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I. INTRODUCTION

Petitioners ask that the Court strike WSDCC's May 13, 2005 rebuttal witness list as untimely and improper. This premature request is not supported by a citation to a single case and seeks to wrest the decision to admit rebuttal witnesses from the sound discretion of the trial court. Additionally, brief examination of the classes of witnesses Petitioners seek to exclude reveals that these individuals were properly included on WSDCC's Rebuttal Witness List.

II. ARGUMENT AND AUTHORITY

First, it is premature for the Court to determine who is and is not a rebuttal witness before Petitioners have presented their case in chief. Rebuttal evidence is admissible to enable a party to answer a new matter presented by the opposing party. *See State v. Kroll*, 87 Wn.2d 829, 841 (1976) (allowing rebuttal evidence in response to new theories presented by opposing party). It follows that exclusion of rebuttal witnesses before Petitioners have put on their case is drastically premature. *See, e.g., Carle v. McChord Credit Union*, 65 Wn. App. 93, 110 (1992) (affirming trial court's decision to allow testimony from rebuttal witness, even though plaintiff did not notify defendant of the rebuttal witness until seven days after trial had begun).

Second, Petitioners do not cite any law for their assertion that WSDCC's witness list is improper and untimely. Such authority was likely omitted because it would clearly show both the illogic of Petitioners' argument, and that the decision to admit rebuttal witness rests within the sound discretion of the trial court. An often-cited Washington Supreme Court decision explains the rationale for allowing this discretion:

Ascertaining whether the rebuttal evidence is in reply to new matters established by the defense . . . is a difficult matter at times.

1 Frequently true rebuttal evidence will, in some degree, overlap or
2 coalesce with the evidence in chief. Therefore, the question of
3 admissibility of evidence on rebuttal rests largely on the trial court's
4 discretion
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6 *State v. White*, 74 Wn.2d 386, 394-95 (1968); *see also State v. Public Util. Dist. No. 1*, 83
7 Wn.2d 219, 222 (1973) ("Admission of rebuttal evidence is within the trial court's
8 discretion."). During trial, the Court will be uniquely positioned to exercise its discretion to
9 admit or exclude WSDCC's rebuttal witnesses in light of the evidence offered by the
10 Petitioners. Exclusion of witnesses before trial has begun is premature.
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16 Turning to Petitioners' specific objections, their arguments unravel. Petitioners
17 object to a class of rebuttal witnesses from the King County Records, Elections and
18 Licensing Services who may testify regarding various ballot-counting failures and other
19 errors that occurred in King County during the 2004 Gubernatorial Election. *See* Petitioners'
20 Motion to Strike WSDCC's Rebuttal Witness List ("Motion") at 2. WSDCC's Witness List
21 filed on May 6, 2005, included the following witnesses who may be called at trial:
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28 **A representative or representatives of King County Records,**
29 **Elections, and Licensing Services,** [who] may testify regarding
30 lawful provisional ballots that King County did not count because it
31 failed to completely canvass the ballots or to timely process voter
32 registrations given to King County; lawful absentee ballots that King
33 County did not count even though timely returned by registered voters
34 because King County lost their voter registrations; and lawful
35 provisional ballots that King County did not count because King
36 County's computer system indicated that the voter's registration had
37 been cancelled and then King County failed to conduct the
38 investigation required by law into the circumstances of the original
39 cancellation.
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43 WSDCC's Witness List at 4. This explicit reservation put Petitioners and all other parties on
44 notice that WSDCC intended to call witnesses to support these allegations. At the time
45 WSDCC filed its Witness List, however, given that it was two weeks prior to the discovery
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1 cut-off date, WSDCC did not know the name or names of the specific individuals with
2 personal knowledge of the facts necessary to support WSDCC's claim of errors in King
3 County. As discovery progressed in the week following the filing of WSDCC's initial
4 witness list, WSDCC became aware of certain individuals who had personal knowledge to
5 support these allegations. Therefore, *the identical* classification included in the Witness List
6 was reproduced in the Rebuttal Witness List and WSDCC disclosed five fact witnesses who
7 may testify regarding these allegations. See WSDCC's Rebuttal Witness List at 2. The
8 Court should reject Petitioners' hyper-technical argument to exclude from testifying any
9 King County witness who has personal knowledge of the subjects disclosed for potential
10 testimony in WSDCC's initial witness list. Indeed, discovery is ongoing, and both
11 Petitioners and WSDCC are taking depositions of King County witnesses up to and
12 including the discovery cut-off date of May 20. The Court should exercise its discretion to
13 allow testimony from the King County witnesses identified on WSDCC's Rebuttal Witness
14 List.
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Next, Petitioners take issue with two classes of rebuttal witnesses who are Washington voters who may testify regarding, among other issues, "for whom they cast their ballot." Motion at 2-3. WSDCC understands that Petitioners will offer expert evidence that voters in certain counties and precincts were more likely to have cast ballots for Dino Rossi than for Christine Gregoire in the 2004 Gubernatorial Election. These rebuttal witnesses may be offered to rebut Petitioners' theory that precinct-based proportionate reduction is sufficient proof of for whom individual voters voted in the gubernatorial election. By testifying regarding their voting precinct and for whom they voted, these witnesses may directly rebut Petitioners' theory of proportional reduction. Moreover, WSDCC expects that

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Petitioners may contest whether the ballots in question were actually cast by lawfully registered voters. The witnesses would rebut any such suggestion.

In short, they may be critical rebuttal witnesses, and this Court should allow their testimony.

III. CONCLUSION

For the foregoing reasons, the Court should deny Petitioners' motion to strike WSDCC's rebuttal witness list.

Dated: May 17, 2005.

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THE HONORABLE JOHN E. BRIDGES

SUPERIOR COURT FOR THE STATE OF WASHINGTON
FOR CHELAN COUNTY

Timothy Borders et al.,

Petitioners,

v.

King County et al.,

Respondents,

and

Washington State Democratic Central
Committee,

Intervenor-Respondent.

NO. 05-2-00027-3

**[PROPOSED] ORDER DENYING
PETITIONERS' MOTION TO
STRIKE WSDCC'S REBUTTAL
WITNESS LIST**

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THIS MATTER comes before the Court on Petitioners' Motion to Strike WSDCC's Rebuttal Witness List ("Motion"). The Court having reviewed the Motion, Washington State Democratic Central Committee's Opposition thereto, and any reply, and being fully advised in the premises, now, therefore, hereby ORDERS that:

Petitioners' Motion to Strike WSDCC's Rebuttal Witness List is hereby DENIED.

ENTERED this ____ day of _____ 2005.

The Honorable John E. Bridges

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I declare under penalty of perjury that the foregoing is true and correct, and that this certificate was executed in Seattle, Washington on May 17, 2005.

By Joyce Nowille
Joyce Nowille