

THE HONORABLE JOHN BRIDGES

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

Timothy Borders, et al.,

Petitioners,

v.

King County and Dean Logan, its Director of
Records, Elections and Licensing Services, et al.,

Respondents

No. 05-2-00027-3

**NOTE FOR MOTION ON
SPECIAL SETTING**

TO: THE CLERK OF THE COURT

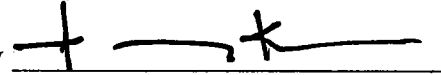
AND TO: ALL PARTIES AND COUNSEL OF RECORD

NOTE FOR SPECIAL SETTING: Please note that this matter has been set before the
Honorable John E. Bridges on May 2, 2005, at 8:30 a.m.

NATURE OF HEARING: Petitioners' Motion in Limine to Exclude Evidence
Concerning Previously Rejected Ballots and Other "Offsetting Errors"

Dated this 13th day of April, 2005.

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By 

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1 other problems and perhaps to consider other alleged offsetting errors.¹ This effort is
2 outside the scope of the election contest statute and contrary to previous rulings by this
3 Court and the Washington Supreme Court. Petitioners therefore bring this motion in
4 limine to exclude any evidence supporting this effort, such as evidence that previously
5 rejected ballots were wrongly rejected.²

6 **First**, this Court's dismissal of Petitioners' equal protection claims renders this
7 evidence irrelevant, and any effort by WSDCC to introduce such evidence disregards the
8 Court's order and directly contradicts the WSDCC's position and continuous refusal to
9 allow discovery on this issue. **Second**, the WSDCC's claims concerning ballots rejected
10 by county officials has already been dismissed by the Washington Supreme Court, which
11 ruled that it was not an error under the election contest statute for the counties to reject the
12 ballots at issue for signature mismatches. **Third**, the WSDCC waived any opportunity to
13 allege signature matching and other offsetting errors when it failed to serve a pleading
14 setting forth any claims or affirmative defenses, and when it refused to respond to
15 Petitioners' discovery. **Fourth**, admitting such evidence would set a dangerous precedent
16 for future election contests. If political parties can contest an election by claiming to
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18 ¹ Offsetting errors related to *rejected* ballots and signature mismatch decisions by election officials is
19 distinguishable from another newly discovered error by King County, namely the failure to count valid
20 absentee ballots. In recent weeks, it has come to light that King County failed to count ballots that were
21 deemed *valid* prior to certification of the election results. See
22 http://www.metrokc.gov/elections/news/2005_04_2.htm; [http://archives.seattletimes.nwsources.com/cgi-
bin/texis.cgi/web/vortex/display?slug=ballots02m&date=20050402](http://archives.seattletimes.nwsources.com/cgi-bin/texis.cgi/web/vortex/display?slug=ballots02m&date=20050402) The failure to count these ballots was
23 apparently an oversight by elections officials. Such error (an error that does not involve second guessing a
24 discretionary decision) is not the subject of this motion, and the parties may need to brief this issue further
25 after the parties have had a chance to conduct additional discovery.

26 ² At this time, Petitioners are aware of at least one type of objectionable evidence that the WSDCC intends to
27 pursue at trial, namely the evidence regarding alleged mistakes by counties in rejecting ballots due to
signature mismatches. However, as described in this brief, the WSDCC's failure to file any responsive
pleading when they intervened and their incomplete and evasive discovery responses render it impossible for
Petitioners to know what other types of related evidence the WSDCC intends to offer at trial. It is
Petitioners' position that all evidence purporting to challenge the discretionary decisions to reject ballots
made by county election officials should be excluded at trial. If the WSDCC identifies additional categories
of evidence or alleged offsetting errors, Petitioners may need to submit additional briefing or file additional
motions.

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1 disagree with the discretionary decisions made by elections officials regarding signatures
2 on provisional and absentee ballots, all future elections may involve widespread after-the-
3 fact ballot chases around the state.

4 II. STATEMENT OF FACTS

5 A. Claims and Evidence Before the Court in the Election Contest

6 Petitioners filed this election contest petition on January 7, 2005, alleging among
7 other claims, illegal votes and error, neglect, and misconduct by election officials.
8 Petitioners also asserted equal protection claims based on the inconsistent treatment of
9 signatures by county election officials evaluating the validity of provisional and absentee
10 ballots, and based on the rejection of ballots cast by lawful, registered voters. The
11 WSDCC challenged Petitioners' initial pleadings, moving to dismiss all causes of contest
12 on January 21, 2005. Although the Court allowed the election contest to proceed, it
13 dismissed Petitioners' equal protection claims based on allegations that the counties
14 wrongly rejected and were unwilling to revisit discretionary decisions about signature
15 mismatches and rejected provisional ballots – the very errors that the WSDCC now
16 appears ready to submit as offsetting errors. *See* February 18, 2005 Order Denying in Part
17 and Granting in Part Motions of Respondents and Intervenors.

18 B. The WSDCC's Plan to Present Evidence to Rehabilitate Previously 19 Rejected Provisional and Absentee Ballots

20 The parties have been engaged in the exchange of discovery since mid-January
21 2005. Petitioners have been providing the WSDCC with responsive documents on a
22 rolling basis, beginning February 22, 2005. Such productions have been in response to the
23 WSDCC's request that Petitioners produce all evidence of errors, neglect, and illegal votes
24 well in advance of the hearing date. Declaration of Amy Koziak ("Koziak Decl."), ¶1.

25 The WSDCC, however, has refused to provide Petitioners with responsive
26 documents or divulge the evidence it plans to set forth at trial regarding purported

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1 offsetting errors or votes, while reserving the right to assert specific evidence of offsetting
2 votes at a later date in the litigation. The WSDCC's response to discovery requests
3 regarding evidence of illegal votes, misconduct or errors was to direct Petitioners to a room
4 full of tens of thousands of pages of documents produced by counties in response to Public
5 Disclosure Act requests, without identifying to which of the Petitioners' specific discovery
6 requests the documents are responsive, as required by the Civil Rules. The WSDCC also
7 specifically refused to provide information related to its efforts to rehabilitate signatures or
8 resurrect previously rejected ballots in King and other counties throughout Washington.
9 See Koziak Decl., Ex. A (WSDCC's Answer to Interrogatory No. 21 and Request for
10 Production Nos. 5 and 6 in response to Petitioners' First Set of Discovery Requests). Yet
11 in a recent April 7, 2005 letter, counsel for the WSDCC stated that "to the extent the
12 WSDCC's investigation uncovers evidence that provisional or absentee ballots were
13 wrongly rejected by any county, it intends to argue that such votes should be counted."
14 See Koziak Decl., Ex. B (April 7, 2005 letter from WSDCC's counsel to Petitioners'
15 counsel). It thus now appears that the WSDCC intends to pursue claims regarding
16 signature mismatches and other alleged offsetting errors, although it has still not provided
17 documents or interrogatory answers explaining the factual bases for such claims.

18 Although the WSDCC remains evasive in responding to discovery from the
19 Petitioners and the Secretary of State, its position has been clearer in statements to the
20 media. For example, a March 18, 2005, Seattle Post-Intelligencer article quotes the
21 WSDCC's plan to research and revisit King County's decision to reject 4,432 provisional
22 ballots. See Koziak Decl., Ex. C (Gregory Roberts, *Democrats Still Looking for Votes –*
23 *Just in Case*, Seattle Post-Intelligencer, March 18, 2005). Based on the media stories and
24 evasive discovery responses, Petitioners now believe that the WSDCC is planning to
25 present evidence to challenge King County's decisions to reject thousands of ballots –

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1 perhaps by asking the Court to compare each provisional ballot envelope signature to each
2 voter registration signature for the more than 4,000 ballots. The WSDCC may also be
3 planning to present other evidence related to its disagreement with other discretionary
4 decisions by elections officials, but Petitioners are unable to identify specific additional
5 categories because they have no idea what specific evidence the WSDCC intends to use at
6 trial. Petitioners therefore bring this motion to exclude such evidence and to clarify the
7 limited scope of evidence appropriate for presentation by intervenors at trial.

8 III. ARGUMENT AND AUTHORITY

9 A. This Court Made This Evidence Irrelevant When It Dismissed 10 Petitioners' Equal Protection Claims

11 This Court made evidence of signature mismatches and disagreements about the
12 rejection of provisional ballots irrelevant to the issues in this proceeding when it dismissed
13 Petitioners' equal protection claims as to such ballots on February 18, 2005. Petitioners
14 originally challenged the rejection of hundreds of such ballots by county election officials,
15 alleging in their election contest petition that

16 Petitioners' rights to equal protection of the laws have been
17 violated by the inconsistent treatment of ballots wrongfully
18 rejected by Respondents, and the lawful, valid votes of
19 electors, including the petitioners, have been diluted by the
20 counting of invalid or illegal votes.

21 *See* Election Contest Petition, p. 4. The WSDCC argued that such claims should be
22 dismissed and the Court agreed. *See* WSDCC's Motion to Dismiss Causes of Contest;
23 February 18, 2005, Order Denying in Part and Granting in Part Motions of Respondents
24 and Intervenors.

25 Furthermore, the WSDCC relied on the dismissal of these claims when it refused to
26 produce documents related to the signature verification issues and provisional ballots. It
27 stated in its preliminary discovery responses that the Petitioners' request was beyond the
scope of permissible discovery and not reasonably calculated to lead to the discovery of

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1 admissible evidence because the Court dismissed such claims. *See* Koziak Decl., Ex. A
2 (WSDCC's Response to Interrogatory No. 21 and Request for Production Nos. 5 and 6 of
3 Petitioners' First Set of Interrogatories and Requests for Production). Despite this
4 response, the WSDCC persists in reserving the right to use such evidence at trial. Its
5 response to Interrogatory No. 21 (and similar language in its responses to Request for
6 Production Nos. 5 and 6) concludes with the statement that "the WSDCC's investigation is
7 ongoing and it will supplement its answer as appropriate." *Id.*

8 Petitioners pushed WSDCC for clarification of WSDCC's position during Rule 37
9 telephone conferences and an exchange of letters. In an April 7, 2005 letter to Petitioners'
10 counsel, the WSDCC stated for the first time that "to the extent the WSDCC's
11 investigation uncovers evidence that provisional or absentee ballots were wrongly rejected
12 by any county, it intends to argue that such votes should be counted." *See* Koziak Decl,
13 Ex. B (April 7, 2005 letter from WSDCC's counsel to Petitioners' counsel).

14 The WSDCC's apparent plan to submit evidence challenging the discretionary
15 decisions made by election officials with regard to provisional or absentee ballots is
16 contrary to the Court's order dismissing such claims from the lawsuit and the WSDCC's
17 own initial responses to discovery. The Court has already spent significant resources
18 reviewing these issues on the WSDCC's motion to dismiss causes of contest, and the
19 WSDCC should not be allowed to reintroduce the issues. Such evidence must be
20 excluded. Certainly if the Petitioners are barred from revisiting such discretionary
21 decisions, the WSDCC is, too. The trial must be a level playing field.

22 **B. The Washington Supreme Court Held That Discretionary Decisions by**
23 **County Elections Officials To Reject Ballots for Signature Problems**
24 **Were Not Error Under The Contest Statute**

25 Evidence and claims concerning rejected ballots are also immaterial to this contest
26 action in light of the decisions of the Washington Supreme Court *on these very same*

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1 *issues* during the recount litigation. In fact, this is now the third litigation since the 2004
2 General Election in which the parties litigated whether an election official has discretion to
3 review and make decisions about the validity of provisional and absentee ballots. The
4 Washington Supreme Court in two separate opinions – one dealing with the very same
5 ballots at issue – held that signature matching decisions for provisional and absentee
6 ballots are within the discretion of elections officials and that the Court should defer to
7 these officials’ judgment.

8 In *McDonald v. Reed*, the WSDCC filed an election contest petition alleging error
9 due to King County and other officials’ refusal to revisit discretionary and allegedly
10 erroneous signature matching decisions related to provisional and absentee ballots. The
11 WSDCC filed numerous affidavits from individuals and asserted that election officials had
12 made mistakes in comparing the ballot envelope signatures to the original voter
13 registration signatures and rejecting their ballots. In December 2004, the Washington
14 Supreme Court rejected the WSDCC’s claim that counties must revisit prior discretionary
15 decisions about signature mismatches and rejected the contention that it was error under
16 the contest statute for the counties to refuse to do so. *See McDonald v. Reed*, 153 Wn.2d
17 201 (2004). The Court found no wrongdoing or misconduct related to King County’s
18 discretionary decisions about provisional ballots when canvassing returns, despite the
19 WSDCC’s allegations of errors in the signature match decisions.

20 Moreover, later in December 2004, the Supreme Court again declined to interfere
21 with the discretionary decision-making by election officials when denying the Washington
22 State Republican Party’s motion to stop the recanvass of ballots with signature verification
23 problems in *WSRP v. King County Division of Records*, 153 Wn.2d 220 (2004). In this
24 second case, the Washington Supreme Court again deferred to the discretion of election
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1 officials and ruled that officials have the discretion to recanvass certain ballots in a recount
2 if County officials determine that an error had occurred.

3 Both decisions reflect the Court's deference to the discretionary decisions that
4 election officials must make when reviewing signatures on provisional and absentee
5 ballots. In his concurring opinion in *WSRP v. King County Division of Records*, Justice
6 Chambers noted that "[t]here is a certain amount of subjectivity inherent in the
7 legislatively established process of comparing signatures and counting absentee and
8 provisional ballots....The legislature, probably in recognition of this inherent subjectivity
9 has given local county election officials the authority and discretion to recanvass ballots or
10 voting devices until the last day to certify the election. Should election officials fail to
11 carry out their duties within the law, there are procedures for challenging the results." 153
12 Wn. 2d at 228.

13 The WSDCC has no evidence that election officials failed to carry out their
14 discretionary duties in the manner provided by law. Rather, the WSDCC simply disagrees
15 with the ultimate decisions regarding some of the rejected ballots. Because the
16 Washington Supreme Court, in an election contest filed by the WSDCC regarding this
17 election, has already rejected the WSDCC's argument that it was error for election officials
18 to reject provisional ballot signatures (apparently the same ones they intend to litigate
19 again here), the WSDCC's evidence and claims regarding previously rejected provisional
20 ballots must be excluded.

21 **C. WSDCC Failed to Plead Such Claims When Intervening and May Not**
22 **Now Assert Them.**

23 The only errors asserted in this election contest are those pled by Petitioners in their
24 election contest petition. If the WSDCC intended to raise allegations of error, misconduct,
25 or negligence, it should have filed a responsive pleading answering Petitioners' petition

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