

Martin Romeril, a judge of elections in Bethlehem, offered suggestions for how to improve the ballot and make it easier for voters to make their selections, and said more machines will be needed next year. But in emails to Hess, the county's acting elections registrar, Romeril also defended how the election went.

"So far, very few problems have been experienced by voters," Romeril wrote that night. "We have counseled patience, and the voters have all left the polling station confident that they were able to cast their ballot as they intended."

Two days later, election commissioner Maudeania Hornik also reached out to Hess, expressing appreciation for the extra work the elections office had done.

"I'm not interested in meeting and pointing fingers, an error is an error," Hornik wrote. "That's just part of life, it's not perfect, there's plenty gray."

On Dec. 19, Hornik joined her colleagues in [expressing no confidence in the machines](#), saying she was "extremely disappointed" in their performance. Her comment came after representatives of the Democratic and Republican county committees urged Northampton County to

consider a new system in 2020, saying voter confidence was too badly
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Despite the bipartisan appeal, the machines are on course to see at least another election. Richard Santee, the solicitor to the Election Commission Board, said for a new system to be purchased, county council and the county executive would also have to be on board. And county council members have indicated they'll give ES&S another shot in April.

Council President Ron Heckman said a list of logistical realities make that necessary. For the county to have a new system in place for the primary, council would have four months to:

- Reach its own consensus on adopting a new system and notify the Election Commission Board
- Wait for the volunteer board with four new members to research other systems and identify what system to use in future elections
- Find millions of dollars in the budget to buy that system
- Give the McClure administration and a new vendor time to negotiate a contract and ship hundreds of devices to the county
- Update county equipment to interact with the voting system
- Train staff, poll workers and voters on how to use the voting system
- Perform all the routine preparations that take place before an election, including testing the system, readying the ballot and delivering the machines to polling stations

“The plane is already up in the air. We can’t get out now,” Heckman said.

Councilwoman Peg Ferraro said she was appalled by ES&S’s performance last month. Had the company followed its own protocols, none of the problems voters experienced should have occurred, she said.

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But Ferraro said that because the failures have been identified, she's more confident that they won't happen again. ES&S will be motivated to deliver a smooth election experience, and county officials will not tolerate more mishaps, she said.

If anything, Ferraro wants to double down on the machines by buying more to ensure lines don't grow too long on Election Day. She also called on the county to step up efforts to familiarize voters with the machines. The machines should be introduced in public areas such as libraries and supermarkets with election staff on hand to explain how they work, she said.

"These machines need to be all over. Have people vote [on pretend ballots] all the time. Just let them vote," Ferraro said.

Morning Call reporter Riley Yates can be reached at 610-253-5751 or riley.yates@mcall.com.

Riley Yates



Riley Yates is an investigative reporter with The Morning Call who focuses on criminal justice and the courts. A transplant to the Northeast, Yates was born in Petersburg, Alaska, and grew up there and in Seattle. He has reported from the Northampton County Courthouse in Easton since 2008.

Tom Shortell



Tom Shortell covers transportation and county government in the Lehigh Valley for The Morning Call. He's previously covered the Slate Belt, Northampton County Court, Jersey City, NJ and the Jersey Shore. A graduate of St. Bonaventure University, Shortell will gladly pay you Tuesday for a hamburger today.

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EXHIBIT 12

COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY
COMMONWEALTH OF PENNSYLVANIA
CIVIL DIVISION

IN RE: 2019 Municipal : CV-2019-10404
Election, :
: :
: :
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NOTES OF PROCEEDINGS

BEFORE **THE HONORABLE STEPHEN G. BARATTA**,
Judge, Northampton County, Third Judicial District,
Easton, Pennsylvania, Courtroom No. 4, on Tuesday,
November 5, 2019.

APPEARANCES:

ROBERT A. NITCHKEY, JR., ESQUIRE
Hemstreet, Nitchkey & Freidl
730 Washington Street
Easton, PA 18042
-- For Court of Common Pleas
The Honorable Michael J. Koury, Jr. and
The Honorable Craig A. Dally

RICHARD E. SANTEE, JR., ESQUIRE
Shay, Santee & Kelhart
44 East Broad Street, Suite 210
Bethlehem, PA 18018
-- Solicitor for the County

OFFICIAL COURT REPORTER
STACEY JACOVINICH

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I N D E X

WITNESSES

ALL WITNESSES:	PAGE:
Amy Hess: Examination	16:1
Charles Dertinger: Direct Examination by Mr. Santee	45:1
Cross-Examination by Mr. Nitchkey	52:2

EXHIBITS

None

1 THE COURT: All right. Why are we
2 here?

3 MR. NITCHKEY: Your Honor, this is our
4 Motion to open the record. We were before --

5 THE COURT: Our motion would be?

6 MR. NITCHKEY: On behalf of President
7 Judge Koury and Judge Dally, who are the movants in
8 this matter.

9 THE COURT: You want to re-open the
10 record?

11 MR. NITCHKEY: Yes.

12 THE COURT: Well, the record wasn't
13 made in front of me.

14 MR. NITCHKEY: No. And that was -- we
15 have the Order.

16 THE COURT: So I'm at a disadvantage,
17 so why don't we just make our own record.

18 MR. NITCHKEY: Okay. If I can hand
19 this up. We had a hearing before Judge McFadden
20 earlier this afternoon.

21 THE COURT: Okay. I think I have a
22 copy of that. I'm aware. I spoke briefly with
23 Judge McFadden over lunch, since she was aware that
24 she would be handing off her election duties to me,
25 just to let me know that there were some questions

1 about certain, I guess, machines that weren't
2 registering yes or no votes or something like that.

3 MR. NITCHKEY: Correct.

4 THE COURT: And she indicated that she
5 directed that the Judges of Election at the precinct
6 could aid any voter should they ask for help.

7 MR. NITCHKEY: Correct.

8 THE COURT: That is about all I know.

9 MR. NITCHKEY: Since that time -- and
10 we don't have Amy Hess down here -- but Ms. Hess has
11 -- and I don't want to speak for her, but there have
12 been telephone calls received about problems with
13 machines.

14 THE COURT: From voters or from Judges
15 of Election?

16 MR. NITCHKEY: Judges of Election.
17 Specifically at the Farmersville Elementary School,
18 where -- and this still relates to the yes or no in
19 the periphery of the voting screen -- when it comes
20 to the retention of these two Judges, it would only
21 take no for an answer. It would not take the yes
22 button.

23 So now we're asking for The Court to
24 order that --

25 THE COURT: You mean, the machines were

1 programmed not to retain Judges Koury or Dally? Is
2 that what you're telling me?

3 MR. NITCHKEY: It does sound that way,
4 Judge.

5 THE COURT: Okay.

6 MR. NITCHKEY: And quite honestly,
7 there have been numerous other problems with voting
8 machines in that respect, but we won't go into that
9 now.

10 THE COURT: But it doesn't make sense
11 that that problem would be limited only to one
12 judicial district or one election district.

13 MR. NITCHKEY: No, probably not. And
14 that's why we're here because this could very well
15 --

16 THE COURT: So it's a county-wide
17 problem you're telling me?

18 MR. NITCHKEY: Well, I can't say that
19 for sure. I don't want to make any
20 misrepresentations.

21 THE COURT: I assume you represent the
22 election commission?

23 MR. SANTEE: Yes, Your Honor.

24 THE COURT: What do you know about
25 this, Mr. Santee?

1 MR. SANTEE: There have been reports.
2 How this particular report got reported to -- and,
3 again, the acting chief clerk Amy Hess isn't here.

4 THE COURT: Do we need her?

5 MR. SANTEE: Well, I don't believe so
6 based -- Your Honor -- well, just, Your Honor, I
7 don't believe so right now. Certainly Your Honor
8 will have an opportunity to decide that, but it's
9 neither here nor there exactly how this got
10 reported. It got reported when someone from --

11 THE COURT: I get -- you're in
12 agreement, apparently, that there's been some
13 complaints?

14 MR. SANTEE: There was -- and it was
15 recently brought to our attention, and we've been --

16 THE COURT: Is it county-wide, is what
17 I'm asking?

18 MR. SANTEE: We are not aware of the --
19 I don't want to speak that it's county-wide because
20 we are aware of reports. And it's more than one,
21 but we can't speak to the volume or whether it's in
22 every voting district in the county. But there have
23 been reports of issues with machines.

24 THE COURT: And Mr. Nitchkey couches
25 the problem as Judge Dally and Judge Koury's

1 retention elections only allow voters to vote no and
2 not yes.

3 MR. SANTEE: There was -- that was the
4 report that we received from one particular
5 district.

6 THE COURT: Okay.

7 MR. SANTEE: In one particular
8 district, we got that report. That's what spurred
9 this Motion. There have been reports of other
10 complaints with regard to yes/no retention questions
11 that were addressed earlier with Judge McFadden.

12 THE COURT: Okay.

13 MR. SANTEE: And --

14 THE COURT: Is it an ongoing problem or
15 did you resolve it after your meeting with Judge
16 McFadden?

17 MR. SANTEE: We've been addressing
18 problems as they are reported, Your Honor. And so
19 in terms of whether it's ongoing -- all we can do is
20 respond to reports as they come in.

21 THE COURT: You're not a software guy.
22 I understand that.

23 MR. SANTEE: Correct.

24 THE COURT: Do you know what the
25 problem is though?

1 MR. SANTEE: I would have to talk to
2 the software people.

3 THE COURT: Okay. Did Judge McFadden
4 suggest that there might be software people
5 available today?

6 MR. SANTEE: No, she did not suggest
7 it. I don't think -- I don't know if she suggested
8 that. Your Honor --

9 THE COURT: Because I asked a question
10 to her about -- it just didn't make sense that it
11 would be limited only to certain machines. If
12 there's a software glitch on one or two machines, it
13 should be county-wide probably.

14 MR. SANTEE: It might not be a software
15 issue. It might be a calibration issue with the
16 screen.

17 THE COURT: Calibration issue?

18 MR. SANTEE: That may be an issue.
19 Which is different --

20 THE COURT: You mean, the touch screen
21 might be defective?

22 MR. SANTEE: The touch screen may not
23 be sensitive correctly on particular machines to
24 register the vote. It's a -- Your Honor, again,
25 speaking to the limits of my technological know-how,

1 this is secondhand information.

2 THE COURT: Okay. Well, I guess what I
3 should do right now is have Mr. Nitchkey describe
4 for me the extent of the problem from his
5 standpoint. I'll hear from you then about any
6 additional information or objections you might want
7 to raise. And then we'll have to discuss what
8 possibly could be done.

9 Does that make sense?

10 MR. SANTEE: Yes, Your Honor.

11 THE COURT: Why don't you give me an
12 offer of proof, first, as to what you believe the
13 problem is?

14 MR. NITCHKEY: Judge, the problem, as
15 we understand it, in addition to the one that was
16 testified to earlier today --

17 THE COURT: And that would be in
18 Farmersville?

19 MR. NITCHKEY: No. No. No. Earlier
20 today was wider spread. It was in a number of
21 different polling places.

22 THE COURT: Okay.

23 MR. NITCHKEY: And the Order that you
24 have in front of you required the voting office to
25 notify all Judges of Elections that if the voter had

1 a problem with any yes/no question, they were
2 supposed to ask for help.

3 Now we're in a situation where --

4 PRESIDENT JUDGE KOURY: They were
5 supposed to instruct the voter before they went in.

6 MR. NITCHKEY: Exactly. Before they
7 went in. Right. Now we're in a situation where,
8 when it comes to the retention of these two Judges,
9 it will not accept a yes vote. It will only accept
10 a no vote. So our position is --

11 THE COURT: Now, can I ask this
12 question --

13 MR. NITCHKEY: Sure.

14 THE COURT: -- because I've only seen
15 the machines for the first time today.

16 MR. NITCHKEY: Right.

17 THE COURT: These machines spit out --
18 they don't spit out. They swallow a paper ballot
19 into the machine somewhere.

20 MR. NITCHKEY: That's after you
21 complete your vote.

22 THE COURT: Right.

23 MR. NITCHKEY: Push the button to bring
24 the paper down, check to make sure all of your votes
25 have been cast, and then press the cast button.

1 THE COURT: Okay. Has anyone been able
2 to check the paper ballot against the --

3 MR. NITCHKEY: They haven't gotten that
4 far because, in fact, the calls that came in said
5 that these two voters were disenfranchised with not
6 being able to make a yes vote and walked out of the
7 booth.

8 THE COURT: Okay. So we're never going
9 to be able to check a voter who has complained about
10 being disenfranchised with a paper ballot because
11 there's no indication identifying that paper ballot
12 to a specific voter.

13 MR. NITCHKEY: That can be --

14 THE COURT: That shouldn't happen.

15 MR. NITCHKEY: That can be checked with
16 the testimony of Amy who took the call and was told
17 that by the Judge of Elections at the Freemansburg
18 poll.

19 THE COURT: I'm guessing, though, that
20 the machines keep everyone's vote anonymous so that
21 --

22 MR. NITCHKEY: Certainly.

23 THE COURT: -- so that the election
24 people can never determine what Baratta did when he
25 went into the ballot with regard to Judge Koury's

1 election.

2 MR. NITCHKEY: Actually, I'll disagree
3 respectfully. Because the way these new machines
4 are set up -- okay -- if they did not complete their
5 vote, the workers -- the poll worker would have to
6 go in and press the cast to bring the sheet down to
7 remove it to destroy it.

8 THE COURT: Okay. Well, I'm just
9 saying that people who make complaints, though, we
10 can't, in any way, verify --

11 MR. NITCHKEY: Other than the testimony
12 of --

13 THE COURT: Other than the individual
14 testimony of the voter believing that their vote was
15 not recorded.

16 MR. NITCHKEY: Well, the testimony of
17 Amy who took the call directly from the Judge of
18 Elections.

19 THE COURT: Right, but that's a hearsay
20 --

21 MR. NITCHKEY: I understand that, Your
22 Honor.

23 THE COURT: I'm saying that the only
24 people who can discuss the issue about whether or
25 not their vote was actually calculated would be the

1 individual --

2 MR. NITCHKEY: Right.

3 THE COURT: -- voter.

4 MR. NITCHKEY: But these are exigent
5 circumstances. I understand it's hearsay.

6 THE COURT: So you believe that this is
7 county-wide. How pervasive is it? Is it every
8 voter? Is it just a few voters who have complained?

9 MR. NITCHKEY: Again, I cannot stand
10 here and represent that it's county-wide. All we
11 have is the reports that we've received. This
12 particular problem seemed to be only at the
13 Farmersville poll, as opposed to the problem earlier
14 today which was at quite a number of different
15 polls. But what we're asking --

16 THE COURT: So you believe there's a
17 problem. It's from information that's been provided
18 to the -- our election office.

19 MR. NITCHKEY: That's correct.

20 THE COURT: Our Bureau of Election, I
21 think.

22 MR. NITCHKEY: Yes.

23 THE COURT: But you don't know how
24 extensive it is?

25 MR. NITCHKEY: I do not.

1 THE COURT: Is that a fair statement as
2 to what the issue is?

3 MR. SANTEE: Certainly, generally
4 speaking, yes. That's essentially the issue, is
5 that we're not sure -- we're not going to agree
6 necessarily --

7 THE COURT: Well, you have your --

8 MR. SANTEE: I do have my clerk here.
9 And so but --

10 THE COURT: Perhaps she can give us a
11 better idea since she's fielding the complaints I
12 think; right?

13 MR. SANTEE: Well, she's fielding the
14 complaints that were brought to her attention.
15 Because in this particular instance, we weren't
16 aware of the complaint until a member from Judge
17 Koury's campaign brought it to our attention. And
18 then she spoke with the -- to the issue on that one.

19 THE COURT: Can we hear from Amy?
20 Maybe Amy can tell us from her standpoint what she
21 thinks the problem might be. That might be helpful.

22 MR. SANTEE: And so in terms of --
23 we're talking about, right now, at the Farmersville
24 polling place; correct?

25 THE COURT: No, I think he's talking

1 about county-wide, I believe.

2 MR. NITCHKEY: Yes. Any other calls
3 she's received.

4 MR. SANTEE: Okay. So any other calls
5 she's received about the problem with the yes/no
6 questions.

7 MR. NITCHKEY: Right. And specifically
8 only being able to vote no on the retention issue
9 for these two Judges.

10 THE COURT: All right. This is what
11 would help me: If Amy can tell me what she believes
12 the problem is from her standpoint. Because she
13 would know more than anyone else as to what the
14 complaints are; is that fair?

15 MS. HESS: Yes.

16 MR. SANTEE: Ms. Hess can testify about
17 the complaints she's received.

18 THE COURT: Right. I just want, from
19 her standpoint, what is the problem? How pervasive
20 is it from her knowledge? That's all I want to
21 know.

22 MR. SANTEE: Understood, Your Honor.

23 THE COURT: Amy?

24 **AMY HESS,**

25 **having been duly sworn according to law,**

1 **was examined and testified as follows:**

2 THE COURT: State your name for the
3 record.

4 THE WITNESS: Amy Hess.

5 THE COURT: And your position.

6 THE WITNESS: Acting election register.

7 THE COURT: Acting?

8 THE WITNESS: I'm acting, yes.

9 THE COURT: All right. What can you
10 tell me about this issue?

11 THE WITNESS: The issue that they had
12 just brought up -- that a voter went in and voted
13 yes for Mr. Koury -- Judge Koury, sorry. Voted yes
14 and then it went to no. This is the first time I'm
15 hearing about that.

16 THE COURT: When you say -- how does
17 the voter know that it went to no? I don't know.

18 MR. NITCHKEY: They light up. I'm
19 sorry. I didn't mean to --

20 THE COURT: Well, what does that mean?
21 You mean, you pressed the button for yes, that's
22 supposed to light up, and instead the no --

23 THE WITNESS: Correct.

24 THE COURT: And when you press the no
25 button, does the yes come on?

1 THE WITNESS: That I am unaware of.

2 THE COURT: Okay. So how many
3 complaints like that have you received?

4 THE WITNESS: This one is the first of
5 that nature.

6 THE COURT: But wait. I thought there
7 were complaints earlier today before Judge McFadden?

8 THE WITNESS: There were.

9 THE COURT: Were they the same type of
10 complaints?

11 THE WITNESS: No.

12 THE COURT: What were the complaints
13 this morning?

14 THE WITNESS: This morning, the
15 complaints were that when somebody went to vote for
16 the yes or no questions on the ballot, none of them
17 were lighting up.

18 THE COURT: All right. So they were
19 also having yes or no issues -- having their vote
20 recorded, but it was not for the Judges. It was for
21 the ballot question?

22 THE WITNESS: It was for the Judges,
23 those questions, yes.

24 THE COURT: Okay. So it's a similar
25 problem. It's a similar problem as of this morning?

1 THE WITNESS: Correct.

2 THE COURT: Okay. Do you know how many
3 complaints you've gotten?

4 THE WITNESS: Quite a few. Offhand, I
5 do not have a direct number.

6 THE COURT: Okay. All right.

7 MR. NITCHKEY: The difference between
8 this morning and this afternoon is --

9 THE COURT: Let's assume that there is
10 some type of glitch with the machines.

11 MR. NITCHKEY: Right.

12 THE COURT: It's 4:15 in the afternoon.

13 MR. NITCHKEY: Understood.

14 THE COURT: What relief do you think I
15 can give you?

16 MR. NITCHKEY: What we're asking for,
17 Your Honor -- earlier it was established that at
18 each of the 156 polling places, there is someone
19 there who has a cell phone.

20 So we're asking that The Court issue an
21 Order directing the voter office to contact each
22 one, and tell them that if there is a problem --

23 THE COURT: Each one?

24 MR. NITCHKEY: Each of the voting
25 stations.

1 THE COURT: Okay.

2 MR. NITCHKEY: And tell them -- tell
3 the Judge of Elections to instruct their poll
4 workers that if there is a similar problem with the
5 yes/no on the retention, or any other yes/no, that
6 either under the Election Code that machine be shut
7 down. And/or before the voter go in, that they be
8 instructed that if the yes/no does not work, that
9 they be offered the opportunity to fill out a paper
10 ballot instead.

11 THE COURT: Okay. Well, let's assume
12 that some of these districts have only one machine.
13 So if that machine is giving a voter difficulty, do
14 you have paper ballots available? You have blank
15 ones, but do you have written paper ballots
16 available?

17 THE WITNESS: We have emergency ballots
18 that every district was given. And we only have the
19 amount of 25 per every district.

20 THE COURT: So that probably won't be
21 enough.

22 MR. NITCHKEY: Not judging by the
23 turnout today.

24 THE COURT: Okay. So you want me to
25 direct our Clerk of Elections -- or Director of

1 Elections -- Commissioner of Elections?

2 THE WITNESS: Acting.

3 THE COURT: Acting commissioner.

4 MR. SANTEE: Acting clerk.

5 THE COURT: Acting Clerk of Elections,
6 to contact all the districts, and tell them that if
7 any machine is giving them difficulty, they're
8 directed to shut that machine down?

9 MR. NITCHKEY: Yes. And/or tell the
10 voter before they go into the booth that if they
11 cannot register a yes on the yes or no questions,
12 they should step out and fill out a paper ballot.
13 And tell them that before they go into the booth.

14 THE COURT: Mr. Santee?

15 MR. SANTEE: Your Honor, that's outside
16 the scope of the Election Code. Under the Election
17 Code, there is a provision about emergency ballots.
18 That if 50 percent or more of the machines in the
19 precinct are inoperable, you go to emergency
20 ballots. Any ballot available can be used.

21 THE COURT: And the keyword is
22 inoperable.

23 MR. SANTEE: Correct.

24 THE COURT: So if there's a voter who
25 claims that his or her vote is not being registered,

1 is that machine then inoperable?

2 MR. SANTEE: The voter would -- it
3 would have to be investigated by the poll worker.
4 The voter is -- should ask for help.

5 THE COURT: How does a poll worker
6 determine that the machine is inoperable?

7 MR. SANTEE: The poll worker can, upon
8 request, assist the voter and the voter can indicate
9 --

10 THE COURT: So if the poll worker can't
11 make the machine accept the vote as directed by the
12 voter, then that poll worker can declare that
13 machine inoperable?

14 MR. SANTEE: The Judge of Elections is
15 the only individual at a polling place. And the
16 Judge of Elections would then call the elections
17 office here for a fix before declaring it
18 inoperable. It's not something that --

19 THE COURT: Well, my guess is no other
20 voter should be allowed to go in then if they're
21 having a problem at that point with the machine.

22 MR. NITCHKEY: Agreed.

23 THE COURT: If the Judge of Elections
24 says, I can't make this machine work right, I don't
25 know that we should allow anybody else in there;

1 should we?

2 MR. SANTEE: And, Your Honor, I can't
3 speak to a specific -- with regards to the Judge of
4 Elections duties, we rely on the discretion at that
5 point.

6 THE COURT: This is the problem:
7 There's some case law about this. And that if
8 there's a number of voters who claim that they were
9 denied the opportunity to register a vote, the
10 entire election could be declared -- and set aside.
11 And we might have to do this all over again.

12 So this gets to be a really serious
13 problem. And I'd like to try to fix it as best I
14 can right now to avoid that serious problem. But if
15 we can't come up with an agreement that addresses
16 this issue, and there are voters that come forward
17 -- if we get ten voters that come forward and claim
18 that their vote was not cast, we got a big problem,
19 I think, here.

20 MR. SANTEE: We want to fix this too.
21 There's no doubt that we want to make sure that this
22 election -- all votes are counted. And it's coming
23 up with a solution.

24 THE COURT: Well, will you accept at
25 this point the proposal by Mr. Nitchkey that will

1 address this issue?

2 MR. SANTEE: What we can -- well, not
3 necessarily -- in terms of asking the poll workers
4 for help, we've already contacted the Judge of
5 Elections and told them to instruct voters, before
6 they enter, that if they're having a problem with
7 the yes or no questions that they ask for help. I
8 think that's still the workaround. That's what they
9 all should be doing at this point.

10 THE COURT: Well, have you been getting
11 reports from your Judges of Election that when they
12 give help, they're able to make the machine work
13 right?

14 MR. SANTEE: I can't speak to that,
15 Your Honor.

16 THE COURT: What do you hear, Amy,
17 anything?

18 THE WITNESS: You mean if a voter
19 cannot vote correctly?

20 THE COURT: Well, has a voter come out
21 and said, hey, my machine is not taking my vote --
22 has your Judge of Election been able to go in and
23 help that voter and properly have that voter's
24 selection registered?

25 THE WITNESS: Yes, in some cases this

1 morning.

2 THE COURT: In some cases?

3 MR. NITCHKEY: But not all.

4 THE WITNESS: This morning, yes. When
5 the questions were not registering when they were
6 pressing the buttons, yes.

7 MR. NITCHKEY: But that was when only
8 one of them worked -- or neither one worked. Now,
9 only one is working. And that seriously jeopardizes
10 the outcome of this election, Your Honor. I think
11 it's reasonable.

12 THE COURT: Well, pretty soon people
13 are off of work. And there's going to be a bit of a
14 -- there's going to be a fair number of voters yet
15 to vote.

16 MR. NITCHKEY: Agreed. That's why it's
17 so important.

18 THE COURT: What are we going to do,
19 have the Judges of Election get up every five
20 minutes and repeat instructions over and over again
21 for the new people to come in? I mean, I don't
22 understand what we're supposed to do.

23 MR. NITCHKEY: Quite honestly, Your
24 Honor, the lines are so long at this election that
25 there is plenty of time to assign the Judge of

1 Election to instruct each voter, as they're standing
2 in line --

3 THE COURT: Each voter?

4 MR. NITCHKEY: Pardon?

5 THE COURT: You want your Judges of
6 Election to talk to each voter individually about
7 the problems?

8 MR. NITCHKEY: Yes. Or perhaps put a
9 sign up. I mean --

10 THE COURT: I mean, how many -- they
11 have to man the books. You know, they do a lot of
12 things. They're not going to be able to talk to
13 each voter before they vote.

14 MR. NITCHKEY: The alternative, though,
15 Your Honor, as you pointed out, is that these voters
16 may not be able to cast the vote that they want to
17 cast. And that's a huge problem.

18 THE COURT: But that's a problem that
19 we don't identify and resolve today. The only thing
20 we can try to do right now is assist these voters to
21 make sure their vote is registered.

22 You're suggesting that we continue to
23 have the Judge of Elections instruct people that are
24 -- anyone who's having difficulty to come out and
25 ask for help. I think we're probably okay with

1 that; correct?

2 MR. SANTEE: Yes, Your Honor.

3 THE COURT: All right. What else can I
4 do, other than that?

5 MR. NITCHKEY: Well, they should be
6 alerted that they may have difficulty with the
7 yes/no vote on the periphery of the screen. And
8 that if they do, they are to come out and ask to
9 fill out a paper ballot.

10 And quite honestly --

11 THE COURT: The -- addressed in the --
12 it's not like the last word on procedure, but,
13 generally, it is when the machines are not
14 available, then we turn to the emergency paper
15 ballots.

16 MR. NITCHKEY: Well, doesn't an
17 inoperable machine become an unavailable machine?

18 THE COURT: Yes, that's what I mean.
19 It's inoperable.

20 MR. NITCHKEY: Right. And if this
21 happens repeatedly --

22 THE COURT: Someone is going to have to
23 make that conclusion.

24 MR. NITCHKEY: That's why we asked for
25 what we asked for.

1 THE COURT: I still don't understand
2 exactly what the resolution is from today going
3 forward to the end of election. And I don't know if
4 it really fixes anything because we've already been
5 voting for, what, nine hours? I mean, we can't
6 correct any past -- if there were past problems with
7 the machines, those voters may have been
8 disenfranchised. I don't know. I don't know how we
9 address that.

10 But going forward, if it resolves the
11 issue now, just giving instructions, I'm okay with
12 that. I don't know that you have to talk to each
13 voter one by one, but there has to be some kind of
14 warning that there might be a problem. And if you
15 have a problem, let us know right away and our Judge
16 of Election will try to assist you. It seems to be
17 reasonable.

18 MR. NITCHKEY: How about if each
19 polling place is instructed to put a sign up? If
20 the yes/no question buttons do not --

21 THE COURT: Yes, but who has the
22 crayons and the paper and all that other stuff to do
23 a sign? You know, these -- I can't order them to
24 make a sign because I don't know that they're going
25 to be able to do that.

1 MR. NITCHKEY: Right.

2 THE COURT: You know, and then they
3 don't comply with my Order. So I don't know that I
4 can say, make a sign.

5 MR. SANTEE: Your Honor, there was an
6 Order issued that directed the Judges of Election to
7 instruct the poll workers to alert voters before
8 entering. Because there is time for a machine
9 operator, before the voter goes in, to say, if you
10 have a problem with the yes/no questions, please let
11 us know. And there are technicians going out all
12 the time.

13 THE COURT: Let's do this. As quick as
14 you can, write out the instructions that you want
15 them to give, so I can give them to our clerk to
16 relay to her people, these are the instructions you
17 have to give. And anyone who has a problem then,
18 you assist them.

19 MR. NITCHKEY: Okay.

20 THE COURT: And if their vote still is
21 not recorded, note that because we have to know
22 about that later.

23 MR. NITCHKEY: Surely.

24 THE COURT: Okay. I don't know what
25 else I can do.

1 Do you guys want to testify or say
2 anything? I mean, you -- you're on the ballot. I
3 don't know if there's anything else that you think
4 that should be done.

5 PRESIDENT JUDGE KOURY: Well, Judge, we
6 already have an Order from Judge McFadden saying
7 that if -- that the poll worker must instruct the
8 voter with a certain sentence. So they already are
9 required to say that.

10 MR. NITCHKEY: To each voter.

11 PRESIDENT JUDGE KOURY: Now, we've
12 reached a new level at this point. And the new
13 level is that the machines are not allowing the
14 voters to vote yes. So the machine is inoperable
15 with respect to our question. All the issues today
16 that were reported were only with respect to the
17 bottom right corner of the screen with respect to
18 where Judge Dally and I are.

19 THE COURT: Judge Koury -- and I
20 understand what you're saying now. And that may
21 very well be true, but if the machines are
22 inoperable, then probably the entire election is
23 going to be invalidated. Because I can't correct
24 that now.

25 PRESIDENT JUDGE KOURY: Sure. I

1 understand that, but the request we are asking for
2 is: That if the machine is not allowing the voter
3 to vote yes, then we believe it's inoperable, it
4 should be shut down, and people should be allowed to
5 vote only by paper ballot.

6 THE COURT: Let me ask this question:
7 If you get 51 percent of the voters saying yes, is
8 that okay? Or do you want a high number?

9 PRESIDENT JUDGE KOURY: If there's one
10 person who was disenfranchised out of the 50,000
11 that vote, then we've done a disservice to our
12 county after spending all of that money for the
13 machines. That's my position.

14 THE COURT: That may be true, but the
15 question is ultimately: I think if there's a
16 problem with regard to disenfranchisement, it's
17 already occurred.

18 PRESIDENT JUDGE KOURY: It's occurring
19 all day today. It's been continuing continuously,
20 and it hasn't been fixed.

21 THE COURT: I know, but I can't rule on
22 any of the machines being inoperable at this point
23 without a record with regard to the individual
24 machine. And we can't even do that now. So all we
25 can do is give some kind of instructions right now

1 and wait until a final record can be made with
2 regard to people who may have been disenfranchised.

3 JUDGE DALLY: If I can just say
4 something. And I understand what The Court is
5 saying. The only concern I have, and maybe it's
6 contrary to what Judge Koury is looking for, but the
7 concern you have when you're making a machine
8 inoperable is: What happen to the people that are
9 there to vote? Unless you have enough emergency
10 ballots for them to use.

11 THE COURT: Well, they don't. They
12 only have 25.

13 JUDGE DALLY: Right.

14 THE COURT: But my guess is they
15 probably have a box somewhere and they can
16 distribute more, I guess; right?

17 THE WITNESS: We have a printer.

18 THE COURT: You have to print more?

19 THE WITNESS: Yes.

20 THE COURT: All right. Well, you know,
21 we can always ask that more get sent out. But the
22 Judge of Elections has to make a determination that
23 there's a machine inoperable in order to move to the
24 paper ballots; right?

25 JUDGE DALLY: And you don't want to

1 disenfranchise those that are waiting in line either
2 that are going to say, well, I'm not going to wait
3 in line, I want to go home.

4 THE COURT: I agree.

5 JUDGE DALLY: So that's the other
6 concern.

7 THE COURT: But in order for The Court
8 now to order them to use the paper ballots, there
9 has to be a declaration that the machines are
10 inoperable. I don't know that I can do that on this
11 record at this point.

12 JUDGE DALLY: I understand that. But
13 the other reason we wanted to come into court this
14 afternoon with these new allegations -- or the new
15 facts that were developed -- was because -- to make
16 another record today as to what occurred.

17 THE COURT: Just out of curiosity, has
18 there been any reports of problems with regard to
19 the people that are in the contested elections?

20 MR. NITCHKEY: Yes.

21 THE COURT: Meaning the people in the
22 left side of the ballot? So people who were voting
23 for the two open judge spots, the DA spot, the
24 school board, and the county council; are they
25 having problems?

1 MR. NITCHKEY: Yes, Your Honor.

2 THE COURT: Have you received
3 information, Amy?

4 THE WITNESS: I did receive about two
5 phone calls.

6 THE COURT: So you're aware of two
7 complaints about some problems there?

8 MR. NITCHKEY: And I've heard from two
9 of your own county employees that they had
10 difficulty.

11 THE COURT: They're not my employees.
12 All right. All right. So I think write your
13 instructions. And Mr. Santee will take a look at
14 it, give it to Amy. And if it's different than what
15 they already have, you know, I'll direct that they
16 provide that instruction. I don't think that I can
17 do anything else, though, at this point.

18 MR. SANTEE: Your Honor, if I may.
19 With regard to the instruction, it would be to --

20 THE COURT: The instruction is: Be
21 careful about your vote; make sure it's registered
22 in the machine; if you have any concern that your
23 vote is not being registered, meaning the proper
24 button lighting up, let the Judge of Election know
25 so they can provide assistance.

1 MR. NITCHKEY: Specifically, let us
2 know.

3 THE COURT: And if the Judge of
4 Election can't fix the problem so that the voters'
5 selection is properly noted, then I think that
6 machine might have to be declared inoperable; right?

7 MR. SANTEE: Well, that's up to --

8 THE COURT: If you have one voter that
9 can't register a vote, then the problem -- it's a
10 machine problem and not a voter.

11 MR. SANTEE: That machine could be
12 stopped being used while they fix it.

13 THE COURT: Who's going to fix that?

14 MR. SANTEE: Well, they can call in and
15 they are support people both in the election offices
16 that go out to address these problems. Which has
17 been ongoing all day. And the Judge of Elections,
18 ultimately, as Your Honor pointed out, was
19 ultimately responsible for declaring that machine.

20 THE COURT: But if it takes two hours,
21 Mr. Santee, likely there are people that want to
22 vote that aren't going to stay around. And they're
23 going to be denied the opportunity to vote.

24 MR. SANTEE: Long lines are a concern,
25 Your Honor. That's something we don't want to see.

1 THE COURT: Right. Okay. I don't
2 think this can be fixed. I mean, you're registering
3 your problem. We have it of record, but --

4 MR. NITCHKEY: Excuse me. One minute,
5 Your Honor.

6 Your Honor, we're okay with the Order
7 the way it stands with the record that we've made.

8 THE COURT: Well, yes, but what we
9 discussed was that if there are -- if there needs to
10 be different instructions, that we agree as to the
11 instructions now and send the clerk out to provide
12 those instructions to her various Judges of
13 Elections.

14 So is that -- what Mr. Santee has, is
15 that the agreement?

16 MR. NITCHKEY: We haven't written
17 anything out yet.

18 THE COURT: Well, he's been writing it
19 down as he's been speaking.

20 MR. SANTEE: Well, I have -- so the
21 instruction -- if we could take a couple of minutes,
22 Your Honor, so it would be careful. Instruct -- be
23 careful. I guess -- because we want to make this --
24 and I'm sorry, Your Honor. We want to make this
25 succinct.

1 THE COURT: Right.

2 I think it should be that if anyone
3 here has concerns that their vote is not being
4 properly recorded by the machine, they should ask
5 the Judge of Election for help.

6 If the Judge of Election can't satisfy
7 the problem, then the Judge of Election should note
8 that the machine is currently inoperable and call
9 the clerk so that someone who's available to come
10 out can come out and look at the machine. I mean,
11 that's as succinct as I can --

12 MR. SANTEE: That's -- and, Your Honor,
13 I'm concerned about an Order directing the Judge of
14 Elections to declare a machine inoperable.

15 THE COURT: Well, when the Judge of
16 Elections can't make the machine register the vote
17 properly, it has to be inoperable. Because if your
18 Judge of Election can't vote right, how can you
19 expect the voter to vote right?

20 MR. SANTEE: And so, Your Honor --

21 THE COURT: You know what I'm saying?

22 MR. SANTEE: I understand what you're
23 saying. So this would be instructing the voter --

24 THE COURT: Because we don't -- we know
25 that the machine is presenting a problem for voters,

1 so let's take that machine out of circulation then,
2 if it's causing a problem.

3 I'm just thinking, Mr. Santee, this:
4 If a voter claims that his vote wasn't registered
5 and the machine didn't work right, and you continue
6 to use that machine and other people vote, the
7 question is going to be: Why is it that only one of
8 those voters was unable to use the machine and the
9 other voters were properly able to use it?

10 Because there are people that might not
11 realize that their vote is -- you know, they might
12 not be sophisticated enough to say, hey, all the
13 lights don't seem to be on right. They may be just
14 assuming that this machine works fine as it is. And
15 that's what your concern gets to be I think.

16 If the Judge of Election is going to
17 tell you that, I went in and I couldn't make the
18 machine work right, then what confidence can we have
19 that other people who come back to that and they
20 vote, that their vote is going to be properly
21 recorded?

22 MR. SANTEE: And that would be
23 something that the Judge of Elections makes that
24 determination.

25 THE COURT: He's going to have to make

1 that call, yes.

2 MR. SANTEE: Yes. And that would be
3 something -- the process would be the call.

4 THE COURT: And speak -- and consult
5 with the Clerk of Elections.

6 MR. SANTEE: That's fine. That's what
7 the process is.

8 **(Off the record discussion.)**

9 THE COURT: All right. Just so you do
10 know, I'm off the clock. Are we going to have any
11 more problems? It doesn't make any sense to have
12 someone else come in and hear this all over again.
13 If there are any more problems, give me a call and
14 I'll come in right away.

15 JUDGE DALLY: Your Honor, I know one
16 thing -- I'm surprised sitting here that the
17 elections office doesn't have a call log when they
18 get complaints. Do they?

19 THE COURT: I don't know.

20 THE WITNESS: Do we mark every
21 complaint?

22 JUDGE DALLY: Do you have a call log
23 when someone calls in with a complaint? Because
24 you're pretty -- your testimony here today is kind
25 of, well, we had a few, we had several.

1 THE WITNESS: Because there's so many
2 different people answering phones.

3 JUDGE DALLY: Okay. Do you have a call
4 log?

5 THE WITNESS: No, we do not.

6 JUDGE DALLY: Okay. I would request
7 that the Court order them to have a call log for
8 complaints.

9 THE COURT: Well, it would make sense
10 if you register the complaints that you get after
11 now. Just so we have some kind of diary about what
12 the complaints are. Because they might be different
13 kinds of complaints. They might not all be the same
14 thing, which would, you know, be helpful for you to
15 know that people might be complaining about
16 different things.

17 MR. SANTEE: Your Honor, if I may. The
18 County would like to put on some evidence. I'd like
19 to ask Charles Dertinger about the recording --
20 specifically with regard to a call log issue, but
21 there have been some issue -- concerns. He might be
22 better suited to speak to that.

23 THE COURT: You mean, he knows better
24 about how the clerk's office is running than your
25 clerk?

1 MR. SANTEE: No, Your Honor. It's the
2 direct administration -- being the supervisor of the
3 elections office.

4 THE COURT: That's fine. You can call
5 whomever you want. I don't care.

6 MR. SANTEE: Thank you, Your Honor.

7 MR. NITCHKEY: Does this go to the
8 problem that we're addressing now?

9 THE COURT: I have no idea.

10 MR. SANTEE: Well, now with the
11 reactions to the record that was made, it goes to
12 the record that was made, Your Honor. Especially,
13 what was --

14 THE COURT: About what record?

15 MR. SANTEE: About the problems with
16 all of the machines, efforts to fix, the call log
17 that was just recently raised.

18 THE COURT: Okay.

19 MR. NITCHKEY: And the only reason I'm
20 saying that is because of the hour. I mean, there's
21 -- the polls are open for another three hours.

22 PRESIDENT JUDGE KOURY: Can we get the
23 Order out first?

24 MR. NITCHKEY: Can we get this Order
25 signed and out to the poll workers before we

1 continue a record?

2 THE COURT: Well, if you don't need Amy
3 anymore, she can go back to her office and do that
4 then. If she's finished.

5 MR. SANTEE: So at this point then --

6 THE COURT: May she been released?

7 MR. NITCHKEY: Well, yes. Let me read
8 it into the record what we have, And now, this --

9 THE COURT: Just read the instructions.

10 MR. NITCHKEY: Voter Registration
11 Office shall immediately notify all Judges of
12 Election in Northampton County that each voter be
13 notified before going into the booth that if the
14 yes/no buttons do not work, the voter shall notify a
15 poll worker. And if the situation cannot be
16 remedied by the Judge of Elections, that machine
17 shall be declared inoperable and the voter shall
18 fill out an emergency ballot.

19 MR. SANTEE: Your Honor, in terms of
20 the declaration of the machine being inoperable,
21 look, practically speaking, if there's a problem
22 with the machine and it is inoperable, the Judge of
23 Elections should make -- that's what the Election
24 Code specifies; you have -- you should have
25 emergency ballots done. I think having a Court