next meeting.

E. CAUSE 98-05: THE DECLARATION OF CANDIDACY OF BOB KERN FOR UNITED STATES REPRESENTATIVE, DISTRICT 6:

The chair recognized Mr. King, who stated that the issue raised in the affidavit originally filed in this case concerned the name of the candidate as set forth on his declaration of candidacy.

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Mr. King noted that Commission members had received a copy of the March 6, 1998 affidavit filed by Ms. Jeannie B. Merkler with their meeting packets, and that the Election Division received an appearance this morning by Mr. Stephen Laudig of Laudig George Rutherford & Sipes on behalf of Ms. Merkler, along with eleven certified documents as attachments to Ms. Merkler's affidavit. Mr. King distributed copies of these documents to Commission members and interested parties. Mr. King stated that, with the consent of the Commission, the documents filed by Ms. Merkler and her counsel would be designated as: (1) Exhibit A-1, the copy of Ms. Merkler's March 6 affidavit; and (2) Exhibit A-2, Mr. Laudig's appearance, and the following certified documents: (A) Justis information sheet on Bobby Hidalgo; (B) an abstract of judgment of conviction; (C) minute sheet regarding Bobby Hidalgo; (D) Marion County Board of Voter Registration Information Report; (E) Voter Registration form, undated; (F) Voter Registration form, dated February 5, 1997; (G) Voter Registration form, dated February 16, 1996; (H) Voter Registration form, dated May 1995; (I) Voter Registration form, dated, February 15, 1995; and (J) Declaration of Candidacy for Primary Nomination, dated January 22, 1998. The Commission consented, and these exhibits were incorporated by reference in these minutes.

The chair recognized Mr. Laudig, who was administered the oath by Mr. King. Mr. Laudig stated that he represented Ms. Merkler, and indicated that he would be brief since he operated under the theory that if you get the facts out the law will take care of itself.

Mr. Laudig stated that an individual claiming the name of "Bob Kern" is not Bob Kern, but has the true name of "Bobby Scott Hidalgo." He said that this individual was born on March 31, 1964.

Mr. Laudig noted that Commission members had been provided with the Justis information sheet for this individual, which is generated on all convicts in Marion County. He stated that under Indiana Rules of Evidence 44(B), the Commission may consider a forgery conviction in determining the credibility of a witness. He noted that the individual claiming to be Bob Kern had received a forgery conviction, and had gone through a series of name changes in his voter registration documented in the attachments to Ms. Merkler's affidavit. Mr. Laudig stated that he believes this individual's given name was "Bobby Scott Hidalgo", and this belief is shared by the Indianapolis Police Department and the Marion County Superior Courts. He indicated that through a series of claimed named

changes in his voter registration, this individual slowly changes his name to Bob Kern.

Mr. Laudig stated that he is not challenging this person's eligibility to be a candidate, but is challenging his use of this name in a manner intended to deceive the voting public as to his criminal record, and whether a voter should vote for this person.

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Mr. Laudig stated that this individual should not be a candidate under the name "Bob Kern", but under his given name, which is not Bob Kern. He concluded by stating he would ask Commission members to ask the individual claiming to be Bob Kern what his given name was, when it was lawfully changed, and what evidence he has to support that, and then ask Commission members if next year they wished to see a candidate named "Doc Bowen", "Andy Jacobs", or your most popular candidate for public office. He remarked that he was not here to prevent this gentleman from running for Congress, but wanted him to do so in a truthful fashion, and to not degrade the integrity of the state by perpetrating a fraud on the public.

The chair then recognized Mr. Kern, who stated that he is a candidate for United States Representative in the Sixth Congressional District. He stated that his given name when born was "Kern", which is his mother's maiden name.

Mr. Kern said that on his grandfather's death bed he told him that he would make him proud of him after he made a fool of himself and got a criminal record. He stated that he had nothing to hide, and that he had spent ten years trying to rehabilitate himself. He remarked that he was in Indiana Youth Center under the name "Bob S. Hidalgo", but his grandfather's name was Paul Kern. Mr. Kern stated that when he ran for Congress two years ago, he ran under the name of "Bob Scott Hidalgo Kern." He said that the media knows him "Bob Kern" as a convicted felon, and he is not trying to deceive or hide anything from anyone. He added that he took his grandfather's name to make him proud of him. Mr. Kern remarked that the people deserve an answer from him if he is a felon, and he has made a public statement that he is a convicted felon, but that this should not deprive him of his right to run.

Mr. Kern said that page four of the Election Commission's *Candidate Guide*, under "Basic Qualifications" stated that he is disqualified due to his felony conviction for running for any state office, state legislative office, local office, or school board office, but that he has the right to run for the two offices of United States Senator or United States Congressman. He stated that he had the right to run for these offices to make himself a better person. He said that he received this felony conviction because he chose not to testify against someone else, and that although it was a stupid choice, he made it. He added that he had been suffering ten years as a result. Mr. Kern said that he would not lie by saying he had done nothing wrong, because he had.

Mr. Kern stated that the statutes regarding the placement of candidates on the ballot do not state that he cannot use his mother's maiden name, something that he is proud of. He stated that he had been asked to withdraw to his candidacy by the Marion County Democratic Chairman at party headquarters. He said that he told the

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chairman about his criminal record after the chairman made his request for Mr. Kern to withdraw because Mr. Kern had nothing to hide.

Mr. Kern said that when he called the Democratic Party office to request a map of the Tenth Congressional District, the chairman told him that he had no reason to call the office because he was not a slated candidate, and that the chairman wanted to know why Mr. Kern had not come to the county party office to sign off as a candidate. Mr. Kern said that he told the county chairman that it was Mr. Kern's right as a United States citizen to run for an office. He said that if he wanted to deceive someone, he would have run for mayor, or another office that he was not eligible to run for, but he was eligible to run for United States Representative. He said he would make the best darn candidate there is.

In response to a question from Mr. Perkins regarding the name that he was given at birth, Mr. Kern stated that the name given to him at birth "Bobby Kern." In response to a question from Mr. Perkins regarding whether he had legally changed his name since then, Mr. Kern responded that he had not, but his mother did, and that his name was changed to "Hidalgo." In response to a question from Mr. Morgan, Mr. Kern responded that his name had been changed when he was a baby. In response to a question from Mr. Perkins regarding whether he had changed his name since then, Mr. Kern said his name had not been changed. When Mr. Perkins asked if his legal name was now "Bobby Hidalgo", Mr. Kern responded that he gathered that it was, but that he didn't know that he had to change the name that was originally given to him. He added that every time he put his name down on an application it would come back denied with no reason why.

Mr. Perkins stated that he was trying to sort out what Mr. Kern's legal name was right now. Mr. Kern said his name had been changed by his mother to help out when she filed for child support, but that he had no control over this since he was an infant. In response to a question from Mr. Perkins, he said that this name change was probably the result of a court order, but that on page 245 of the orange Election Code books, the law states that he can do this. He added that his name will never be "Bayh", or "Bowen", or anything like that since he would not have the right to use the name of someone who is not family, or who he is not related to. Mr. Kern said that he had not done that. He said that he understood that the law allowed an individual to use their given name to run for office, and that he took this provision of the law for what it said.

Mr. Perkins asked when Mr. Kern had started using the last name of "Kern." Mr. Kern responded "two or three years ago", before the last election. In response to a question from Mr. Perkins, Mr. Kern

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stated that this was not the result of a legal name change, but something that he took it upon himself to do after he received permission from his grandmother to do that. He stated that his grandmother said it would be appropriate for him to do that since his grandfather had wanted him to be a better person. He added that his grandfather had found out before his conviction that Mr. Kern was hanging around with the wrong people, and that his grandfather wanted him to get away from them, but he didn't do so since he has a big heart. He added that he tried to make his own decisions, but that sometimes people do make the wrong decisions. Mr. Perkins stated that he was not here to make any judgments about Mr. Kern's past, but remarked that he was just trying to get the facts about what Mr. Kern's actual legal name is. Mr. Kern said that legally it is "Hidalgo", but according to the Election Code he has a right to use his given name, and his given name was "Kern", not "Hidalgo." He added that if he had the choice today to decide what name he wanted it would be "Kern", and not any other name.

Mr. Long asked if Mr. Kern had a driver's license. He responded that he did not, since he was epileptic. Mr. Long asked if Mr. Kern had a Bureau of Motor Vehicles Identification card. He responded that he had an Indiana ID which says "Hidalgo", but that he can't get this changed unless he goes to court, and that he can't afford an attorney to go to court since he is on a fixed income because of his disabilities. He added that this ID does not say what is his given name and his surname. He said that his given name was "Kern."

Mr. Long responded that Mr. Kern may have misunderstood the law since a given name is an individual's first name, and a surname is an individual's family name, and that "given name" does not refer to the name a person is given at birth. He added that his own given name was "Anthony" and his surname is "Long." Mr. Long stated that he agreed that Mr. Kern had the right to file for an office as much as anyone else would, but that Mr. Kern ought to use his real name.

Mr. Kern asked if the name he was born with wouldn't hold any water here. He added that he had a problem with this issue two years ago, and that he had undertaken every effort to resolve it when he decided to use "Kern." He said that he is being challenged because he didn't follow directions from the Marion County chairperson, and ran against someone else who wants to be first on the ballot. He remarked that he wasn't challenged two years ago, and wondered why he was being challenged now.

Mr. Perkins said that if he understood Mr. Kern's testimony, his legal last name as "Hidalgo", and that there has not been a judgment or court order of any kind that would change that. He added that it appeared to him that "Kern" was not the correct name

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he should be using to seek his candidacy, and that the proper course, if possible, was to file to legally change his name to "Kern" as the name he wishes to use to seek office. Mr. Kern responded that the Election Code does not say that. He also presented a document to the Commission entitled "Offender Information System", and dated March 10, 1998.

The chair noted that Mr. Kern's time had expired, and recognized Mr. Laudig for three minutes of rebuttal. Mr. Laudig stated that he had no rebuttal to offer.

The chair recognized Mr. King, who stated that he and Ms. Robertson had information concerning applicable statutes that they believed the Commission needed to be appraised of that had not been brought forward by either party in this matter.

Ms. Robertson called the attention of the Commission to *In re: Hauptley*, 260 Ind. 150, 312 N.E.2d 857, a 1974 Indiana Supreme Court case annotated at Burns's Indiana Code 34-4-6-2, in which the Court held that there is no legal requirement that an individual go to court to legally change his or her name. She noted that in the documents submitted in this cause, Mr. Kern had filed applications with the county voter registration office, indicating that he was changing his name, and stating the name it was being changed from.

Mr. King stated that, with the consent of the Commission, the document filed by Mr. Kern in this cause would be designated as "Exhibit B-1." The Commission consented, and this exhibit was incorporated by reference in these minutes. Mr. King suggested to the chair that since the information concerning this case was coming forward without the opportunity for either side to address it, that it might be appropriate for the Commission to offer a short time for each party to respond to this information. The Commission agreed to this course.

The chair recognized Mr. Laudig, who stated that having a name, and using a name, is different from appearing on the ballot under a particular name. He stated that the challenger is not seeking to prevent this individual from using the name "Bob Kern," and that if he wishes to use this name in his private life to enter into contracts with banks or other commercial arrangements, he can do so if he has no intent to commit fraud or obtain money under false pretenses. Mr. Laudig stated that the use of this name between himself and other individuals is completely distinct from the relationship that comes into existence when he appears on the ballot. He said in that instance, the State of Indiana is telling voters that "this is Bob Kern," but this is in fact not Bob Kern. Mr. Laudig stated there is a complete distinction between changing one's name in private life and how it must appear on the ballot as the candidate's given name and surname under Indiana Code 3-10-1-14(b). Mr. Laudig said that this individual is not using his given

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name and surname, and that although he may commonly use "Bob Kern", that is not his true name. He requested that the Commission take that distinction into account, and stated that the case referred to by staff counsel concerned commercial dealings, not ballot access, where totally different considerations come into play.

The chair recognized Mr. Kern, who stated that he had although Mrs. Merkler claims that he is trying to deceive voters by using another name, that this is untrue. He said that Mrs. Merkler does not know him, and could not care less who he is, and added that she only came forward because of Mr. Laudig. He said that if Mrs. Merkler did care, she would probably want to contact him to find out what he was about. Mr. Kern stated that he had every intent to use this name, "Kern", in a respectable way.

Mr. Long stated that he had looked at the Indianapolis telephone book, and did not see Mr. Kern listed under either "H" or "K." Mr. Kern responded that he did not have a telephone under either name.

In response to a question from Mr. Long concerning how an individual could telephone him, Mr. Kern stated that his telephone number was on file with the Election Division, and listed in the name of his aunt, Suzanne Fischmann. In response to a question from Mr. Morgan, he added that when he did have a telephone, it was in the name of "Scott Kern", his middle name and his last name.

In response to a question from the chair, Mr. Kern stated that when he was on the ballot two years ago, his name was "Bobby Scott Hidalgo Kern."

The chair recognized Ms. Robertson, who said that the text of Indiana Code 3-10-1-14(b) reads in full "A candidate's given name and surname as set forth in candidate's voter registration record shall be printed in full" on the primary election ballot.

Mr. Morgan asked Mr. Laudig whether it was correct that if this gentleman were to make everything uniform across the board, and in one name or the other, the Commission probably wouldn't have this challenge, and that Mr. Laudig probably wanted everything to be defined, one way or the other. Mr. Morgan said that he understood Mr. Kern's desire to do better, but he thought Mr. Kern could understand the confusion with these names, and he thought that is part of the issue here. Mr. Kern responded that the issue here was that Mr. Laudig did not want him on the ballot, and would not even tell Mr. Kern who he was running against before Mr. Kern would even think about withdrawing. Mr. Morgan stated that this was the issue for Mr. Morgan. Mr. Kern said that he does not go around using everyone else's names, only "Kern", the name that he was born under. He remarked that this was his grandfather's name, and his grandmother's name, although she now has the name "Noble" due to marriage, but this does not change the fact that his name is "Kern."

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Mr. Morgan asked if Mr. Kern saw any benefit in eventually getting this uniform on all of his identification. Mr. Kern responded that he wanted everything changed, since he did not intend to deceive anyone. Mr. Morgan stated that he had not made that statement. Mr. Kern said that the challenge said that he was trying to deceive the voters, and he was not trying to do so. He stated that the only ones deceived were the people in this room by lies, and that he was ashamed to say that he was a Democrat right now. Mr. Kern stated that no one had a problem two years ago when he ran on the ballot because there were nine candidates against Julia Carson. He said that because he did not talk his aunt into withdrawing her candidacy (and because he did not withdraw his own candidacy), he was threatened that his name was going to be washed in the mud and someone was going to find out after he told Mr. Laudig that he was a convicted felon. He said who cares if he was a convicted felon ten years ago, since that was the past and we in the future. He said no one wants to live in the past, and if they do, we should go back to the old economy we had.

Mr. Morgan stated that Mr. Kern was starting to digress here, and that he was asking Mr. Kern about his future with his question of whether he saw a benefit in getting his name changed so that it would be uniform everywhere someone would look. Mr. Kern replied "yes", and Mr. Morgan stated that was all he was asking.

Mr. Perkins asked staff counsel if there was another issue in this case involving Mr. Kern's status as a convicted felon in seeking this office. Mr. King responded that there was not since Indiana Code 3-8-1-5 specifically exempts candidates for federal office from the prohibition against convicted felons seeking elected office.

Mr. Long asked staff counsel to address Indiana Code 3-7-41-2, which concerned name changes in voter registration records, and asked whether there is statutory authority for a person who wishes to change their name in the common situations, such as marriage or divorce, to go to court, or whether an individual can simply go to a voter registration office and change their name. Mr. King stated that under both the federal National Voter Registration Act and the Indiana statute cited by Mr. Long, there are a couple of different ways for a voter to change his or her name on the voter registration records. He indicated that under IC 3-7-41-2, a voter can fill out a change of name statement by checking a box on the voter registration application indicating that the application is for a name change. Mr. King noted that this type of voter registration application is sworn to in the same way that any other voter registration application is, and is a statement that the application is a legitimate change of name. Mr. King stated that the other procedure set forth in this statute for a voter to change his or her name is when the voter goes to the polls and signs the

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poll list for the precinct, and states the voter's new name as part of the voting process. Mr. King added that in 1997, this statute was amended to repeal language that had limited the use of this procedure to changes of name resulting from marriage, divorce, or court order. He stated that under IC 3-7-41-2 and the registration forms prescribed under the federal NVRA, an individual can indicate a name change by filling out the form and checking the box. Mr. King noted that this procedure was in addition to the one cited by Ms. Robertson earlier at IC 34-4-6, which involves filing a petition with a court for a name change order. In response to a question from the chair, Mr. King stated that a voter could change his or her name either way.

There being no further testimony or questions, the chair closed the hearing on this cause.

Mr. Perkins stated that based on the testimony and other evidence presented by both sides in this matter, and on the additional information presented by staff counsel, he moved to deny the challenge filed against Mr. Kern by Ms. Jeannie B. Merkler. Mr. Cruea seconded the motion.

Mr. Long stated that he would vote against this motion, since he believed that although this gentleman can legally go by any name he wants to go by, Mr. Long did not think he had done that since he testified before the Commission under oath that a state identification card has been issued to him in the name of "Bobby Hidalgo." Mr. Long added that although this individual has stated he does not have the money to have his name changed through court proceedings, in his experience in other counties, the clerk's office has forms that an individual can fill out for a change of name without hiring a lawyer, and after one legal publication the person's name can be changed. Mr. Long said he did not know what the cost of this procedure would be in Marion County, but that this gentleman had not done that, and he had not taken the effort to the Bureau of Motor Vehicles to change his state identification, which he understood would cost a fee of five dollars. Mr. Long stated that he did not think this individual had taken the necessary legal steps to declare himself to be "Bob Kern", and to run under that name. Mr. Long added that this area is a troublesome one to him. He said that due to Mr. Kern's testimony regarding his identification card, and the fact that he has performed this name change in a somewhat circuitous route according to the evidence set forth in the voter registration applications, Mr. Long felt uncomfortable in voting for his placement on the ballot in this fashion.

Mr. Morgan stated that he concurred with Mr. Long's feelings. He said that he hoped anyone in Mr. Kern's position would make the

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effort to get their name uniform, and that he did not believe it was that cost prohibitive or hard to get done. Mr. Kern interjected that he had a mental disability which hinders his activity.

There being no further discussion, the chair called the question. The question received a vote of two "ayes" (Mr. Cruea and Mr. Perkins), and two "nays" (Mr. Long and Mr. Morgan).

Mr. Long then moved that the challenge filed against Mr. Kern by Ms. Jeannie B. Merkler be granted for the reasons stated in his remarks concerning the previous motion. Mr. Morgan seconded the motion.

The chair stated that this was also a hard case for him, but that since counsel had advised that a voter can change his or her name by going in to the county voter registration office, he felt he must vote against this motion.

There being no further discussion, the chair called the question. The question received a vote of two "ayes" (Mr. Long and Mr. Morgan), and two "nays" (Mr. Cruea and Mr. Perkins).

In response to a question from the chair, Mr. King stated that the effect of the votes on two motions in this case was set forth in Indiana Code 3-6-4.1-7(b), which provided that the Commission is permitted to take official action in this cause only when the affirmative vote of at least three members is received on any motion. He added that he and Ms. Robertson had indicated in their initial discussion that subsequent relief for either party lies in the courts.

The chair recognized Mr. Long on a point of personal privilege. Mr. Long addressed Mr. Kern by stating that he was certain there was a Legal Services Organization in either Indianapolis or Evansville who could assist him with getting his legal name straightened out. He added that it was his personal advice to Mr. Kern that he proceed in this way, or to attempt to file his case as an indigent.

Mr. Morgan asked Mr. Kern if he understood the result of the Commission's votes today. Mr. Kern responded that he thought it meant that he could not run now. Mr. Morgan stated that this was not correct, since he was still on the ballot, and that he wanted to be certain that Mr. Kern did not leave the meeting today misunderstanding this. The chair added that since the Commission did not vote in favor of either Mr. Kern or the challenger, Mr. Kern's name would be left on the ballot, unless there was further action on this case in the courts.

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5. LITIGATION REPORT:

A. Anderson v. Long

The chair recognized Mr. King, who stated that Mr. Laudig had advised him concerning an unrelated matter prior to this Commission meeting that the United States District Court had denied

the motion to disqualify Mr. Laudig as plaintiff's counsel in the Marion County small claims court case. Mr. Laudig stated that this was correct, and noted that the Election Commission had not joined in the Marion County Election Board's motion to disqualify him. Mr. King stated that the Election Division would provide additional information concerning this ruling at the next commission meeting.

B. Brownsburg Area Patrons Affecting Change [BAPAC] v. Baldwin

Mr. King stated that in this case, the U.S. Seventh Circuit Court of Appeals had decided that before proceeding further in this case, it would be necessary for the Indiana Supreme Court to clarify the definition of "political action committee" under Indiana Code 3-5-2-37. He noted that this question had already been certified by the Seventh Circuit to the Indiana Supreme Court. Mr. King stated that a copy of the Seventh Circuit's decision had been provided to Commission members, and with the consent of the Commission would be incorporated by reference in these minutes. The Commission consented.

Mr. King added that staff would advise Commission members as soon as possible of any litigation concerning the Commission which might arise out of today's proceedings.

6. VOTING SYSTEM CERTIFICATION:

A. GOVERNMENTAL BUSINESS SYSTEMS (GBS) ACCU-TAB The chair recognized Mr. King, who stated that he had recently met with a representative of Information Services Division to review the documentation submitted by GBS concerning this system's compliance with Indiana Code 3-11-15. He noted that some ambiguities had been identified in this review, but that he hoped these could be resolved so that the Commission could act on this matter at its next meeting.

B. ELECTION SERVICES AND SYSTEMS (ES&S) PC-BT VOTING SYSTEM

Mr. King stated that except for a follow-up conversation with the vendor since the last Commission meeting, there was no additional information to report regarding this system.

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C. DISCUSSION OF INDIANA CODE 3-11-7.5-28 (REQUIREMENT FOR SERIALY NUMBERED STUBS ON BALLOT CARDS)

Mr. King said that this question had not been brought before the Commission due to a problem, but had arisen recently during the preparation of optical scan ballot cards for the May 1998 primary. Mr. King noted that the optical scan ballots are the newer version of the "punch cards", which permit a voter to cast a ballot by shading in, rather than punching through, a circle next to a candidate or party name. He indicated that current Indiana law does not distinguish between punch cards and optical scan cards in requiring that the ballot contain serially numbered stubs that are perforated along the ballot itself.

Mr. King stated that he understood from conversations with two Indiana vendors that they had not been printing these serially numbered stubs on optical scan ballots in the past, and were already at the printer preparing the May 1998 primary ballots. He said that the vendors did not believe that they could alter these ballots now, but wished to receive guidance from the Commission with regard to the 1998 general election ballots. Mr. King stated that although the current statute clearly required these types of stubs, the vendors believed that the cost of providing the ballots to county customers would increase by 25% or 50% as a result of the additional cost from printing the stubs.

The chair recognized Mr. Steven Corey, who stated that he was formerly employed by MicroVote, and would begin working for Governmental Business Systems, effective April 1, 1998. He said that other representatives of GBS had planned to be present, but were unable to reach Indianapolis due to bad weather in Chicago. Mr. Corey stated that he would be happy to convey any information that the Commission wished to GBS, and would promptly supply any information to the Commission that it requested.

The chair stated that the Commission had been discussing IC 3-11-7.5-28, the statute requiring serially numbered stubs on optical scan cards, and said that this statute needed to be enforced. He indicated that the Commission would discuss this issue further at a future meeting.

7. CO-DIRECTORS' REPORT:

A. CAMPAIGN FINANCE ENFORCEMENT

The chair recognized Ms. Christie, who stated that the Commission would need to schedule its next meeting in the near future to address campaign finance violations. She noted that many committees had filed their January 1998 annual reports late, or not at all,

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and that under the new campaign finance enforcement statute some large fines could be assessed. Ms. Christie stated that the Commission should plan for a lengthy meeting, and that it would be helpful to hear these matters before the filing of the pre-primary reports in April.

B. KIDS ELECTION CELEBRATION (FEBRUARY 10, 1998)

There was no report concerning this matter.

C. SENATE CONCURRENT RESOLUTION 7-1998 (BICENTENNIAL OF THE RIGHT TO VOTE IN INDIANA)

The chair recognized Mr. King, who stated that during the 1998 session, the Indiana General Assembly had adopted a resolution to celebrate two hundred years of elections in Indiana, and had forwarded a copy to the Commission, as well as other interested entities. A signed copy of Senate Concurrent Resolution 7-1998 is incorporated by reference in these minutes.

D. NVRA REPORT

The chair recognized Mr. Northern, who stated that Commission members had received a copy of a document titled "1997 Total NVRA Forms Processed and Average Voters." A copy of this report is incorporated by reference in these minutes. Mr. Northern remarked that this document was an annual summary of the voter registration reports processed in each Indiana county, and also indicates the average number of voters in each county during 1997. He indicated that he had not included a key to indicate the type of each voter registration form indicated on the charts, but that he would be happy to supply that to Commission members.

In response to a question from Mr. Long, Mr. Northern indicated that the "purge" figures included in the report reflected the Duplicate Voter Registration Elimination Program conducted last year, along with individuals who had filed voter registration cancellations after registering in other jurisdictions.

The chair thanked Mr. Northern for his report.

8. OTHER BUSINESS:

A. ELECTRONIC DATA INTERCHANGE FOR CAMPAIGN FINANCE REPORTING

The chair recognized Mr. King, who distributed copies of a document entitled "Electronic Data Interchange for Campaign Finance Reporting." He noted that these were specifications developed by Quest Information Systems, Inc., the Commission's campaign finance vendor during the last several months. Mr. King stated that he and

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Ms. Robertson had reviewed this document, and were of the opinion that since the specifications would prescribe the form in which an electronic submission of campaign finance reports could be made, that action by the Commission to approve the specifications would be appropriate. Mr. King added that these specifications had been developed by Quest after extensive consultation with vendors who were currently supplying campaign finance software to committees.

Mr. King and Ms. Robertson stated that they had been advised by Quest that there would be two minor changes to this document, but that staff counsel wished to present the specifications to the Commission action, based on the assumption that some committees would wish to file their April 1998 pre-primary reports both by paper and electronically. Mr. Northern added that he would attempt to address any technical questions concerning the fields that Commission members might have.

The chair recognized Mr. Long, who stated that he was reluctant to vote to approve these specifications if neither Commission members and staff were familiar with the technical aspects of the document. In response to a question from the chair, Mr. King stated that both co-directors had previously signed off on the specifications as delivered by the vendor.

Mr. Cruea moved, based on the action of the co-directors, that the specifications be approved as submitted. Mr. Long seconded the motion. There being no further discussion, the chair called the question, and declared the motion adopted with four members voting (Mr. Cruea, Mr. Long, Mr. Morgan, and Mr. Perkins) voting "aye", and no member voting "nay."

9 ADJOURNMENT:

There being no further business to come before the Commission, Mr. Morgan moved, seconded by Mr. Cruea, that the Commission do now adjourn. The chair called the question and declared the motion adopted with four members (Mr. Cruea, Mr. Long, Mr. Morgan, and Mr. Perkins) voting "aye", and no member voting "nay." The Commission then adjourned at 4:25 p.m.

Respectfully Submitted,

Laurie P. Christie
Co-Director

Mary Ann Tippet
Co-Director

APPROVED:

Dudley Cruea,
Chairman

Dudley Cruea, Chairman

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

CIVIL LITIGATION DIVISION

February 29, 2012

VIA OVERNIGHT MAIL

Hon. R. Kenneth Coleman
Special Circuit Judge
P.O. Box 1995
New Albany, MS 38652

RE: *Orly Taitz v. Democrat Party of Mississippi, Secretary of State of Mississippi; In the Circuit Court of Hinds County, Mississippi, First Judicial District; Civil Action No. 251-12-107CIV*

Dear Judge Coleman:

Please find enclosed two copies of Secretary of State Delbert Hosemann's Motion to Dismiss that we have caused to be filed today in the referenced action, and two copies of a Memorandum in Support of his Motion to Dismiss. Also enclosed is one copy of the legal authorities cited by the Secretary of State in his Memorandum.

Thank you for your consideration in this matter.

Sincerely,

Justin L. Matheny
Special Assistant Attorney General

JLM:fh

cc: Orly Taitz (via overnight mail)
Samuel L. Begley

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

CIVIL LITIGATION DIVISION

February 29, 2012

Barbara Dunn, Clerk
Hinds County Circuit Court
Post Office Box 327
Jackson, Mississippi 39205

RE: *Orly Taitz v. Democrat Party of Mississippi, Secretary of State of Mississippi; In the Circuit Court of Hinds County, Mississippi, First Judicial District; Civil Action No. 251-12-107CIV*

Dear Ms. Dunn:

Please find enclosed the original and one copy of Secretary of State Delbert Hosemann's Motion to Dismiss in the above-referenced cause. Please file the original and return the "filed" stamped copy to me in the self-addressed stamped envelope.

Your assistance in this matter is appreciated.

Sincerely,

A handwritten signature in cursive script, reading "Justin Matheny / fh".

Justin L. Matheny
Special Assistant Attorney General

JLM:fh

cc: Hon. R. Kenneth Coleman (via overnight mail)
Orly Taitz (via overnight mail)
Samuel L. Begley

**CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

DR. ORLY TAITZ, ESQ.

PETITIONER

V.

CIVIL ACTION NO. 251-12-107CIV

**DEMOCRAT PARTY OF MISSISSIPPI;
SECRETARY OF STATE MISSISSIPPI**

RESPONDENTS

The Mississippi Secretary of State's Motion to Dismiss

Mississippi Secretary of State Delbert Hosemann submits this motion to dismiss the petition filed in this cause pursuant Rules 12(b)(1), 12(b)(5), and 12(b)(6).

1. Petitioner Orly Taitz is a nationally known figure whose notoriety is derived in part by her numerous unsuccessful lawsuits in which she as an attorney or party has alleged that Barack Obama is not eligible to hold the office of the President of the United States. While Taitz, a California resident, cannot vote in Mississippi's March 13 Democratic Party presidential primary, she nonetheless seeks a court order removing President Obama from the Mississippi Democratic Party's presidential primary ballot.

2. As set forth in more detail in the accompanying memorandum, Taitz's legal action is fatally flawed for multiple reasons and should be dismissed.

3. The petition is time barred pursuant to Code Section 23-15-961 because Taitz missed the deadline to file with the Circuit Court.

4. The petition fails to state a claim for mandamus as the Secretary of State has no duty under state law to determine the qualifications of a presidential candidate in connection with a primary election ballot. The Secretary of State's duty and authority with respect to presidential primaries conducted by political parties is defined by statute. Relevant to the dispute regarding President Obama, Code Section 23-15-1089 requires that

The Secretary of State shall place the name of a candidate upon the presidential preference primary ballot when the Secretary of State shall have determined that such a candidate is generally recognized throughout the United States or Mississippi as a candidate for the nomination of President of the United States.

Miss. Code Ann. § 23-15-1089. Code Section 23-15-1089 authorizes the Secretary of State to make one, and only one, determination about a presidential candidate: whether he or she is “generally recognized throughout the United States or Mississippi as a candidate for the nomination of President of the United States.” If that person is generally recognized as a candidate, then the Secretary of State is required by law to place the name on the primary ballot. The statute does not authorize the Secretary of State to investigate whether a generally recognized candidate meets the qualifications established by federal law for the office. Section 23-15-1089 simply does not impose a “clear legal duty” on the Secretary of State to undertake such a review and, therefore, mandamus relief cannot be ordered.

5. The petition fails to state a claim for any relief, including declaratory and injunctive relief, against the Secretary of State. Regardless of whether the relief sought against the Secretary of State is classified as declaratory, injunctive, or in the nature of a writ of mandamus, the petition should be dismissed for failure to state a claim. State law clearly mandates the Secretary of State to place on the primary ballot every person “generally recognized throughout the United States or Mississippi as a candidate for the nomination of President of the United States.” Miss. Code Ann. § 23-15-1089. State law imposes no other qualification for placement on the ballot other than to be a generally recognized candidate for the office. Since the petition does not allege that President Obama is not generally recognized as a candidate for the nomination of President, the placement of President Obama’s name on the ballot is

appropriate and required under state law. The petition seeking the removal of President Obama from the primary ballot fails to state a claim as a matter of law.

6. Taitz lacks standing to pursue this action. Standing is a jurisdictional requirement necessary to invoke the authority of the judiciary. Taitz's lack of standing deprives this Court of jurisdiction.

7. The petition and summons have not been properly served on the Office of the Attorney General as required by Rule 4(d)(5). *See* Affidavit of Diana Ware, Exhibit A.

FOR THESE REASONS, Mississippi Secretary of State Delbert Hosemann respectfully requests that the Court enter an order dismissing Petitioner Dr. Orly Taitz's Petition and assessing all costs of this action to Petitioner.

THIS the 29th day of February, 2012.

Respectfully submitted,

Delbert Hosemann, Mississippi
Secretary of State

BY: Jim Hood, Attorney General
State of Mississippi

BY:



Harold E. Pizzetta, III (Bar No. 99867)
Justin L. Matheny (Bar No. 100754)
Office of the Attorney General
550 High Street, Suite 1200
P.O. Box 220
Jackson, MS 39205
Telephone: (601) 359-3680
Facsimile: (601) 359-2003

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on the following persons by US Mail, properly addressed and postage prepaid, and/or by other means where indicated:

Orly Taitz (via overnight mail)
29839 Santa Margarita Parkway, Suite 100
Rancho Santa Margarita, CA 92688

Samuel L. Begley
Begley Law Firm, PLLC
P.O. Box 287
Jackson, MS 39205

THIS the 29th day of February, 2012.



Justin L. Matheny

**IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI**

DR. ORLY TAITZ, ESQ.

PLAINTIFF

VS.

CIVIL ACTION NO. 251-12-107CIV

**DEMOCRAT PARTY OF MISSISSIPPI,
SECRETARY OF STATE OF MISSISSIPPI**

DEFENDANTS

AFFIDAVIT OF DIANA WARE

STATE OF MISSISSIPPI

COUNTY OF HINDS

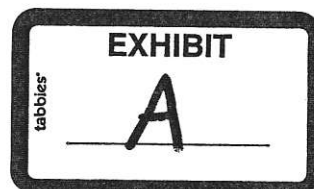
Personally appeared before me, the undersigned authority in and for the jurisdiction aforesaid, the within named Diana Ware, who after being duly sworn, deposes and says:

1. My name is Diana Ware. I am of legal age. I make this affidavit from personal knowledge and the statements contained herein are true to the best of my knowledge and ability.

2. I am a Special Projects Officer IV with the Civil Litigation Division of the Office of the Attorney General.

3. The Office of the Attorney General is served with a number of summons, complaints, subpoenas, and other legal pleadings on a daily basis. It is the practice of our office to immediately record receipt of all complaints and other pleadings in our service log. Furthermore, for civil matters like this case, a service of process control docket sheet is completed by me, indicating the style of the case, cause number, method of service, date of service, etc.

4. I have reviewed our records for the period February 14, 2012 through February 29, 2012, which includes a computerized docket search, as well as a search of the service log, regarding the



matter of *Dr. Orly Taitz, Esq. V. Democrat Party of Mississippi, Secretary of State of Mississippi*, Cause No. 251-12-107 CIV. I can find no record indicating that the Office of the Attorney General received service of process with regard to this case.

5. Further the affiant saith not.

I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing are true and correct.

Diana Ware

DIANA WARE

Signed and sworn to before me
this 29th day of February, 2012.

Sharon Smith

Notary Public and for the State of Mississippi



**MISSISSIPPI
ATTORNEY
GENERAL'S
SUMMONS
LOG**

2012

Organization or Law Firm	Mississippi Attorney General's Summon's Log			Case and Case #
	Date	Time	Runner Name	
James R. Dior self	2/13	2:05	SY	G 2012-236 237-W/4 258-5/2
Katherine D. Bishop 662-563-9299	02/14	0900	Robert Butler H.C.S.O.	S-07-12-279 Carl D. Smith vs Rebecca Russell + Ms Dept of Human Services
Jason E Tate 601-260-1445	02/14	0900	Robert Butler H.C.S.O.	2009-007 Jeffrey Irvin vs Tyreka Fazande
John W. Satcher 601-787-3434	02/14	0900	Robert Butler H.C.S.O.	2011-A135 Cedric Dewayne House vs James Cooley, Eric House, Ms Dept. of Health, Ms. Dept of Human Services

Organization or Law Firm	Mississippi Attorney General's Summon's Log			Case and Case #
	Date	Time	Runner Name	
Taylor Law Firm 601-928-7272	02/14	0900	Robert Butler H.C.S.O.	CL6601-2011-0229-2 John Boteler vs. Denis Carlson...
Sean A Southern 318-330-9020	02/14	0900	Robert Butler H.C.S.O.	12-0101GN-G Wells Fargo Bank, NA vs Marion G. Weckse Jr... Ms. Dept. of Revenue
Lauren Sonnier 228-327-1424	02/14	0960	Robert Butler H.C.S.O.	2012-0152CB Brenda Marcombe vs Pamela Jean Lyon, American General Finance... Jim Hood
Felecia Perkins 601-352-5053	2/14	1130	Latesha Napier	92002-135 Elliot Benson v. Cheantia Lee & DHS STATE OF MISSISSIPPI

Organization or Law Firm	Mississippi Attorney General's Summon's Log			Case and Case #
	Date	Time	Runner Name	
Patrick A. Spaulan	2-14-12	11:35	GARY WINDHAM	212-0246-CB
Jim R. Mozingo	2-14-12	12:51	Hunter Twiford IV	G 2012-174 q/3
CINDY COFFEY SHAPIRO & MASSEY, LLC	2-14-12	2:05	CINDY COFFEY	2012-53
G. Dennis Giddens & Welch	2-14-12	3:10	William Welch	2012-224

Organization or Law Firm	Mississippi Attorney General's Summon's Log			Case and Case #
	Date	Time	Runner Name	
Giddens b. Adams & Wulfsberg 601-373-4647	2-14-12	3:10	William Wulfsberg	Peggy J. Gilbert - A/K/A Gould 6-2012-222/-T/1- G-2012-224/-0/3 Houston Hoover
Rushing & Guise PLLC. 228-374-2313	2/15	1045	Robert Butler H.C.S.O.	2011-0109-M Gulf States Engineering vs Gill and Associates Land & Home vs Gerald Cruthard
Richard M. Lingle PLLC 601-366-0454	2/15	1045	Robert Butler H.C.S.O.	12-514 Muna Federal Credit Union vs State of Ms... Dept of Revenue
John W. Satcher 601-787-3434	2/15	1045	Robert Butler H.C.S.O.	2012-A004 Jonathan M. Jones vs Chesslese Hartfield & Ms. Dept of Human Services

Organization or Law Firm	Mississippi Attorney General's Summon's Log			Case and Case #
	Date	Time	Runner Name	
Phil Embury	2/16/12	11:00	Kelly Womack	# Civil Action No: 12-02-047PL
Dennis Horn	2/16/12	11:05	Tommy Jackson	Civil Action No: 3:12CV109HTW-LRA
Statelwide Soc. of Proc.	2/17	9:45	Craig Wells	# 11-cv-2425
William L. Griffin, Jr. 662-844-0900	02/17	10:00	Robert Butler H.C.S.O.	CV05-0381-41-H Marvin W. Stewart vs Jessica Stewart + DHS.

Organization or Law Firm	Mississippi Attorney General's Summon's Log			Case and Case #
	Date	Time	Runner Name	
Shelton + Associates P.A. 662-842-5051	02/17	11:00	Robert Butler H.C.S.O.	12-0011-M Brandon Daugherty vs Dept. of Human Services
Morris and Associates 318-330-9020	02/17	11:00	Robert Butler H.C.S.O.	2012-0322(A) Wells Fargo Bank vs Edward Inman, Ms. Dept of Revenue
Courtney + Camp 601-948-2307	02/17	11:00	Robert Butler H.C.S.O.	2011-0315 Ms. Dept. of Corrections Writ of Garnishment
Courtney + Camp 601-948-2307	02/17	11:00	Robert Butler H.C.S.O.	D2461-11-1620 Ms. Dept. of Corrections Writ of Garnishment

Organization or Law Firm	Mississippi Attorney General's Summon's Log			Case and Case #
	Date	Time	Runner Name	
Stephenson Law office 601-693-2246	2/17/12	11:35pm	Cody Hicks	CA-00-0448
Tracee Darby 601 941 7738	2/17/12	12:38 pm	Gina Ousley	P2011-30-T/1
Carrie Carrie Logan Nancy Steen, Esq.	2/17/12	2:55	Carrie Logan	1077512) 07-30212)
M. Judith Barnett	2/17/12	3:25	Jeff Moore	Jeffery Holoman V S. State of Miss

Organization or Law Firm	Mississippi Attorney General's Summon's Log			Case and Case #
	Date	Time	Runner Name	
Amy Foster Ryan 601-888-9919	02/21	1040	Robert Butler H.C.S.O.	94-0120 Sidney McDonald vs Marcye Robertson & Ms. Dept. of Human Services
Aaron P. Daniel 731-642-7580	02/21	1040	Robert Butler H.C.S.O.	11,0071-C1 Ms. State University vs Ms. Dept. of Mental Health
Maxine Lawson-Conway 228-475-9444	02/21	1040	Robert Butler H.C.S.O.	96-1617NH Alberta Nix vs Ms. Dept. of Human Services & Joshua Nix
Josie Mayfield Hudson 601-638-2434	02/21	1040	Robert Butler H.C.S.O.	G-95-1223 S/2 Walter Bernard Middlebrook vs Jessie Theresa Middlebrook & Ms. Dept. of Human Services

Organization or Law Firm	Mississippi Attorney General's Summon's Log			Case and Case #
	Date	Time	Runner Name	
Christopher E Kitchens 662-837-0099	02/21	1040	Robert Butler H.C.S.O.	97-0018-A Roy Len Kelly + Mary Sue Kelly vs Dept of Human Services
James L. Gray 601-749-2700	02/21	1040	Robert Butler H.C.S.O.	12-0109-GN-B Forrest Entekin + Sarah Lynn Entekin vs Haviva Withnell Entekin... Ms. Dept. of Human Services
Adams + Edens 601-825-9508	02/21	10:54	Craig Upton SRA Investig. Inc.	C6601-2012-0024-4 Citicorp Trust Bank, FSB vs. Clinton Lee Jacobs + Wendy Lynn Jacobs Dept. of Revenue
Wiseman Bray PLLC 901-372-5003	02/21	10:54	Craig Upton SRA Investig. Inc.	L12-060 Brittany Tobar vs. The University of MS

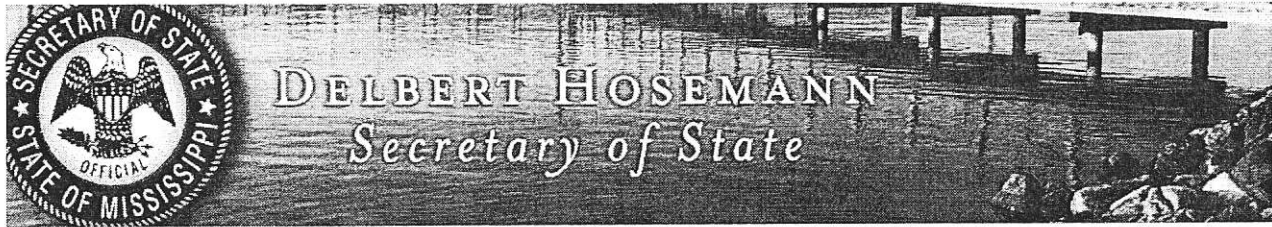
Organization or Law Firm	Mississippi Attorney General's Summon's Log			Case and Case #
	Date	Time	Runner Name	
Trauts Vance attorney	2/21/12	11:50	Amber Asmely	2007-051 HS
Giddens Giddens & Welch	2/21/12	12:20	William Welch	62012-282
Estes & Estes	2-21-12	12:20	William Welch	C2301-12-0075
Estes & Estes	2-21-12	12:20	William Welch	C230-12-0068

Organization or Law Firm	Mississippi Attorney General's Summon's Log			Case and Case #
	Date	Time	Runner Name	
Esker & Esker	2-21-12	12:20	William Wild	C2301-12-0082
Burns & Associates, PLLC	2/21/12	12:40	Rebecca Hornington	2012-1
Adams + Edens	2-22	9:50 _{am}	Craig Upton	11-03100-1
Katherine D. Bishop 662-563-9299	02/22	1015	Robert Butler H.C.S.O.	B-09-09-433 Tramaine F. Tate vs Teresa Collins + Mr. Dept. of Human Services

Organization or Law Firm	Mississippi Attorney General's Summon's Log			Case and Case #
	Date	Time	Runner Name	
Simpson Law Firm 601-957-6600	2/22	10:45	Donnie Greer	MS State Dept of Health CO-2011-628-JH
Shelton Law Firm	2/22	11:50 AM	GARY WILKINSON	12-00382 - (C3)
Billie G. Graham 601-426-9900	2/23	11:20	Robert Butler H.C.S.O.	2012-0160 Isabel Hernandez... vs Ms. State Dept. of Health
Brown Clark 601-845-0518	2/23	1:13	Chip Taylor	2012-0039 P1 Paternity of Michael D Tony SL

Organization or Law Firm	Mississippi Attorney General's Summon's Log			Case and Case #
	Date	Time	Runner Name	
Paul E. Rogers	2/23/12	2:00	Leo Jolley	Nikkita Bailes vs Aaron Thurman C72008.98 q3
John N. Satcher 601-787-3434	2/24	0925	Robert Butler H.C.S.O.	12-0102-GN-W Kevin Allen Steele vs Sarah Smith + Ms. Dept of Health + Ms. Dept. of Human Service
Robert W. Camp 601-948-2307	2/24	0925	Robert Butler H.C.S.O.	CU-2011-6025-SMT 2 Writ of Garnishment Gladys M. Jenkins
John N. Satcher 601-787-3434	2/24	0925	Robert Butler H.C.S.O.	12-0102-GN-W Kevin Allen Steele vs Sarah Smith + Ms. Dept of Health + Ms. Dept. of Human Services

Organization or Law Firm	Mississippi Attorney General's Summon's Log			Case and Case #
	Date	Time	Runner Name	
James B. Wright 228-875-2304	2/24	0925	Robert Butler H.C.S.O.	2011-2376-CB Larry Elliott vs Jackson County Mr. - Jim Hood
Keith K. Clough PROCESS	2/24	11:12	Keith K. Clough	Sherry Jones v Melvin Richardson 8-2012-105 S/R
McHardy & Associates	2/24/12	1:50	Gary Whitman	12-0125-GD-G
Wayne Dowdy 601-783-6600	2/27	11:00	Robert Butler H.C.S.O.	2012-120 John Joseph Ledet vs Atty General Jim Hood

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FOR IMMEDIATE RELEASE: December 15, 2011

CONTACT: [Pamela Weaver](#), (601) 270-4100**Presidential Preference Primary**

Jackson, MS—State law says, "The Secretary of State shall place the name of a candidate upon the presidential preference primary ballot when the Secretary of State shall have determined that such a candidate is generally recognized throughout the United States or Mississippi as a candidate for the nomination of President of the United States. On or before December 15 immediately preceding a presidential preference primary election the Secretary of State shall publically announce and distribute to the news media for publication a list of the candidates he intends to place on the ballot at the following presidential preference primary election..." (Miss. Ann Code §23-15-1089)

"I encourage all Mississippians to review the qualifications of each of the candidates listed in the Presidential Preference Primary prior to the Election, which will be held March 13, 2012," says Secretary of State Delbert Hosemann. "This list gives the voter ample time to review the candidate's qualifications prior to casting their ballot."

The following is a list of generally recognized Democratic Candidates:

Barack Obama

The following is a list of generally recognized Republican Candidates:

Michele Bachmann

Newt Gingrich

John Huntsman

Gary Johnson

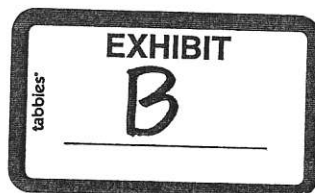
Ron Paul

Rick Perry

Mitt Romney

Rick Santorum

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**CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

DR. ORLY TAITZ, ESQ.

PETITIONER

V.

CIVIL ACTION NO. 251-12-107CIV

**DEMOCRAT PARTY OF MISSISSIPPI;
SECRETARY OF STATE MISSISSIPPI**

RESPONDENTS

**The Mississippi Secretary of State's Memorandum
in Support of His Motion to Dismiss**

Mississippi Secretary of State Delbert Hosemann submits this memorandum in support of his motion to dismiss the petition pursuant Rules 12(b)(1), 12(b)(5), and 12(b)(6).

Petitioner Orly Taitz is a nationally known figure whose notoriety is derived in part by her numerous unsuccessful lawsuits in which she as an attorney or party has alleged that Barack Obama is not eligible to hold the office of the President of the United States. While Taitz, a California resident, cannot vote in Mississippi's March 13 Democratic Party presidential primary, she nonetheless seeks a court order removing President Obama from the Mississippi Democratic Party's presidential primary ballot.¹ Taitz's legal action is fatally flawed for multiple reasons and should be dismissed.

Procedural Background

Taitz's Circuit Court Petition invokes Code Section 23-15-961 as the statutory basis for her claims and as the basis for this Court's subject matter jurisdiction. According to the Circuit Court Petition, on or about January 8, 2012, Taitz submitted an "Official Petition" to the Executive Committee of the Mississippi Democratic Party in which she purported to challenge

¹ According to the petition, Taitz is a resident of Rancho Santa Margarita, California. See Circuit Court Petition at 8.

President Obama's citizenship and thereby his qualifications to hold the office of President. *See* Exhibit 1 to the Circuit Court Petition (set forth on pages 8-19 of the Petition); Miss. Code Ann. § 23-15-961(1). The petition to the Executive Committee demanded that President Obama be removed from the Democratic Party's primary ballot. *Id.* at 19.

Taitz alleges that the Democratic Party took no action on her "Official Petition." *See* Circuit Court Petition at 4. Citing Section 23-15-961(3), Taitz interpreted this non-action to be a denial of her request to remove President Obama from the primary ballot. Taitz believes herself to be aggrieved by the denial of her request and filed this petition for judicial review with the Hinds County Circuit Court pursuant to Section 23-15-961(4).

The Duty of the Secretary of State Regarding Presidential Primary Ballots

The Secretary of State's duty and authority with respect to presidential primaries conducted by political parties is defined by statute. Relevant to the dispute regarding President Obama, Code Section 23-15-1089 requires that

The Secretary of State shall place the name of a candidate upon the presidential preference primary ballot when the Secretary of State shall have determined that such a candidate is generally recognized throughout the United States or Mississippi as a candidate for the nomination of President of the United States.

On or before December 15 immediately preceding a presidential preference primary election the Secretary of State shall publicly announce and distribute to the news media for publication a list of the candidates he intends to place on the ballot at the following presidential preference primary election. Following this announcement he may add candidates to his selection, but he may not delete any candidate whose name appears on the announced list, unless the candidate dies or has withdrawn as a candidate as provided in this chapter.

Miss. Code Ann. § 23-15-1089.

On December 15, 2011, the Secretary of State publically released the list of "generally

recognized candidates” for the nomination of President and included on that list President Obama. *See* December 15, 2011 Press Release, Exhibit B; Miss. Code Ann. § 23-15-1089.

Argument

I. Taitz’s Legal Contentions.

Although Taitz characterizes her requested relief as being declaratory and injunctive in nature, the relief she is seeking against the Secretary of State is actually in the nature of a writ of mandamus. Taitz asserts that the Secretary of State has a legal duty to remove President Obama from the primary ballot and she is seeking a court order compelling him to perform what she believes to be his legal duty. *See Dupree v. Carroll* 967 So.2d 27, 28 (Miss. 2007) (“The writ of mandamus exists to force an elected official to perform a duty of office.”). Specifically, Taitz wrongly believes that the Secretary of State has the legal duty under state law to determine whether a generally recognized candidate for the presidency is qualified to hold that office and to ensure that an unqualified candidate does not appear on a party’s presidential primary ballot.

In light of the clear terms of Section 23-15-1089, Taitz is wrong as a matter of law. The Secretary of State is required by law to place each “generally recognized” candidate on the presidential primary ballot. Section 23-15-1089 does not authorize the Secretary of State to review whether a generally recognized candidate meets the federal law qualifications to be President. Section 23-15-1089 provides no authority for the Secretary of State to refuse to place on the ballot a generally recognized presidential candidate. As set forth below, the relief sought by Taitz, even if otherwise legally viable, is directly contrary to the requirements of Section 23-15-1089.

II. The petition is time barred pursuant to Miss. Code Ann. § 23-15-961 because Taitz waited too long to file with the circuit court.

Taitz relies upon Code Section 23-15-961 as the statutory basis for her claim and as the basis for this Court's subject matter jurisdiction. Section 23-15-961 contains strict time limitations directing (1) the deadline to file an objection with the party's executive committee, and (2) the deadline to file any appeal with the circuit court. The time limitations in Section 23-15-961 are jurisdictional and a failure to file within the specified deadlines requires dismissal of the petition. *See Gourlay v. Williams*, 874 So.2d 987, 988 (Miss. 2004) (dismissing petition found to be time barred under 23-15-961). Here, Taitz missed the statutory deadline by which to file her appeal with this Court.

Because pre-election challenges must be quickly resolved or risk delaying the election, state law requires a person seeking to contest a candidate's qualifications to act briskly. Code Section 23-15-961 sets forth the following jurisdictional deadlines:

- A petition to challenge a candidate's qualifications must be filed with the political party "within ten (10) days after the qualifying deadline for the office in question." Miss. Code Ann. § 23-15-961(1).
- The party's executive committee has must rule on the challenge "within ten (10) days of receipt of the petition." Miss. Code Ann. § 23-15-961(2). If the executive committee does not act with the ten days, the inaction "shall be interpreted as a denial of the request for relief contained in the petition." Miss. Code Ann. § 23-15-961(3).
- Any party aggrieved by the action or inaction of the executive committee may file a petition for judicial review to the circuit court. "Such petition must be *filed no later than fifteen (15) days after the date the petition was originally filed with the appropriate executive committee.*" Miss. Code Ann. § 23-15-961(4) (emphasis supplied).

Taitz has not met the last mandatory deadline. She did not file her petition for review

with this Court within fifteen days “after the date the petition was originally filed with the appropriate executive committee.”

According to the Circuit Court Petition, Taitz filed her petition with the Democratic Party’s Executive Committee on or after January 8, 2012. *See* Petition at 8 and 19. Although it is difficult to determine on which exact date Taitz filed her petition with the Executive Committee, we know that in order to be timely the petition must have been filed with the committee on or before January 24, which is ten days after the January 14 qualifying deadline. *See* Miss. Code Ann. §§ 23-15-961 (requiring petition to be filed with the executive committee “within ten (10) days after the qualifying deadline”); 23-15-1093 (requiring presidential qualifying to occur “before January 15”). Thus, Taitz’s petition must have been filed with the Executive Committee sometime between January 8 and January 24.²

If Taitz’s petition was filed with the Executive Committee on some date between January 8 and January 24, her fifteen day deadline to file her appeal with this Court expired at the earliest on January 23 and at the latest on February 8. Taitz did not file her petition with this Court until February 14. Her petition to this Court is time barred and must be dismissed. *See Gourlay* 874 So.2d at 988.

III. The petition fails to state a claim for mandamus as the Secretary of State has no duty under state law to determine the qualifications of a presidential candidate in connection with a primary election ballot.

By seeking an order requiring the Secretary of State to perform an official function, Taitz

² If the petition was filed with the Executive Committee after January 24, Taitz would have missed the first deadline set forth in Section 23-15-961 and the result would be the same: dismissal for failure to comply with the deadlines in Section 23-15-961. *See Gourlay*, 874 So.2d at 988.

is requesting mandamus relief against the Secretary of State. *See Dupree*, 967 So.2d at 28 (“The writ of mandamus exists to force an elected official to perform a duty of office.”). Four “essential elements” must coexist before a writ of mandamus may issue: “(1) the petitioner must be authorized to bring the suit, (2) there must be a clear right in petitioner to the relief sought, (3) there must exist a legal duty on the part of the defendant to do the thing which the petitioner seeks to compel, and (4) there must be no other adequate remedy at law.” *Bennett v. Board of Sup'rs of Pearl River County*, 987 So.2d 984, 986 (Miss. 2008). An official can only be mandamusd to perform a ministerial, as opposed to a discretionary, act. *In re Election for House of Representatives Dist. 71*, 987 So.2d 917, 920 (Miss. 2008). Finally, because a writ of mandamus must be premised on a clear legal right to have the officer perform the duty sought to be compelled, a “mandamus cannot be availed of to compel an officer to do that which he has no legal right to do.” *Board of Sup'rs of Winston County v. Adams*, 144 So. 476, 477 (Miss. 1932).

Here, Taitz has the burden of demonstrating that the Secretary of State has a clear legal duty under state law to determine whether a candidate is qualified to be President before placing that candidate on the primary ballot. Taitz has not, and cannot, demonstrate such a duty for the Secretary of State under state law. Code Section 23-15-1089 authorizes the Secretary of State to make one, and only one, determination about a presidential candidate: whether he or she is “generally recognized throughout the United States or Mississippi as a candidate for the nomination of President of the United States.” If that person is generally recognized as a candidate, then the Secretary of State is required by law to place the name on the primary ballot. The statute does not authorize the Secretary of State to investigate whether a generally recognized candidate meets the qualifications for the office established by federal law. Section

23-15-1089 simply does not impose a “clear legal duty” on the Secretary of State to undertake such a review and, therefore, mandamus relief cannot be ordered.

The conclusion that Mississippi’s statute regarding presidential primary ballots does not authorize the Secretary of State to examine the qualifications of a “generally recognized” candidate is supported by a California court’s interpretation of that state’s materially identical statutory language. In *Keyes v. Bowen*, 189 Cal.App.4th 647 (Cal.App. 3 Dist. 2010), the court affirmed the dismissal of a mandamus action against the California Secretary of State seeking to remove then candidate Barack Obama from the primary ballot. California’s statute required the Secretary of State to “place the name of a candidate upon the presidential primary ballot when he or she has determined that the candidate is generally advocated for or recognized throughout the United States or California as actively seeking the nomination of the Democratic Party for President of the United States. . .” *Id.* at 658. The court found that this statute did not “impose a clear, present, or ministerial duty on the Secretary of State to determine whether the presidential candidate meets the eligibility criteria of the United States Constitution.” *Id.*

The *Keyes* court is correct. Taitz’s request for mandamus relief against the Secretary of State should be dismissed because Taitz cannot demonstrate that the Secretary of State has a clear legal duty under state law to determine whether a candidate is qualified to be President before placing that candidate on a party’s primary ballot.

IV. The petition fails to state a claim for any relief, including declaratory and injunctive relief, against the Secretary of State.

Regardless of whether the relief sought against the Secretary of State is classified as declaratory, injunctive, or in the nature of a writ of mandamus, the petition should be dismissed

for failure to state a claim. The central legal premise of Taitz's petition is that state law requires that there be a determination of a candidate's qualifications before that candidate can be placed on a party's presidential primary ballot. The petition cites no authority for that proposition because none exists.

In fact, state law clearly requires the Secretary of State to place on the primary ballot every person "generally recognized throughout the United States or Mississippi as a candidate for the nomination of President of the United States." Miss. Code Ann. § 23-15-1089. State law imposes no other qualification for placement on the primary ballot other than to be a generally recognized candidate for the office. Since, the petition does not allege that President Obama is not generally recognized as a candidate for the nomination of President, the placement of President Obama's name on the primary ballot is appropriate and required under state law. The petition seeking the removal of President Obama from the primary ballot fails to state a claim as a matter of law.

V. Taitz lacks standing to pursue this action.

Standing is a jurisdictional requirement necessary to invoke the authority of the judiciary. *See In the Matter of the Enlargement and Extension of the Municipal Boundaries of the City of Horn Lake*, 822 So.2d 253, 255 (Miss. 2002). In Mississippi, parties have standing to sue "when they assert a colorable interest in the subject matter of the litigation or experience an adverse effect from the conduct of the defendant, or as otherwise provided by law." *Burgess v. City of Gulfport*, 814 So.2d 149, 152 -153 (Miss. 2002) (quoting *State v. Quitman County*, 807 So.2d 401, 405 (Miss. 2001)). In order to have standing to pursue declaratory, injunctive, or mandamus relief, Taitz must demonstrate some particularized harm or interest that "must be different from

the adverse effect experienced by the general public.” *Burgess*, 814 So.2d at 153; *see also City of Madison v. Bryan*, 763 So.2d 162, 166 (Miss. 2000); *Bennett*, 987 So.2d at 986 (“petitioners for writs of mandamus must also show that they have an interest ‘separate from or in excess of that of the general public’ in order to have standing”) (quoting *Aldridge v. West*, 929 So.2d 298, 302 (Miss. 2006)).

Taitz’s lack of standing is clear. First, Taitz has no particularized harm resulting from or interest in which candidates appear on the Mississippi Democratic Party’s presidential primary ballot. Any interest or impact she would experience by virtue of a candidate’s appearance on the ballot would be no different from that experienced by the general public and, thus, she lacks standing. *See Wilson v. City of Laurel*, 249 So.2d 801, 802 (Miss. 1971) (denying request for writ of mandamus to require city to hold election on bond issue because petitioners had failed to show that they would suffer any injury other than that suffered by the citizens of the City of Laurel as a whole). Second, Taitz lack of standing is even more pronounced given that she is not a resident of the State of Mississippi and cannot vote in Mississippi’s primary election.

VI. The petition and summons have not been properly served in the manner required by Rule 4(d)(5).

Additionally, Taitz’s petition should also be dismissed for insufficiency of service of process. Taitz attempted to satisfy her service of process requirement by leaving a copy of the Circuit Court Petition (without a summons) at the Secretary of State’s office. This is not proper service under Rule 4.

A motion to dismiss for insufficient of service of process under Rule 12(b)(5) is the correct procedural vehicle to challenge the mode of delivery or lack of delivery of the summons

and complaint. See *Public Employees' Retirement System of Mississippi v. Dillon*, 538 So.2d 327, 328 & n.1 (Miss. 1988). Pursuant to Rule 4(d)(5), the “summons and complaint shall be served together” and service upon an officer of the State of Mississippi must be made “by delivering a copy of the summons and complaint to the Attorney General of the State of Mississippi.” Leaving a copy of the Petition at the Secretary of State’s office does not constitute proper service on the Secretary of State under Rule 4(d)(5).

As set forth in the affidavit affixed to the Secretary of State’s Motion, the Attorney General’s Office has not yet been served with a copy of the petition and summons in this matter.³ See Affidavit of Diana Ware, Exhibit A to Motion. While Taitz may still have time to serve the petition and summons under Rule 4(h), this matter cannot be heard unless and until the petition is properly served.

Conclusion

For the above reasons, and those set forth in the Secretary of State’s separate Motion to Dismiss filed with the Court, the petition filed in this action should be dismissed.

THIS the 29th day of February, 2012.

³ A court may consider evidence outside of the pleadings when resolving a Rule 12(b)(5) challenge to the sufficiency of service without converting the motion to dismiss into a motion for summary judgment. *Stutts v. Miller*, 37 So.3d 1, 3 & n.3 (Miss. 2010); accord *Thomas v. New Leaders for New Schools*, 2011 WL 6329865, at * 3 (E.D.La. 2011).

Respectfully submitted,

Delbert Hosemann, Mississippi
Secretary of State

BY: Jim Hood, Attorney General
State of Mississippi

BY:



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on the following persons by US Mail, properly addressed and postage prepaid, and/or by other means where indicated:

Orly Taitz (via overnight mail)
29839 Santa Margarita Parkway, Suite 100
Rancho Santa Margarita, CA 92688

Samuel L. Begley
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P.O. Box 287
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THIS the 29th day of February, 2012.



Justin L. Matheny