

The Honorable John E. Bridges
Monday, May 23, 2005
9:00 a.m.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

SUPERIOR COURT FOR THE STATE OF WASHINGTON
FOR CHELAN COUNTY

TIMOTHY BORDERS, et al.,

Petitioners,

v.

KING COUNTY AND DEAN LOGAN, et al.,

Respondents.

v.

WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE,

Intervenor-Respondent,

v.

LIBERTARIAN PARTY OF WASHINGTON
STATE et al.,

Intervenor-Respondents.

No. 05-2-00027-3

PETITIONERS' TRIAL BRIEF

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

TABLE OF CONTENTS

	Page
I. INTRODUCTION.	1
II. SUMMARY OF CASE.....	3
III. FACTS.	4
A. Illegal Votes Cast by Identifiable Voters.	4
1. Felon Voters.	4
2. Persons Who Voted More Than Once.	5
3. Persons Who Voted in the Name of a Deceased Person.....	5
4. Other Categories of Identifiable Illegal Voter.	5
B. Illegal Votes Cast by Persons Who <u>Cannot</u> Be Identified.	5
1. The Process of Voting, Counting and Reconciliation.....	6
a. Poll Site Voting.	6
b. Provisional Ballots.	7
c. Reconciliation.	8
d. Absentee Ballots.....	9
2. King County Alone Counted More Than a Thousand Votes in Excess of the Number of Persons Who Signed the Poll Books to Cast Their Votes at the Precinct Poll Sites.	9
3. King County Counted 875 Absentee Ballots in Excess of Persons Credited With Having Cast Absentee Ballots, and Knowingly Concealed This Information From the Secretary of State.	13
IV. LEGAL ISSUES.	17
A. Causes of Action.	17
1. Claims Under RCW 29A.68.011.	17

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

2. Claims Under RCW 29A.68.020.18

B. The Votes of Which the Petitioners Complain Are Illegal Votes Within the Meaning of RCW 29A.68.020(5).....19

1. Votes of Felons Are Illegal Votes Within the Meaning of RCW 29A.68.020(5).19

2. Double Votes Are Illegal.19

3. Votes Cast in the Name of Deceased Persons Are Illegal Votes.19

4. All Provisional Ballots Cast (or Potentially Cast) by Unregistered Voters, or Cast Directly Into the Accuvote Machines, Are Illegal Votes, and Were Counted as a Result of Election Worker Error, Neglect or Misconduct.....20

5. Votes Inexplicably Cast in Excess of the Number of Persons Identified as Having Voted Are Illegal Votes.....24

6. Absentee Ballots Counted in Excess of the Number of Voters Credited With Having Voted by Absentee Ballot Are Illegal Votes.26

C. The Court Is Required to Set Aside the Election if Error or Misconduct Under RCW 29A.68.011 Leaves the True Outcome in Doubt.....27

D. The Petitioners’ Burden Is Proof by a Preponderance of the Evidence, Not by Clear and Convincing Evidence.....35

E. Petitioners May Satisfy the Requirements of RCW 29A.68.070 (if Applicable) Through the Use of Proportionate Deduction of Illegal Votes.37

1. Proportional Deduction May Constitute Clear and Convincing Proof of the Number of Illegal Votes Each Candidate Received.....37

2. Petitioners May Satisfy RCW 29A.68.110 by Proportional Deduction of Votes.38

a. Proportional Deduction Is an Accepted Means of Determining for Whom Illegal Votes Have Been Cast.....38

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

b. Expert Statistical Analysis Has Been Used to Overturn Election Results Where the Contestant Would Have Prevailed “But for” Illegal Votes.....39

3. Petitioners May Satisfy RCW 29A.070’s Requirement by Proportional Deduction of Illegal Votes.41

F. WSDCC Issues.....43

1. The 1700 Eastern Washington Ballots Are Not Illegal Ballots.43

2. The 622 Provisional Ballots of Voters Whose Registration Had Been Cancelled.44

a. Provisional Ballots in Conjunction With Cancelled Registrations.....45

b. Forwarding of Provisional Ballots.47

3. The “Needs Further Research” Ballots.48

4. The “No Signature on File” Absentee Ballots.51

V. CONCLUSION.....53

TABLE OF AUTHORITIES

Page

FEDERAL CASES

1

2

3 *Curry v. Baker*, 802 F.2d 1302 (11th Cir. 1986)..... 40

4 *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978)..... 32

5 *Marks v. Stinson*, 19 F.3d 873 (3rd Cir. 1994)..... 33, 39, 40

6 *Marks v. Stinson*, 37 F.3d 1487 (3d Cir. 1994)..... 41

7 *Marks v. Stinson*, 1994 U.S. Dist. LEXIS 5273 (No. 93-6157) (E.D. Pa. April 26,

8 1994) 40

9 *Singh v. Blue Cross/Blue Shield*, 308 F.3d 25 (1st Cir. 2002) 46

10 *United States v. Alameh*, 341 F.3d 167 (2d Cir. 2003) 37

STATE CASES

11

12

13 *Adkins v. Huckabay*, 755 So. 2d 206 (La. 2000)..... 23

14 *Boes v. Bisiar*, 122 Wn. App. 569, 574 (2004) 46

15 *Briscoe v. Between Consolidated School District*, 156 S.E. 654 (Ga. 1931)..... 34

16 *Bush v. Head*, 154 Cal. 277, 97 P. 512 (1908)..... 21

17 *In re Contest of the Election for the Offices of Governor and Lieutenant Governor*,

18 93 Ill. 2d 463 (1983) 39

19 *In re Colyer*, 99 Wn.2d 114, 135-36 (1983) 37

20 *Creamer v. City of Anderson*, 124 S.E.2d 788 (S.C. 1962) 34

21 *In re Davis*, 152 Wn.2d 647, 734-743 (2004) 46

22 *Dirst v. McDonald*, 372 Ill. 498 (1939) 38

23 *In re Election of United States Representative for Second Congressional District*,

24 231 Conn. 602 (1994) 36

25 *Ellis ex rel. Reynolds v. May*, 99 Mich. 538 (1894)..... 38

26

27

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Foulkes v. Hays, 85 Wn.2d 629, 732 P.2d 777 (1975) 21, 27, 28,
..... 29, 30, 37

Frese v. Camferdam, 76 Ill. App. 3d 68 (1979)..... 38

Glenn v. Gnau, 251 Ky. 3 (1933)..... 23

Gold Bar Citizens for Good Government v. Whalen, 99 Wn.2d 724, 729 (1983) 21

Gooch v. Hendrix, 5 Cal. 4th 266, 851 P.2d 1321 (1993)..... 21, 22, 32,
..... 33, 34

Great Am. Ins. Co. v. K&W Log, Inc., 22 Wn. App. 468 (1979)..... 37

Green v. Reyes, 836 S.W.2d 203 (Tex. Ct. App. 1992) 42

Hardeman v. Thomas, 208 Cal. App. 3d 153 (1989) 32

Hayes v. Abney, 186 Miss. 208, 188 So. 533 (1939) 25, 26

Heyfron v. Mahoney, 9 Mont. 497 (1890)..... 38

Hills v. Howell, 70 Wash. 603, 127 P. 211 (1912)..... 27, 30, 31,
..... 42

Hitt v. Tressler, 4 Ohio St. 3d 174 (1983)..... 32

Howell v. Fears, 275 Ga. 627 (2002)..... 33

Ippolito v. Power, 22 N.Y.2d 594 (1968) 32, 34

James v. Bartlett, 359 N.C. 260, 607 S.E.2d 638 (N.C. 2005) 21

Kauzlarich v. Yarbrough, 105 Wn. App. 632, 643 (2001) 46

Kirk v. French, 324 N.J. Super. 548 (1998)..... 36

In re Lannon v. Ring, 107 Minn. 453, 120 N.W. 1082 (1909) 25

Maloney v. Collier, 83 S.W. 667 (Tenn. 1904)..... 34

McCavitt v. Registrars of Voters, 385 Mass. 833 (1982)..... 23, 32, 34

McDonald v. Secretary of State, 153 Wn.2d 201 (2004)..... 46, 52

McNabb v. Hamilton, 349 Ill. 209 (1932)..... 38

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Miller v. Spokane International Railway Co., 82 Wash. 170 (1914)..... 37

Matter of Municipal Election Held on May 10, 1994, 139 N.J. 553, 656 A.2d 5
(N.J. 1995)..... 21

O'Neal v. Shaw, 248 Ill. App. 3d 632 (1993)..... 38

O'Neal v. Simpson, 350 So. 2d 998 (Miss. 1977) 23

Ollman v. Kowalewski, 238 Wis. 574 (1941) 38

People v. Hill, 624 N.Y.S.2d 79 (N.Y. 1995)..... 37

Rhyan v. Johnson, 364 Ill. 35 (1936) 38

Rizzuti v. Basin Travel Service, 125 Wn. App. 602 (2005) 46

Stebbins v. Gonzales, 3 Cal. App. 4th 1138 (1992) 23

Stringer v. Lucas, 608 So. 2d 1351 (Miss. 1992)..... 23

Tiller v. Martinez, 974 S.W.2d 769 (Tex. App. 1998)..... 23

Ulreich v. Ameritech Cellular Committee, Inc., 1999 WL.160838 (N.D. Ill. 1999) 46

Vangor v. Munro, 115 Wn.2d 536, 543 (1990)..... 46

Walsh v. Rogillio, 768 So. 2d 653 (La. App. 2000)..... 36

Waters v. Heaton, 364 Ill. 150 (1936)..... 38

Wilkinson v. Queen, 269 S.W.2d 223 (Ky. 1954)..... 25

MISCELLANEOUS

Deschler's Precedents Ch. 9 § 49.1 at 509 H.R. Rep. No. 2255, 83rd Cong., 3rd
Sess. *Ray v. Jenks* (1938) 33

Elections Code, Ch. 29A..... 6, 7, 18

H.R. Rep. No. 334 73rd Cong., 2nd Sess. Kemp, Sanders Investigation (1934)..... 33

H.R. Rep. No. 416, 105th Cong., 2nd Sess., at 8 n.220 (1998) 39

H.R. Rep. No. 626, 92nd Cong., 1st Sess., *Tunno v. Veysey* at 11 33

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

RRS § 5202 18

Wash. Const. art. III, § 4 1

Wash. Const. art. VI, § 3 4

Wash. Const. art. VI., § 3 19, 20

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

Petitioners submit this trial brief in anticipation of the trial of this action, set to commence on May 23, 2005.

I. INTRODUCTION

The basic facts are by now well known to the Court. Initial tabulations of the ballots cast in Washington's general election on November 2, 2005 showed Dino Rossi to have received the most votes for the office of Governor. Because the margin of Rossi's election was less than 2,000 votes (out of some 2.9 million votes counted) and less than one half of one percent of the total number of votes cast for the two candidates, the Secretary of State ordered a mandatory machine recount pursuant to RCW 29A.64.021(a). After the machine recount, Rossi led Gregoire by 42 votes statewide. Gregoire applied for a manual recount pursuant to RCW 29A.64.011. The manual recount gave the election to Gregoire by a margin of 129 votes.

The 39 counties certified their final election results to the Secretary of State during December 2004, pursuant to RCW 29A.60.230 and WAC 434-262-080. The Secretary of State transmitted the results to the Speaker of the House of Representatives pursuant to the Wash. Const. art. III, § 4. On January 10, 2005, the presiding officers of both houses of the legislature delivered a Certificate of Election to Gregoire. On January 7, 2005, the Petitioners filed their Election Contest Petition and the first of numerous affidavits of electors in accordance with RCW 29A.68.011 *et seq.*

The change in the election result in the manual recount was largely attributable to changes in the results in King County, the largest and the most heavily Democratic county in the state. According to the results of the initial count in King County, Gregoire received 59% of the votes cast for either Gregoire or Rossi. In the machine recount, King County counted an additional 941 votes cast for the two candidates, of which King County counted 593, or 63%, for Gregoire. In the manual recount, King County counted another 537 additional ballots cast for the two candidates, of which King County counted 358, or

1 66.6%, for Gregoire. At each count, Gregoire's percentage of the newly discovered votes
2 increased.

3 Subsequent discovery has revealed that the counties, principally but not exclusively
4 King County, counted hundreds of votes cast by persons who were disqualified from
5 voting as felons, and a smaller but significant number of persons who voted twice, or who
6 voted using the voter names and registrations of persons who had died prior to the election.
7 Discovery has also confirmed what the press reports were indicating, that King County's
8 election processes, and its compliance with its processes, were grossly inadequate. Many
9 felons were permitted to vote. More than a thousand votes were cast by persons whom
10 King County had failed to ensure were qualified and registered voters, and whose identities
11 can not now be determined. These votes, like those of felons, double voters, and
12 "deceased" voters, were illegal.

13 King County officials have also testified that they knowingly falsified a critical
14 Mail Ballot Report that formed part of the basis for its certification of results to the
15 Secretary of State. King County officials stated on the report that the number of absentee
16 ballots received exactly equaled the number counted plus the number rejected, when in fact
17 they knew that they had not tracked the number received and that the number listed on the
18 report as received was merely the sum of those counted and those rejected. Long after
19 certification, and in fact many weeks after the commencement of this election contest,
20 King County was still discovering uncounted absentee ballots. Dean Logan, King
21 County's Director of Records, Elections and Licensing Services Division, has admitted the
22 effect of the flaws in King County's election processes:

23 Q. (By Mr. Maguire) Do you know whether the returns
24 in King County were accurate within 129 votes?

25 A. Can you repeat? The difference in votes was far
26 more than 129 in King County so --

27 Q. Right. But the question is do you know whether the
returns in King County were accurate within 129 votes?

