

**BEFORE THE NEBRASKA TAX EQUALIZATION  
AND REVIEW COMMISSION**

|                       |   |                           |
|-----------------------|---|---------------------------|
| CYNTHIA K. MUTHS,     | ) |                           |
|                       | ) |                           |
| Appellant,            | ) | Case No. 08R 183          |
|                       | ) |                           |
| v.                    | ) | DECISION AND ORDER        |
|                       | ) | AFFIRMING THE DECISION OF |
| SARPY COUNTY BOARD OF | ) | THE SARPY COUNTY BOARD OF |
| EQUALIZATION,         | ) | EQUALIZATION              |
|                       | ) |                           |
| Appellee.             | ) |                           |

The above-captioned case was called for a hearing on the merits of an appeal by Cynthia K. Muths ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on August 14, 2009, pursuant to an Order for Hearing and Notice of Hearing issued May 8, 2009 as amended by an Order dated June 10, 2009. Commissioners Wickersham and Hotz were present. Commissioner Wickersham was the presiding hearing officer. Commissioner Warnes was excused from participation by the presiding hearing officer. Commissioner Salmon was absent. The appeal was heard by a quorum of a panel of the Commission.

Cynthia K. Muths was present at the hearing. Scott M. Vogt appeared as legal counsel for the Taxpayer.

Kerry A. Schmid, a Deputy County Attorney for Sarpy County, Nebraska, was present as legal counsel for the Sarpy County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits, and heard testimony.

The Commission is required to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. Neb. Rev. Stat. §77-

5018 (Cum. Supp. 2008). The final decision and order of the Commission in this case is as follows.

**I.  
ISSUES**

The Taxpayer has asserted that actual value of the subject property as of January 1, 2008, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining actual value of the subject property is unreasonable or arbitrary; and

The actual value of the subject property on January 1, 2008.

**II.  
FINDINGS OF FACT**

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains ("the Subject Property") is described in the table below.
3. Actual value of the subject property placed on the assessment roll as of January 1, 2008, ("the assessment date") by the Sarpy County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

Description: Lot 42 Prairie Ridge, Sarpy County, Nebraska.

|             | Assessor Notice Value | Taxpayer Protest Value | Board Determined Value |
|-------------|-----------------------|------------------------|------------------------|
| Land        | \$112,240.00          | \$110,000.00           | \$112,240.00           |
| Improvement | \$505,168.00          | \$385,000.00           | \$505,168.00           |
| Total       | \$617,408.00          | \$495,000.00           | \$617,408.00           |

4. An appeal of the County Board's decision was filed with the Commission.
5. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice.
6. An Order for Hearing and Notice of Hearing issued on May 8, 2009, as amended by an Order issued on June 10, 2009, set a hearing of the appeal for August 14, 2009, at 3:00 p.m. CDST.
7. An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
8. Actual value of the subject property as of the assessment date for the tax year 2008 is:

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Land value            \$112,240.00

Improvement value \$505,168.00

Total value            \$617,408.00.

### **III. APPLICABLE LAW**

1. Subject matter jurisdiction of the Commission in this appeal is over all questions necessary to determine taxable value. Neb. Rev. Stat. §77-5016(7) (Cum. Supp. 2008).

2. “Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm’s length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.” Neb. Rev. Stat. §77-112 (Reissue 2003).
3. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2003).
4. “Actual value, market value, and fair market value mean exactly the same thing.”  
*Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 ( 2002).
5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2003).
6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2008).

7. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
8. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987).
9. The presumption disappears if there is competent evidence to the contrary. *Id.*
10. The order, decision, determination, or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006).
11. Proof that the order, decision, determination, or action appealed from was unreasonable or arbitrary must be made by clear and convincing evidence. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
12. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).
13. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).

14. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).
15. “An owner who is familiar with his property and knows its worth is permitted to testify as to its value.” *U. S. Ecology v. Boyd County Bd. Of Equalization*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).
16. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
17. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by the county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
18. A Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965).

#### **IV. ANALYSIS**

The subject property is an improved residential parcel. The residence has 2,690 square feet on the ground floor, a 3,632 square foot basement with 2,385 square feet of partition finish,

and a 971 square foot garage. (E6:2 & 3). The residence also has an attached garage with 1,361 square feet, a porch, a patio, wood decks, 2 fireplaces, and a built-in bar. (E6:3). Heating for the residence is radiant floor heating with a heat pump. (E6:3). The Taxpayer testified that the exterior walls of the residence are twelve inches thick composed of poured concrete sandwiched between insulating foam.

Value as determined by the County Board was based on use of the cost approach. (E6:2 & 3 and E1). The Cost Approach includes six steps: “(1) Estimate the land (site) value as if vacant and available for development to its highest and best use; (2) Estimate the total cost new of the improvements as of the appraisal date, including direct costs, indirect costs, and entrepreneurial profit from market analysis; (3) Estimate the total amount of accrued depreciation attributable to physical deterioration, functional obsolescence, and external (economic) obsolescence; (4) Subtract the total amount of accrued depreciation from the total cost new of the primary improvements to arrive at the depreciated cost of improvements; (5) Estimate the total cost new of any accessory improvements and site improvements, then estimate and deduct all accrued depreciation from the total cost new of these improvements; (6) Add site value to the depreciated cost of the primary improvements, accessory improvements, and site improvements, to arrive at a value indication by the cost approach.” *Property Assessment Valuation*, 2<sup>nd</sup> Ed., International Association of Assessing Officers, 1996, pp. 128 - 129. The cost of various elements of the residence was determined based on data and calculations supplied by Marshall & Swift. (E6:3). The manual date for the costs used was 06/07. (E6:3). The Taxpayer contends that because the exterior walls of the residence are thicker than normal walls, twelve inches of poured concrete sandwiched between insulating foam with siding and some brick, that the

outside measurements when used in conjunction with the Marshall and Swift tables would overstate value. The belief that value would be overstated is based on an assumption that interior living space would be overstated in the calculations. The Marshall & Swift cost tables do not calculate the cost of living space, the calculation is for the cost of a structure. The quality of construction of the residence is rated as very good by the County Assessor. (E6:2). Various construction techniques are recognized, and costs for each technique are stated for a single story residence of very good quality construction. *Marshall & Swift Residential Cost Handbook*, Marshall & Swift/ Boeckh, LLC, (12/2006), p. VG-13. Poured concrete walls is one of the construction techniques recognized by Marshall and Swift. *Marshall & Swift Residential Cost Handbook*, Marshall & Swift/ Boeckh, LLC, (12/2006), p. VG-13.

The Taxpayer testified that actual cost to construct was less than the amount determined by use of the Marshall & Swift cost tables. The Taxpayer also testified that she had acted as her own general contractor. *Marshall & Swift Residential Cost Handbook*, Marshall & Swift/ Boeckh, LLC, (6/2005), p. 2. Costs of a general contractor are costs included in the Marshall & Swift calculation. To the extent that another person wishing to own a home with poured concrete walls would be willing to act as their own contractor the Taxpayer's argument is valid. The fact that those costs are included in typical costs by Marshall & Swift is evidence that homeowners acting as their own general contractor is not typical. In any event, the services of a general contractor add value, and to the extent that cost indicates value, the costs of a general contractor are estimated by Marshall & Swift. Marshall & Swift indicates that costs of a general contractor may be more than 12% of the contract costs. *Marshall & Swift Residential Cost Handbook*, Marshall & Swift/ Boeckh, LLC, (12/2002), p. D-8.

The Taxpayer testified that construction of the residence was not completed as of January 1, 2008, although it was being lived in since December of 2005. The cost to complete or install the various elements which were not completed as of January 1, 2008, is unknown. The Commission cannot speculate about the amount of those costs.

The Taxpayer asserts that inclusion of a separate cost item for radiant heat was not appropriate. Again that separate cost element is provided for by Marshall & Swift. *Marshall & Swift Residential Cost Handbook*, Marshall & Swift/ Boeckh, LLC, (12/2006), p. VG-21. Again, the evidence from the manual is that the cost for that element is not included in other elements and is appropriate.

The Taxpayer asserts that based on the costs as determined by the County Board using Marshall & Swift costing it would have been cheaper to build an above ground garage rather than the basement garage found on the subject property. Whether one type of construction is less costly than another is not before the Commission. The evidence is that the residence on the subject property has a basement garage. It is the contribution to value of the basement garage that is before the Commission. A basement garage is obviously of a different type of construction than an above ground garage. Evidence of the value attributed to other parcels for above ground garages is not relevant.

The County Board submitted as Exhibit 25 an appraisal presented by the Taxpayer as a part of the County Board proceedings. The appraisal submitted as Exhibit 25 has an effective date of August 10, 2007. The estimate of value stated in that appraisal is \$500,000.00 based on the sales comparison approach. (E25:3). Actual value as indicated by the cost approach as

developed by the Taxpayer's appraiser was \$524,326.00. (E25:3). The appraiser who prepared Exhibit 25 for the Taxpayer ("Taxpayer's Appraiser") did not testify.

One estimate of actual value developed in Exhibit 25 is based on the sales comparison approach. In the sales comparison approach an opinion of value is developed by analyzing closed sales, listings, or pending sales of properties that are similar to the subject property. *The Appraisal of Real Estate*, 13<sup>th</sup> Edition, Appraisal Institute, 2008, pg. 297. An opinion of value based on use of the sales comparison approach requires use of a systematic procedure:

"1. Research the competitive market for information on sales transactions, listings, and offers to purchase or sell involving properties that are similar to the subject property in terms of characteristics such as property type, date of sale, size, physical condition, location, and land use restraints. ...

2. Verify the information by confirming that the data obtained is factually accurate and that the transactions reflect arm's-length market considerations. ...

3. Select relevant units of comparison (e.g., price per acre, price per square foot, price per front foot) and develop a comparative analysis for each unit. ...

4. Look for differences between the comparable sale properties and the subject property using the elements of comparison. Then adjust the price of each sale to reflect how it differs from the subject property or eliminate that property as a comparable. This step typically involves using the most comparable sale properties and then adjusting for any remaining differences.

5. Reconcile the various value indications produced from the analysis of comparables into a single value indication or a range of values." *The Appraisal of Real Estate* 13<sup>th</sup> Edition, The Appraisal Institute, 2008, pgs 301-302.

The Commission notes that the Taxpayer's Appraiser rated construction quality as Good-PC. (E25:3). An average quality home as described by Marshall and Swift is "usually mass produced and will meet or exceed minimum construction requirements of lending institutions, mortgage insuring agencies, and building codes. By most standards, the quality of materials and workmanship is acceptable but does not reflect custom craftsmanship. Cabinets, doors, hardware, and plumbing are usually stock items. Architectural design will include ample fenestration and some ornamentation on the front elevation." *Marshall & Swift Residential Cost Handbook*, Marshall & Swift/ Boeckh, LLC, (12/2006), p. AVG-1. The County Assessor rated the quality of construction as very good . (E6:2). The Taxpayer's Appraiser compared the subject property to parcels with residences of average quality of construction without adjustment. (E25:3 and 8).

The Taxpayer's Appraiser believed that the residence contained 2,553 square feet of above grade living space. Square footage of above ground living space as determined by an appraiser for the county was 2,690. (E6:3). The Taxpayer's Appraiser believed that the residence on the subject property contained 2,553 square feet of basement and that 1,821 square feet of the basement were finished. An appraiser for the county determined that the square footage of basement was 3,632 and that 2,385 square feet of the basement were finished. The differential in gross basement area may be attributable at least in part to the basement garage but that cannot be determined from the record and the Commission will not speculate about the methods or assumptions of the Taxpayer's Appraiser.

The differences between the residence as described by the Taxpayer's Appraiser and the appraiser for the county are material. The Commission does not consider the estimate of actual value shown in Exhibit 25 to be a credible estimate of actual value.

**V.  
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has not produced competent evidence that the County Board failed to faithfully perform its official duties and to act on sufficient competent evidence to justify its actions.
4. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.

**VI.  
ORDER**

**IT IS ORDERED THAT:**

1. The decision of the County Board determining actual value of the subject property as of the assessment date, January 1, 2008, is affirmed.
2. Actual value, for the tax year 2008, of the subject property is:

|                   |                      |
|-------------------|----------------------|
| Land value        | \$112,240.00         |
| Improvement value | <u>\$505,168.00</u>  |
| Total value       | <u>\$617,408.00.</u> |

3. This decision, if no appeal is timely filed, shall be certified to the Sarpy County Treasurer, and the Sarpy County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2008).
  4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
  5. Each party is to bear its own costs in this proceeding.
  6. This decision shall only be applicable to tax year 2008.
  7. This order is effective for purposes of appeal on September 3, 2009.
- Signed and Sealed. September 3, 2009.

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Robert W. Hotz, Commissioner

**SEAL**

**APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.**

I concur in the result.

The majority has considered two standards of review for its review of the County Board's decision. One standard of review is stated as a presumption found in case law and the other is

stated as found in statute. I do not believe consideration of two standards of review is required by statute or case law.

The Commission is an administrative agency of state government. See, *Creighton St. Joseph Regional Hospital v. Nebraska Tax Equalization and Review Commission*, 260 Neb. 905, 620 N.W.2d 90 (2000). As an administrative agency of state government the Commission has only the powers and authority granted to it by statute. Id. The Commission is authorized by statute to review appeals from decisions of a county board of equalization, the Tax Commissioner, and the Department of Motor Vehicles. Neb. Rev. Stat. §77-5007 (Supp. 2007). In general the Commission may only grant relief on appeal if it is shown that the order, decision, determination, or action appealed from was unreasonable or arbitrary. Neb. Rev. Stat. §77-5016(8) (Cum. Supp. 2008).

The Commission is authorized to review decision of a County Board of Equalization determining taxable values. Neb. Rev. Stat. §77-5007 (Supp. 2007). Review of County Board of Equalization decisions is not new in Nebraska law. As early as 1903 Nebraska Statutes provided for review of County Board assessment decisions by the district courts. Laws 1903, c. 73 §124. The statute providing for review did not state a standard for that review. Id. A standard of review stated as a presumption was adopted by Nebraska's Supreme Court. See, *State v. Savage*, 65 Neb. 714, 91 N.W. 716 (1902) (citing *Dixon Co. v. Halstead*, 23 Neb. 697, 37 N.W. 621 (1888) and *State v. County Board of Dodge Co.* 20 Neb. 595, 31 N.W. 117 (1887). The presumption was that the County Board had faithfully performed its official duties and had acted upon sufficient competent evidence to justify its actions. See, Id. In 1959 the legislature provided a statutory standard for review by the district courts of county board of equalization,

assessment decisions. 1959 Neb Laws, LB 55, §3. The statutory standard of review required the District Court to affirm the decision of the county board of equalization unless the decision was arbitrary or unreasonable or the value as established was too low. *Id.* The statutory standard of review was codified in section 77-1511 of the Nebraska Statutes. Neb. Rev. Stat. §77-1511 (Cum. Supp. 1959). After adoption of the statutory standard of review Nebraska Courts have held that the provisions of section 77-5011 of the Nebraska Statutes created a presumption that the County Board has faithfully performed its official duties and has acted upon sufficient competent evidence to justify its actions. See, e.g. *Ideal Basic Indus. V. Nucholls Cty. Bd. Of Equal.*, 231 Neb. 297, 437 N.W.2d 501 (1989). The presumption stated by the Court was the presumption that had been found before the statute was enacted.

Many appeals of decisions made pursuant to section 77-1511 were decided without reference to the statutory standard of review applicable to the district courts review of a county board of equalization's decision. See, e.g. *Grainger Brothers Company v. County Board of Equalization of the County of Lancaster*, 180 Neb. 571, 144 N.W.2d 161 (1966). In *Hastings Building Co., v. Board of Equalization of Adams County*, 190 Neb. 63, 206 N.W.2d 338 (1973), the Nebraska Supreme Court acknowledged that two standards of review existed for reviews by the district court; one statutory requiring a finding that the decision reviewed was unreasonable or arbitrary, and another judicial requiring a finding that a presumption that the county board of equalization faithfully performed its official duties and acted upon sufficient competent evidence was overcome. No attempt was made by the *Hastings* Court to reconcile the two standards of review that were applicable to the District Courts.

The Tax Equalization and Review Commission was created in 1995. 1995 Neb. Laws, LB 490 §153. Section 77-1511 of the Nebraska Statutes was made applicable to review of county board of equalization assessment decisions by the Commission. *Id.* In 2001 section 77-1511 of Nebraska Statutes was repealed. 2001 Neb. Laws, LB 465, §12. After repeal of section 77-1511 the standard for review to be applied by the Commission in most appeals was stated in section 77-5016 of the Nebraska Statutes. Section 77-5016(8) requires a finding that the decision being reviewed was unreasonable or arbitrary. *Brenner v. Banner County Board of Equalization*, 276 Neb. 275, 753 N.W.2d 802 (2008). The Supreme Court has stated that the presumption which arose from section 77-1511 is applicable to the decisions of the Commission. *Garvey Elevators, Inc. V. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).

The possible results from application of the presumption as a standard of review and the statutory standard of review are: (1) the presumption is not overcome and the statutory standard is not overcome; (2) the presumption is overcome and the statutory standard is not overcome; (3) the presumption is not overcome and the statutory standard is overcome; (4) and finally the presumption is overcome and the statutory standard is overcome. The first possibility does not allow a grant of relief, neither standard of review has been met. The second possibility does not therefore allow a grant of relief even though the presumption is overcome because the statutory standard remains. See, *City of York v. York County Bd of Equal.*, 266 Neb. 297, 664 N.W.2d 445 (2003). The third possibility requires analysis. The presumption and the statutory standard of review are different legal standards, and the statutory standard remains after the presumption has been overcome. See. *Id.* The burden of proof to overcome the presumption is competent evidence. *Id.* Clear and convincing evidence is required to show that a county board of

equalization's decision was unreasonable or arbitrary. See, e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002). Competent evidence that the county board of equalization failed to perform its duties or act upon sufficient competent evidence is not always evidence that the county board of equalization acted unreasonably or arbitrarily because the statutory standard of review remains even if the presumption is overcome. *City of York*, supra. Clear and convincing evidence that a county board of equalization's determination, action, order, or decision was unreasonable or arbitrary, as those terms have been defined, may however overcome the presumption that the county board of equalization faithfully discharged its duties and acted on sufficient competent evidence. In any event the statutory standard has been met and relief may be granted. Both standards of review are met in the fourth possibility and relief may be granted.

Use of the presumption as a standard of review has been criticized. See, G. Michael Fenner, *About Presumptions in Civil Cases*, 17 Creighton L. Rev. 307 (1984). In the view of that author the presumption should be returned to its roots as a burden of proof. *Id.* Nebraska's Supreme Court acknowledged the difficulty of using two standards of review and classified the presumption in favor of the county board of equalization as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. See, *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987). Use of the *Gordman* analysis allows consideration of both the presumption and the statutory standard

of review without the difficulties inherent in the application of two standards of review. It is within that framework that I have analyzed the evidence.

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Wm R. Wickersham, Commissioner