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Subject

Elections - Ballots
Marking - Name

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STATE OF KANSAS

Office of the Attorney General

State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

VERN MILLER
Attorney General

November 21, 1974

Opinion No. 74-367

Mr. Tracy D. Klinginsmith
Jackson County Attorney
Jackson County Courthouse
Holton, Kansas 66436

Dear Mr. Klinginsmith:

You inquire concerning the legal effect of certain marks on certain ballots cast in the recent general election.

First, you inquire whether the names written in by the voter of "John Doe" for the office of county clerk, "John Doe" for that of county treasurer, "Joe Blow" for the office of county attorney, and "John Doe, Democrat" for the office of township trustee constitute identifying marks so as to void the ballot in its entirety, or whether these write-in designations merely invalidate the ballot as to these particular offices. The voter properly marked an "X" in the voting square opposite each of these names written in.

K.S.A. 25-3002(b)(2) states in part thus:

"Any ballot upon which an identifying mark has been made shall be wholly void and no vote thereon shall be counted. Determination of whether a mark is an identifying mark shall rest in the discretion of the board canvassing in the case of a canvass...."

In *Parker v. Hughes*, 64 Kan. 216 (1902), the court discussed the use of so-called distinguishing marks. An "identifying mark" is a mark

"by which it may be inferred that the voter sought to distinguish his ballot for the purpose of being able to assure a purchaser of votes that he had 'delivered the goods.'" 64 Kan. at 222.

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In that case, the name of a candidate appeared on the ballot as a candidate for the same office under two separate party headings. A number of voters voted for that candidate on both tickets. Concerning those double-marked ballots, the court stated thus:

"It must be admitted that these marks do not necessarily indicate a corrupt purpose. It is as reasonable, or more reasonable, to say that the voter so marked his ballot out of a superabundance of caution, or because he found Mr. Parker's name printed twice and supposed therefore that he was to put down two crosses, as to say that his act must be explained upon the hypothesis of a corrupt motive. This is made doubly forceful when we remember the large number of ballots so marked, coming from all parts of the city. It is the duty of the court to ascertain the intent of the voter, and if it may fairly and reasonably deduce a motive consonant with honesty, rather than dishonesty, from his ballot, to count the same for the candidate of his choice, rather than to disenfranchise him. *A distinguishing mark, to warrant the rejection of the ballot, must be found to have been made for the purpose of identification.*" [Emphasis supplied.]

Theoretically, a voter may be able to identify his ballot for corrupt purposes by writing in a particular name. The privilege of writing in one's own choice for election to an office is extended to all voters, however. The exercise of that privilege, accordingly, should not be deemed to be an identifying mark, even when the privilege is used frivolously, as here. When the voter writes in the name of a fictional or nonexistent person, as here, he has identified the ballot no more than any other voter who uses his write-in privilege legitimately to vote for a qualified elector. In our view, these write-in votes should not be deemed to invalidate the entire ballot, but only the write-in votes thus cast, there being, presumably, no qualified elector in the county with those names.

Secondly, concerning ballot numbered "2" in the enclosure, you inquire whether marks in the square at the right of the name of candidates for county clerk and probate judge constitute irregular "X's," and thus may be counted, or whether these marks are invalid. In each instance, the

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marks appear as partially deflated, misshapen circles, one not being entirely closed. K.S.A. 25-3002(b)(1) states that "[o]ne line crossing another line at any angle within a voting square shall be a valid voting mark." In each of these two instances, no line crosses another. In *Parker v. Hughes, supra* the court approved rejection of certain ballots which were marked with a single stroke rather than an "x" on the ground that such marks were distinguishing marks. These marks are directly analogous, and our judgment, do not constitute valid voting marks. In addition, under the holdings approved in *Parker v. Hughes*, we believe that these two marks invalidate the entire ballot on which they appear, on the ground that these marks are not valid voting marks, and differ from the required "X" in just the same fashion that single marks, disapproved in *Parker v. Hughes* and held to invalidate entire ballots there, differ from the required "X."

On ballot numbered "three" of the enclosures, the voter wrote "other" in the blank for write-in votes for sheriff, placing an "X" in the square at the right thereof. When a voter writes in other than a name, whether it be real or fictional, in the exercise of his privilege to cast a write-in vote for a particular office, that written-in matter should be deemed to invalidate the entire ballot, on the ground that the written-in matter can have no other purpose than to identify the ballot, and does in fact do so.

In ballot number "four," the voter placed both a check mark and a square at the right of the name of the candidate for county clerk. In *Parker v. Hughes, supra*, the court upheld rejection of any voting mark other than an "X." Here, the voter has placed an "X," in itself a valid voting mark, and also a check mark, which thus enables the ballot to be identified. The answer to this question is not necessarily clearcut, for on the one hand, there is an "X," a valid voting mark, and in addition, however, there is an additional mark which is not authorized, and which, standing alone, under *Parker v. Hughes, supra*, would be grounds for invalidating the entire ballot. There is, in this instance, as in the others, no collateral evidence to support a determination whether the questioned mark was made inadvertently and in good faith, or whether it was made with a purposeful intention to identify the ballot for a corrupt purpose. The occasions are surely few when any such evidence is available to enable a canvassing board properly to determine the motive and reason for a facially

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ambiguous mark. It is possible, of course, to regard the check mark as a good faith inadvertent error, which the voter sought to correct by adding the check mark. This is, of course, unsupported supposition, as is equally the contrary inference that it was done with a malignant purpose. The check mark is a plain departure from the voter instructions on the ballot. In such a case, it is our view that the mark should be taken at face value, i.e., as an improper mark which constitutes, first, an invalid voting mark, and second, an additional mark which enables the ballot to be identified. Thus, deemed identifying mark, the entire ballot should be invalid.

On ballot numbered "five," the voter made a similar error, placing both check marks and "X's" in the boxes opposite the names of three candidates. The observations above, respecting ballot numbered "four," are applicable here, and in our view, the entire ballot should be regarded invalid.

I hope these observations and this opinion will be helpful to you and the county election officer in the discharge of your duties.

Yours very truly,



VERN MILLER
Attorney General

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