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NOTE FOR SPECIAL SETTING

Please note that this matter has been set before the Honorable John E. Bridges on the 2nd day of May, 2005 at 8:30 a.m.

Nature of hearing: **Washington State Democratic Central Committee's Motion in Limine to Exclude Evidence of Petitioners' Erroneously Listed "Illegal Convicted Felon Voters"**

DATED: April 13, 2005.

PERKINS COIE LLP

By /s/ Kevin J. Hamilton
Kevin J. Hamilton, WSBA # 15648
William C. Rava, WSBA # 29948
1201 Third Avenue, Suite 4800
Seattle, WA 98101

Attorneys for Intervenor-Respondent
Washington State Democratic Central
Committee

SPEIDEL LAW FIRM

Russell J. Speidel, WSBA # 12838
7 North Wenatchee Avenue, Suite 600
Wenatchee, WA 98807

JENNY A. DURKAN

Jenny A. Durkan, WSBA # 15751
c/o Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099

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I. INTRODUCTION

Petitioners filed this election contest with the broad and unspecified charge that "respondents" had "[c]ount[ed] the votes of convicted felons who have not had their civil rights restored." Petition ¶ VI.A.3. In response to discovery requests, Petitioners provided conviction records for a number of alleged felons but, although responsive to those requests, declined to provide a list of alleged felon voters. After discovery conferences, Petitioners released to the press, and some hours thereafter to Intervenor-Respondent Washington State Democratic Central Committee ("WSDCC"), a list containing the names of 1135 persons that Petitioners claimed were felons who voted illegally in the 2004 General Election.

Newspapers and other media outlets immediately began reporting that numerous individuals on Petitioners' list had never been convicted of a felony, had their rights restored, or had not voted in the 2004 General Election. Moreover, according to the supporting conviction records provided to WSDCC by Petitioners, well in excess of 200 of the accused voters had no adult felony conviction: the records were from juvenile court. Under Washington law, juveniles adjudicated in juvenile court are not convicted of a crime and therefore do not lose their right to vote.

On April 7, Petitioners released an amended list containing the names of 879 alleged felons. Petitioners' newest list of illegal felon voters is still overinclusive. Such overinclusiveness will unnecessarily damage the reputations and invade the privacy of innocent people, and will waste the Court's time and unfairly burden WSDCC and other parties in defending this contest. This motion in limine seeks to exclude any evidence of illegal votes cast by an alleged felon unless Petitioners prove that the person: (1) was convicted as an adult, not adjudicated as a juvenile; (2) was convicted of a felony (i.e., was not convicted of a misdemeanor or gross misdemeanor); (3) was not given a deferred

1 sentence; (4) has not been discharged pursuant to RCW 9.94A.637; (5) cast a ballot in the
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3 2004 General Election; and (6) marked that ballot to indicate a vote for a gubernatorial
4
5 candidate.¹
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7 **II. FACTUAL BACKGROUND**

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9 WSDCC issued its First Interrogatories and Requests for Production to Petitioner
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11 Rossi for Governor Campaign (the "Rossi Campaign") on January 20, 2005; the responses
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13 thereto were due on February 22. Declaration of Beth A. Colgan in Support of WSDCC's
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15 Motion in Limine to Exclude Evidence of Petitioners' Erroneously Listed "Illegal Convicted
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17 Felon Voters" ("Colgan Decl.") ¶ 2. In its responses, the Rossi Campaign provided stacks of
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19 court pleadings, but ignored WSDCC's request for a list of individuals the Rossi Campaign
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21 contended were illegal voters, including the alleged illegal felon voters. *Id.* After Rule 37
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23 conferences, on March 3, the Rossi Campaign provided the press and, several hours later,
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25 WSDCC with a list of individuals that it alleged were felons who illegally voted in the 2004
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27 General Election (the alleged "Illegal Convicted Felon Voters").² *Id.* That list contained the
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29 names of 1135 individuals. *Id.*
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31 On March 7, the Rossi Campaign produced an amended list of Illegal Convicted
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33 Felon Voters containing the names of 1131 individuals that the Rossi Campaign alleged are
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39 ¹ *Hill v. Howell*, 70 Wash. 603 (1912), requires, in addition, that Petitioners prove for which
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41 candidate each illegal vote was cast. Petitioners, however, ask the Court not to follow *Hill* and
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43 instead to permit them to base their claims on how the legal voters voted, rather than on how the
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45 illegal voters voted, using a method that Petitioners call "proportional analysis." WSDCC is
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47 concurrently filing a separate motion with respect to that issue.

² The Rossi Campaign compiled its lists primarily from a series of databases, including a
database of felony convictions or juvenile adjudications maintained by the Washington State Patrol
and voter registration databases maintained by the Secretary of State and several Washington
counties. *Id.* ¶ 7.

1 felons who cast illegal votes in the 2004 General Election. *Id.* ¶ 3. The March 7 list
2 included over 200 individuals who had not been convicted of a felony, but had been
3 adjudicated as a juvenile in juvenile court. *Id.* On March 17, WSDCC informed Petitioners
4 of this flaw in their March 7 list, and Petitioners' counsel assured WSDCC that Petitioners
5 were "investigating whether particular people, who were found guilty of offenses before the
6 age of 18, should be excluded from the final list of illegal voters." *Id.*, Exs. A, B. Due to
7 the large number of errors in the original list, WSDCC asked Petitioners on March 21 to
8 stipulate regarding the elements Petitioners must establish to prove an illegal vote under
9 RCW 29A.68.020(5)(a)(ii). *Id.*, Ex. C. Petitioners did not agree to stipulate.
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19 On April 4, in response to discovery requests, WSDCC provided Petitioners with a
20 list of names of individuals that it believes were erroneously included on Petitioners'
21 March 7 list. *Id.*, ¶ 5. On April 7, Petitioners produced a second amended list that contained
22 the names of 879 individuals that the Rossi Campaign alleges are felons who cast illegal
23 votes in the 2004 General Election (the "List"). *Id.* However, this List still included many
24 of the names that WSDCC has identified as errors. *Id.*
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31 On April 9, after Petitioners produced the current List, WSDCC asked Petitioners to
32 stipulate that, to constitute an illegal vote under RCW 29A.68.020(5)(a)(ii), Petitioners must
33 establish that: (1) the person was convicted as an adult, not merely adjudicated as a juvenile
34 in juvenile court proceedings; (2) the person was convicted of a felony (i.e., was not merely
35 convicted of a misdemeanor or a gross misdemeanor); (3) the person was not given a
36 deferred sentence; (4) the person has not been discharged pursuant to RCW 9.94A.637; (5)
37 the person cast a ballot in the 2004 General Election; and (6) the person marked that ballot
38 to indicate a vote for a gubernatorial candidate. *Id.*, Ex. D. To date, Petitioners have not
39 even responded to WSDCC's proposed stipulation. *Id.* ¶ 6.
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1 It is a time-consuming and laborious process to verify whether any alleged individual
2 was convicted of a felony, whether the person's civil rights have been restored, and whether
3 the person actually voted. *Id.* ¶ 8. At a minimum, it requires reviewing court records and
4 voting records for each individual. *Id.* Given that the Rossi Campaign produced its most
5 recent List on April 7, WSDCC has not completed its investigation of the accuracy of the
6 List. *Id.* However, WSDCC has again identified individuals on the current List who the
7 Rossi Campaign has erroneously listed as "Illegal Convicted Felon Voters." *Id.* WSDCC's
8 motion is not intended as an exhaustive rebuttal to Petitioners' List, but below are a few
9 examples of the lack of support for Petitioners' List as to each element of proving an illegal
10 vote by a convicted felon, on which Petitioners bear the burden of proof.

11 **Juveniles.** First, the List still includes individuals who were adjudicated as
12 juveniles, but who have never been convicted of a felony as an adult. *Id.* ¶ 10. Indeed, after
13 the Rossi Campaign released its original list to the press, *The Seattle Times* checked 462 of
14 the 1131 names and determined that at least 165 individuals of that 462 from the March 7
15 list committed only juvenile offenses. *See id.*, Ex. E. The Rossi Campaign admitted on
16 March 16 that "perhaps hundreds" of the people on the List were wrongfully included. *Id.*
17 As to the current List, to date WSDCC has identified at least seven individuals that were
18 adjudicated as juveniles, and for whom Petitioners have not provided any evidence of an
19 adult conviction. *Id.* ¶ 10, Ex. F. WSDCC is continuing to investigate the scope of this
20 problem.

21 **Non-Felons.** Second, the List still includes individuals who were convicted of
22 misdemeanors or gross misdemeanors, but have never been convicted of any felony. *Id.*
23 ¶ 11, Ex. G. For example, the Rossi Campaign listed one individual from Skagit County as
24 an Illegal Convicted Felon Voter, yet Skagit County confirmed that the individual was
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1 simplify trials." *Fenimore v. Drake Constr. Co.*, 87 Wn.2d 85, 89 (1976). In *Fenimore*, the
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3 Supreme Court stated:

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5 [T]he trial court should grant such a motion if it describes the
6 evidence which is sought to be excluded with sufficient specificity to
7 enable the trial court to determine that it is clearly inadmissible under
8 the issues drawn or which may develop during trial, and if the
9 evidence is so prejudicial in its nature that the moving party should be
10 spared the necessity of calling attention to it by objecting when it is
11 offered during the trial.
12

13 *Id.* at 91.

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15 Under ER 401, "relevant evidence" is any evidence "having any tendency to make
16 the existence of any fact that is of consequence to the determination of the action more
17 probable or less probable than it would be without the evidence." Evidence that is not
18 relevant is not admissible. ER 402. Moreover, ER 403 calls for the exclusion of evidence
19 when its "probative value is substantially outweighed by the danger of unfair prejudice,
20 confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of
21 time, or needless presentation of cumulative evidence." The decision whether to admit
22 evidence under ER 403 is within the trial court's sound discretion. *Indus. Indem. Co. v.*
23 *Kallevig*, 114 Wn.2d 907, 926 (1990) ("A trial court has broad discretion in performing the
24 balancing test contemplated in ER 403 and will be reversed only on a showing of abuse of
25 discretion.")
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38 Petitioners filed this lawsuit and they bear the burden of proof in this action. *See*
39 RCW 29A.68.050 (court "may dismiss the proceedings if the statement of the cause or
40 causes of contest is insufficient"); *In re Contested Election of Schoessler*, 140 Wn.2d 368,
41 392 (2000). As the burden of proof in a pre-election challenge to a voter's registration is
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1 "clear and convincing,"³ it simply would not make sense if there were a *lower* burden of
2 proof on litigants who seek the staggering relief of setting aside a sitting Governor than on
3 those who challenge the registration of a single voter.
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6 The statutory standard governing pre-election challenges to voter registration is
7 consistent with Washington's election contest statutes. RCW 29A.68.110 provides that "[n]o
8 election may be set aside on account of illegal votes" unless there is proof that the number of
9 illegal votes was enough to change the result of the election. Given Washington's statutory
10 framework, the Office of the Secretary of State has emphasized the presumptions that stand
11 against a petitioner in an election contest. In *Becker v. County of Pierce*, the Secretary
12 argued that "[c]ourts should employ every reasonable presumption in favor of sustaining a
13 contested election." Brief of Amicus Curiae of Secretary of State at 11, *Becker v. County of*
14 *Pierce*, 126 Wn.2d 11 (1995) (No. 61553-5). (The Secretary's brief in *Becker* is attached as
15 Appendix A.) The Secretary cited *Chumney v. Craig*, 805 S.W.2d 864, 865 (Tex. App.
16 1991), for the principles that "election results should be upheld unless there is clear and
17 convincing evidence of an erroneous result" and the "presumption that election officials
18 have done their duty in conducting an election, and the contestant has a heavy burden of
19 overcoming the presumption." Brief of Amicus Curiae at 11, *Becker*, 126 Wn.2d 11.
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34 Application of this standard with respect to the proof that each alleged illegal voter is
35 in fact an illegal voter is consistent with the overall high burden of proof Petitioners must
36 meet in order to set aside the 2004 Gubernatorial Election. Washington courts have not
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44 ³ See RCW 29A.08.810 ("Registration of a person as a voter is presumptive evidence of his
45 or her right to vote at any primary or election, general or special."); RCW 29A.08.820 (When a
46 voter's registration is challenged prior to an election, the "challenging party must prove to the
47 canvassing board by clear and convincing evidence that the challenged voter's registration is
improper.").

1 explicitly set forth the precise standard of proof in an election contest, *see Schoessler*, 140
2 Wn.2d at 383 ("We need not address the standard of proof in this case."), but our Supreme
3 Court has repeatedly stated that a petitioner in an election contest must show that the
4 election was "clearly invalid."⁴ *Dumas v. Gagner*, 137 Wn.2d 268, 283 (1999); *see also*
5 *Schoessler*, 140 Wn.2d at 383. Given the "restraint" that the judiciary should exercise in
6 interfering with the elective process which is reserved to the people by the Washington
7 Constitution, *Schoessler*, 140 Wn.2d at 383, the standard should be at least as stringent to
8 prove an illegal vote in an election contest.
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17 **B. The Court Should Exclude All Evidence of Alleged Illegal Felon Voters**
18 **Unless Petitioners Can Prove that Each Person Was Convicted as an**
19 **Adult, Because a Juvenile Adjudication Is Not a Conviction of Any**
20 **Crime, Let Alone an "Infamous Crime."**
21

22 Under Washington's election contest statute, an "illegal vote" includes a "vote cast
23 by a person disqualified under Article VI, section 3 of the state Constitution."
24

25 RCW 29A.68.020(5)(a)(ii). The Washington Constitution excludes from the elective
26 franchise "all persons convicted of an infamous crime unless restored to their civil rights."
27 WASH. CONST. art. VI, § 3. An individual who has been adjudicated as a juvenile offender
28 has not been convicted of an "infamous crime," because he has not been convicted of *any*
29 crime. Under Washington state law, "[a]n order adjudging a child delinquent or dependent
30 under the provisions of [the Juvenile Justice Act] *shall in no case be deemed a conviction of*
31 *a crime.*" RCW 13.04.240 (emphasis added). This statutory provision, and the legal
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⁴ Other jurisdictions that have addressed the precise standard of proof require election contestants to prove the alleged defect by clear and convincing evidence. *See, e.g., In re Election Contest of Democratic Primary*, 725 N.E.2d 271, 275 (Ohio 2000); *Speights v. Willis*, 88 S.W.3d 817, 821 (Tex. App. 2002); *Vacco v. Spitzer*, 179 Misc. 2d 584, 586, 685 N.Y.S.2d 583 (N.Y. Sup. Ct. 1998).

1 conclusion that "a juvenile has not committed a crime, including a felony, when he has
2 committed an offense," has been deemed to be so clear and unambiguous on its face that
3 there is no interpretation for a court to perform. *In re Frederick*, 93 Wn.2d 28, 30 (1980)
4 ("The foregoing provisions make clear that a juvenile has not committed a crime, including
5 a felony, when he has committed an offense.").

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10 Cases regarding Washington's statutory scheme for dealing with juvenile
11 adjudications repeatedly clarify that a juvenile "offense" is not a "crime." *See In re Weaver*,
12 84 Wn. App. 290, 293-94 (1996) (granting personal restraint petition of juvenile transferred
13 to adult mental facility upon turning 18, where adult commitment statute only authorized
14 commitment after a felony conviction, and juvenile adjudication was not a felony
15 conviction). A "juvenile offender" is "any juvenile who has been found by the juvenile
16 court to have committed an offense." RCW 13.40.020(15). A juvenile "offense" is defined
17 as "an act *designated a violation or a crime if committed by an adult.*" RCW 13.40.020(19)
18 (emphasis added). Fingerprints are required on "every order adjudicating a juvenile to be a
19 delinquent based upon conduct which *would be a felony if committed by an adult.*"
20 RCW 10.64.110 (emphasis added). And, according to RCW 9.68A.105(1)(c),
21 RCW 43.43.690(2), and RCW 46.61.5054(1)(c), various penalties may be assessed against a
22 juvenile for an offense which, if committed by an adult, would constitute a crime or
23 violation. "By negative implication if not expressly, all these statutes indicate that an act
24 which would be a crime if committed by an adult is not a crime, and thus not a felony, if
25 committed by a juvenile." *Weaver*, 84 Wn. App. at 294.⁵

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⁵ WSDCC is not arguing that a juvenile tried and convicted of a felony as an adult in superior court was eligible to vote in the 2004 General Election unless the individual had been discharged pursuant to RCW 9.94A.637.

1 The United States Supreme Court has also concluded that juveniles cannot be
2 convicted of a "crime," and therefore do not have the same rights as adults in the justice
3 system:
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6 Because the State is supposed to proceed in respect of the child as
7 *parens patriae* and not as adversary, courts have relied on the premise
8 that the proceedings are "civil" in nature and not criminal, and have
9 asserted that the child cannot complain of the deprivation of important
10 rights available in criminal cases. It has been asserted that he can
11 claim only the fundamental due process right to fair treatment. For
12 example, it has been held that he is not entitled to bail; to indictment
13 by grand jury; to a speedy and public trial; to trial by jury; to
14 immunity against self-incrimination; to confrontation of his accusers;
15 and in some jurisdictions . . . that he is not entitled to counsel.
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19 *Kent v. United States*, 383 U.S. 541, 554-55 (1966). In Washington, cases in juvenile court
20 are tried without a jury. RCW 13.04.021(2); *see also State v. Schaaf*, 109 Wn.2d 1, 16-17
21 (1987) (holding that a juvenile is not constitutionally entitled to a jury trial due to the nature
22 of proceedings available to juveniles, as compared to adult offenders).
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27 The Washington Juvenile Justice Act and the juvenile justice system "attempt[] to
28 distinguish juvenile offenders from their adult counterparts." *Schaaf*, 109 Wn.2d at 15.
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31 Indeed, the Washington Supreme Court has stated:
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33 The fact that juveniles are accountable for criminal behavior does not
34 erase the differences between adult and juvenile accountability. The
35 penalty, rather than the criminal act committed, is the factor that
36 distinguishes the juvenile code from the adult criminal justice system.
37 Under the juvenile code, a court order adjudging a child delinquent or
38 dependent "shall in no case be deemed a conviction of crime." We
39 have interpreted this provision to mean that a juvenile cannot be
40 convicted of a felony. "[A] juvenile has not committed a crime,
41 including a felony, when he has committed an offense, 'an act
42 designated as a crime *if committed by an adult.*'"
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46 *Id.* at 7-8 (internal citations omitted). Thus, there is a "degree of flexibility and informality"
47 in juvenile proceedings. *Id.* at 12. Juvenile proceedings are more rehabilitative in nature

1 than the "rigidly punitive system" for adult criminal justice. *Id.* at 15. And "[t]hough
2 juveniles are accorded many of the procedural rights granted adult criminal suspects,
3 juvenile proceedings do not yet so resemble adult proceedings that a jury trial is required."
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7 *Id.* at 13. In sum, juvenile proceedings do not involve the many constitutional protections
8 afforded to adult criminal defendants, so it is not surprising that a juvenile adjudication is
9 not considered a felony conviction, nor is it surprising that a juvenile adjudication does not
10 result in the same consequences as an adult conviction, including loss of the right to vote.
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14 For the reasons outlined above, a person adjudicated as a juvenile offender can
15 legally vote (if the person meets the other requirements of the elective franchise, such as
16 age). However, Petitioners' List includes individuals who were adjudicated as juvenile
17 offenders and have never been convicted of any crime as an adult. *See* Colgan Decl. ¶ 10,
18 Ex. F. The Court should exclude all evidence of alleged felon voters unless Petitioners can
19 prove by clear and convincing evidence that each person on the List was convicted of a
20 felony as an adult.⁶
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38 ⁶ In addition to the fact that juveniles are not convicted of any crime, a juvenile cannot be
39 deprived of his right to vote based on a conviction for an "infamous crime" for yet another reason.
40 Washington law defines an "infamous crime" as "a crime punishable by death in the state
41 penitentiary or imprisonment in a state correctional facility." RCW 29A.04.079. Juveniles,
42 however, are housed in "juvenile detention facilities" and under normal circumstances cannot be
43 housed in an adult correctional facility. RCW 13.04.116. The Juvenile Rehabilitation
44 Administration, a division of the Department of Social and Health Services, is responsible for the
45 placement of juveniles in these facilities. *See generally* WAC 388-730. In contrast, the Department
46 of Corrections is responsible for "the administration of adult correctional programs, including but not
47 limited to the operation of all *state correctional institutions or facilities* used for the confinement of
convicted felons." RCW 72.09.050 (emphasis added).

1 **C. The Court Should Exclude All Evidence of Alleged Illegal Felon Voters**
2 **Unless Petitioners Can Prove That Each Person Was Convicted of a**
3 **Felony.**
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5 The Washington Constitution's reference to a conviction of an "infamous crime" as
6
7 the source of the loss of the right to vote does not apply to every conviction, but only to a
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9 conviction of a felony. An "infamous crime" is "a crime punishable by death in the state
10 penitentiary or imprisonment in a state correctional facility." RCW 29A.04.079. By statute,
11 a sentence to imprisonment for more than one year is "served in a facility or institution
12 operated, or utilized under contract, by *the state*." RCW 9.94A.190(1) (emphasis added).
13 Under the Washington Criminal Code, a felony is a crime that carries a potential sentence of
14 more than one year, RCW 9A.04.040(1), and therefore is a crime that is "punishable . . . by
15 imprisonment in a state correctional facility." RCW 29A.04.079. By contrast,
16
17 misdemeanors and gross misdemeanors are crimes that do not carry the potential for a
18 sentence to imprisonment for more than one year,⁷ and therefore are punishable only by
19 imprisonment in a county facility. RCW 9.94A.190(2) ("[A] sentence of not more than one
20 year of confinement shall be served in a facility operated, licensed, or utilized under
21 contract, by *the county*." (emphasis added).
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33 Consequently, only a felony constitutes an "infamous crime" under the Washington
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35 Constitution and RCW 29A.04.079:
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37 An "infamous crime" is one "punishable by death or imprisonment in
38 the penitentiary." Section 3057, Code of 1881, *cf.* RCW 29.01.080.
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45 ⁷ A crime is a "misdemeanor if it is so designated or if persons convicted thereof may be
46 sentenced to imprisonment for no more than ninety days." RCW 9A.04.040(2); *see also*
47 RCW 9A.20.010(2)(a). Every crime not fitting under the definition of a felony or a misdemeanor is
a "gross misdemeanor." RCW 9A.04.040(2); RCW 9A.20.010(2)(b).

1 Therefore, only a "felony," which provides such punishment (RCW
2 9.01.020) is an infamous crime in this state.
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4 1965-66 Wash. Att'y Gen. Op. No. 66, at *6059 (1966) (citing informal opinion to the
5 Secretary of State dated Nov. 8, 1962); *cf. In re Reinstatement of Walgren*, 104 Wn.2d 557,
6 569 (1985) ("[P]ersons convicted of felonies, whose civil rights have not been restored, may
7 not vote in this state."). Misdemeanors or gross misdemeanors are punishable by
8 imprisonment in a county facility, and therefore do not constitute "infamous crimes." *See*
9 1965-66 Wash. Att'y Gen. Op. No. 66, at *6060 n.2 ("[I]t is clear that such a conviction [a
10 gross misdemeanor] would in no event disqualify a person from exercising his elective
11 franchise.").

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20 Petitioners' List includes individuals who were not actually convicted of felonies, but
21 convicted only of misdemeanors and gross misdemeanors.⁸ For example, Skagit County
22 confirmed that at least one person included on the List was convicted of a gross
23 misdemeanor rather than a felony. *See Colgan Decl.* ¶ 11, Ex. G. As explained above,
24 misdemeanor and gross misdemeanor convictions do not result in a loss of voting rights.
25
26 The Court should therefore exclude all evidence of alleged illegal felon voters unless
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⁸ Additionally, it appears that Petitioners' List includes persons who were not ever convicted of any crime at all. For example, it includes one individual who was subject to a voter registration challenge on March 3, 2005. However, it appears that this individual was a victim of identity theft, and she has never been convicted of a felony. *See Colgan Decl.*, Ex. K.

1 **D. The Court Should Exclude All Evidence of Alleged Illegal Felon Voters**
2 **Unless Petitioners Can Prove That Each Person Was Not Given a**
3 **Deferred Sentence.**
4

5 A person convicted prior to July 1, 1984 who received a "deferred" sentence,
6
7 completed all conditions of probation, and subsequently had the information or indictment
8
9 against him dismissed is not "convicted" for the purposes of disenfranchisement.
10

11 RCW 9.95.200; RCW 9.95.240. Prior to the enactment of the Sentencing Reform Act,⁹ a
12
13 court could summarily grant probation and impose conditions of probation on a defendant
14
15 who pled guilty or was found guilty by verdict. RCW 9.95.200. After the defendant
16
17 fulfilled the conditions of his probation, he could withdraw his plea, or the court could set
18
19 aside a guilty verdict, and in either case the court could dismiss the information or
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21 indictment. RCW 9.95.240. Upon such dismissal, the defendant "shall thereafter be
22
23 released from all penalties and disabilities resulting from the offense or crime of which he
24
25 has been convicted." *Id.*
26

27 Thus, upon such dismissal the defendant regains his voting rights automatically.
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29 Indeed, the Washington Attorney General reached this very conclusion nearly forty years
30
31 ago in a formal opinion issued to a State Representative:
32

33 The language of [RCW 9.95.240] is quite clear. Once the criminal
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35 proceedings have been dismissed pursuant thereto, the defendant is
36
37 thereafter "released from all penalties and disabilities resulting from
38
39 the offense or the crime of which he has been convicted." This, in our
40
41 judgment, includes the constitutional exclusion from the elective
42
43 franchise.

44 1965-66 Wash. Att'y Gen. Op. No. 66, at *6060 (1966).
45

46 ⁹ RCW 9.95.200 and RCW 9.95.240 do not apply to convictions prior to July 1, 1984.
47 RCW 9.95.900. However, those statutes are still relevant to the restoration of voting rights for
persons convicted prior to July 1, 1984.

1 Upon discharge of a deferred sentence under RCW 9.95.240, a criminal defendant
2
3 regains the right to vote. The Court should therefore exclude all evidence of alleged felon
4
5 voters unless Petitioners can prove by clear and convincing evidence that each person on the
6
7 List who was convicted prior to July 1, 1984 did not receive a deferred sentence and
8
9 subsequent discharge under RCW 9.95.240.

10
11 **E. The Court Should Exclude All Evidence of Alleged Illegal Felon Voters**
12 **Unless Petitioners Can Prove That Each Person's Civil Rights Were Not**
13 **Restored.**
14

15 The Washington Constitution expressly provides that a citizen has the right to vote
16
17 unless he (1) is convicted of an "infamous crime" and (2) has not been "restored to [his] civil
18
19 rights." WASH. CONST. art. VI, § 3.

20
21 As part of a sentence for a felony conviction, the sentencing court imposes both
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23 nonfinancial obligations, such as a prison term or parole, and financial obligations, such as
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25 payment of restitution. *See generally* RCW 9.94A.505. Upon completion of all obligations
26
27 imposed under a sentence, the sentencing court must "discharge" the offender.

28
29 RCW 9.94A.637. The "discharge *shall* have the effect of restoring all civil rights lost by
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31 operation of law upon conviction."¹⁰ RCW 9.94A.637(4) (emphasis added). Upon
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33 discharge, it is the sentencing court's duty to provide the offender, the county auditor in the
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35 county where the offender resides, and the Department of Corrections ("DOC") with a
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37 certificate of discharge. RCW 9.94A.637(1).

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44 ¹⁰ In addition to the discharge that occurs automatically under RCW 9.94A.637, a convicted
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46 felon may affirmatively seek restoration of rights in other ways. A person who receives a suspended
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rights. RCW 9.92.066(1). Further, a person convicted of an infamous crime may ask for clemency
from the governor. RCW 9.96.010.

1 The manner in which the sentencing court is notified that the offender has completed
2 all obligations of his sentence depends on when the offender completes those obligations.
3
4 When an offender completes all nonfinancial requirements and legal financial obligations
5 imposed by the sentence while under the custody or supervision of the DOC, no action is
6 required of the offender in order for his voting rights to be restored. RCW 9.94A.637(1)(a).
7
8 The DOC must notify the sentencing court and the court "shall discharge the offender and
9 provide the offender with a certificate of discharge." *Id.* Similarly, no action is required of
10 the offender to restore his voting rights when he completes the nonfinancial requirements
11 (but not the legal financial obligations) while under the custody and supervision of the DOC.
12 RCW 9.94A.637(1)(b). Under these circumstances, the DOC "shall provide notice to the
13 county clerk" that the offender has satisfied the nonfinancial requirements. *Id.* Once that
14 notice is received by the county clerk and the offender subsequently has satisfied all legal
15 financial obligations under the sentence, the "county clerk shall notify the sentencing court,
16 including the notice from the department, which shall discharge the offender and provide the
17 offender with a certificate of discharge."¹¹ *Id.*

18
19 It is only when an offender does not complete the nonfinancial requirements of the
20 sentence while under the supervision of the DOC, or is not subject to such supervision, that
21 the offender himself must provide the court with verification of the completion of the
22 nonfinancial sentence conditions. RCW 9.94A.637(1)(c). When the offender satisfies all
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¹¹ RCW 9.94A.637(1)(a) and RCW 9.94A.637(1)(b) provide for automatic discharge of rights upon completion of the nonfinancial and financial obligations of a sentence. Thus, if the DOC, county clerk, or sentencing court fail to perform their required duties under RCW 9.94A.637, such failure constitutes an error or neglect on the part of an "election officer." *See* RCW 29A.04.055 ("Election officer" includes any officer who has a duty to perform relating to elections under the provisions of any statute, charter, or ordinance").

1 legal financial obligations under the sentence, the "county clerk shall notify the sentencing
2 court that the legal financial obligations have been satisfied." *Id.* When the court has
3 received notification from the clerk and adequate verification from the offender that the
4 nonfinancial sentence requirements have been completed, the "court shall discharge the
5 offender and provide the offender with a certificate of discharge." *Id.*¹²

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11 Petitioners' List includes individuals who have been discharged under
12 RCW 9.94A.637. For example, King County has provided WSDCC with certificates of
13 discharge for three individuals on Petitioners' List. Colgan Decl. ¶ 12, Ex. H. Those
14 individuals have not been convicted of any other felonies. *Id.* As discussed above, the
15 Washington Constitution only disenfranchises persons "convicted of an infamous crime
16 unless restored to their civil rights." WASH. CONST. art. VI, § 3. The Court should exclude
17 all evidence of alleged felon voters unless Petitioners can prove by clear and convincing
18 evidence that each person on the List was not discharged, and thus restored to his civil
19 rights, under RCW 9.94A.637.

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29 **F. The Court Should Exclude All Evidence of Alleged Illegal Felon Voters**
30 **Unless Petitioners Can Prove That Each Person Actually Cast a Ballot in**
31 **the 2004 General Election.**

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33 At the risk of stating the obvious, Petitioners' List of illegal felon "voters" is
34 meaningless unless these individuals actually voted in the 2004 General Election. *See*

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¹² Washington's statutory scheme for the restoration of civil rights is currently the subject of a class action lawsuit in King County. *See* Colgan Decl., Ex. L (Complaint for Declaratory Relief, *Madison v. State*, No. 04-2-33414-4 (King County Super. Ct. Oct. 21, 2004)). There, the plaintiffs claim that the requirement that an offender satisfies all financial obligations prior to discharge is unconstitutional under the United States and Washington Constitutions. *Id.* They also allege that "even felons who have fully paid their legal financial obligations face challenges in restoring their voting rights" because the procedures followed by Washington counties are not consistent. *Id.* ("This has led to confusion and error in the procedures used by counties.").

1 RCW 29A.68.020(5)(1)(ii) (defining "illegal vote" as including "a vote *cast* by a person
2 disqualified under Article VI, section 3 of the state Constitution") (emphasis added).
3

4 Surprisingly, Petitioners' List appears to include individuals who did not even cast a
5 ballot in the 2004 General Election. For example, Whatcom County has confirmed that four
6 individuals on the List were issued absentee ballots, but they did not return those ballots, and
7 did not vote at the polls. Colgan Decl. ¶ 13, Ex. I. The Court should exclude all evidence of
8 alleged felon voters unless Petitioners can prove by clear and convincing evidence that each
9 person on the List actually voted in the 2004 General Election.
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17 **G. The Court Should Exclude All Evidence of Alleged Illegal Felon Voters**
18 **Unless Petitioners Can Prove that Each Person Actually Voted for a**
19 **Gubernatorial Candidate in the 2004 General Election.**
20

21 In order to prevail in an election contest, the illegal votes must be sufficient to
22 change the result of the election. *See* RCW 29A.68.110. Of course, if a person did not vote
23 for the office contested, his vote could not possibly have affected the result of the election
24 for that office. *See Hill v. Howell*, 70 Wash. at 611 (rejecting evidence of electors being
25 wrongfully denied the right to vote where "they did not even say they would have voted the
26 [office at issue] at all").
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33 Petitioners' List includes individuals who have testified under oath that they voted in
34 the 2004 General Election, but did not vote for any gubernatorial candidate. Colgan Decl.,
35 ¶ J. The Court should exclude all evidence of alleged felon voters unless Petitioners can
36 prove by clear and convincing evidence that each person on the List actually voted for a
37 gubernatorial candidate in the 2004 General Election.
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43 **IV. CONCLUSION**
44

45 For the reasons set forth above, the Court should grant WSDCC's motion in limine to
46 exclude the numerous alleged "illegal felon voters" on Petitioners' List unless Petitioners
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1 prove by clear and convincing evidence that each person (1) was convicted as an adult, not
2 adjudicated as a juvenile; (2) was convicted of a felony (i.e., was not convicted of a
3 misdemeanor or gross misdemeanor); (3) was not given a deferred sentence; (4) has not
4 been discharged pursuant to RCW 9.94A.637; (5) cast a ballot in the 2004 General Election;
5 and (6) marked that ballot to indicate a vote for a gubernatorial candidate.
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10 DATED: April 13, 2005.
11
12
13

14 **PERKINS COIE LLP**

15
16
17
18 By /s/ Kevin J. Hamilton
19 Kevin J. Hamilton, WSBA # 15648
20 William C. Rava, WSBA # 29948
21 1201 Third Avenue, Suite 4800
22 Seattle, WA 98101-3099
23
24

25 Attorneys for Intervenor-Respondent
26 Washington State Democratic Central
27 Committee
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SPEIDEL LAW FIRM

Russell J. Speidel, WSBA # 12838
7 North Wenatchee Avenue, Suite 600
Wenatchee, WA 98807

JENNY A. DURKAN

Jenny A. Durkan, WSBA # 15751
c/o Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099

APPENDIX A

Appendix
A-2



Christine O. Gregoire

ATTORNEY GENERAL OF WASHINGTON

905 Plum Street Bldg 3 • PO Box 40100 • Olympia WA 98504-0100

February 12, 1993

120

Hr. Carl Maxey
Maxey Law Offices, P.S.
West 1835 Broadway
Spokane, WA 99201

RE: Nina Becker, Former Candidate for State Auditor
Dear Mr. Maxey:

Your letter of February 2, 1993, to Secretary of State Ralph Munro has been referred to me for a response. Your letter concerned allegations of impropriety on the part of former Pierce County Auditor Brian Sonntag in the certification of the September, 1992, primary election for State Auditor. Both Mr. Sonntag and your client were candidates for the Democratic nomination for State Auditor at that election.

After reviewing your letter, and without expressing any opinion as to the merits of matter, we have found no appropriate further action on behalf of the Secretary of State. We appreciate the fact that you have called this question to our attention.

Sincerely,
Jeffrey T. Even
JEFFREY T. EVEN
Assistant Attorney General
(360) 586-8728

JTE:js
cc: John Pearson

CERTIFICATE OF SERVICE

I certify that I served the Respondents, PIERCE COUNTY, BRIAN SONNTAG, PAUL CYR, and ROGER MIENER, and amicus curiae,

SECRETARY OF STATE, with Appellant's Reply Brief and Appellant's Answer to Amicus Brief, by depositing true copies in the United States Mails addressed to their attorneys of record as follows:

Ronald L. Williams
Deputy Prosecuting Attorney
Civil Division
965 Tacoma Avenue S., Ste 301
Tacoma, WA 98402-2160

Jeffrey T. Even
Off. of Atty General
905 Plum St., 3rd Fl.
Olympia, WA 98504-0100

DATED this 14th day of November, 1994.

Donna R. McNamara
Donna R. McNamara
WSBA # 15515

Attorney for Appellant

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Brief of Amicus Curiae

No. 61553-5

SUPREME COURT
OF THE STATE OF WASHINGTON

NINA M. BECKER,

Appellant,

v.

COUNTY OF PIERCE; BRIAN SONNTRAG,
former Pierce County Auditor ROGER MEENER,
Pierce County Deputy Prosecuting Attorney; and
PAUL CYR, Pierce County Councilman,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT FOR
PIERCE COUNTY

BRIEF OF AMICUS CURIAE, RALPH MURNRO,
SECRETARY OF STATE FOR THE STATE OF WASHINGTON

CHRISTINE O. GREGORE
ATTORNEY GENERAL

JEFFREY T. EVEN
ASSISTANT ATTORNEY GENERAL
WSBA #23067
1125 WASHINGTON S.E.
P.O. BOX 40100
OLYMPIA, WA 98504-0100
(206) 586-0728

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I. STATEMENT OF THE CASE

By this action, Appellant Nina Becker seeks to invalidate the state primary election for the office of state auditor, conducted two years ago, in September 1992. Ms. Becker argues that this court should invalidate the election because the successful candidate for the Democratic nomination for state auditor participated in the canvass of the results for Pierce County in the course of his duties at the time as Pierce County Auditor. She argues that RCW 29.62.030 required that the Pierce County results be determined by the other two members of the canvassing board.

Ms. Becker urges that therefore the election should be invalidated, even though the board unanimously approved the canvass. She does not argue that the voters of Pierce County cast their ballots differently than the canvass report states, but merely that a person participated in the canvass whom she believes should not have.

Ms. Becker now appeals from a judgment dismissing this action. By order entered July 29, 1994, this Court granted the request of the

Secretary of State (hereinafter Secretary) for leave to file this brief as amicus curiae, in support of respondents Pierce County, et al. The Secretary adopts by reference the county's statement of issues presented, and statement of the case. The Secretary urges that this Court affirm the judgment of the Superior Court.

II. ARGUMENT

A. The County Auditor Properly Participated in the Canvass of the Primary

Ms. Becker alleges no act or omission by any elections officials calling into question the integrity of the results of the 1992 primary. She instead argues that RCW 29.62.030 invalidates the results of any election in which the county auditor participates in the canvass, where he or she is a candidate for a different office. The statute provides:

If the primary or election is one at which the county auditor is to be nominated or elected, canvass of the returns for that office shall be made by the other two members of the board; if the two disagree, the returns for that office shall be canvassed by the presiding judge of the superior court of the county.

RCW 29.62.030.

This statute applies only to elections, "at which the county auditor is to be nominated or elected." Id. Even then, it applies only to "that office." Id. This phrasing clearly applies to the position of county auditor. Had the Legislature intended it to address the individual who occupies the office, the statute would have been so worded.

If the Legislature had enacted RCW 29.62.030 to remedy a perceived impropriety in having a candidate for office serve on the canvassing board, it would have covered the other members of the board as well. The canvassing board includes two other elected officials, the county prosecutor and the chair of the county legislative authority. RCW 29.62.020. The statute, however, only relates to the situation in which the position of county auditor is on the ballot, without regard to whether the incumbent is running for re-election. This reflects the prominent role that the auditor's office plays in conducting the election and tabulating the results. See, e.g., RCW 29.04.020. Only the role of the county auditor's office as an

institution can distinguish one member of the canvassing board from the others.

The application of RCW 29.62.030 to this case can be further enlightened by examining the larger context of the September 1992 primary. In a statewide election, the county auditor is the ex officio election supervisor for the county, and physically conducts the election. RCW 29.04.020. The Secretary of State is the chief elections officer for the state. RCW 29.04.070. In the case of a primary for a statewide elected official, the actions of the local canvassing board therefore fit within a larger process.

The county canvassing board certifies the county's results. RCW 29.62.020. The certified county canvass report constitutes the official returns of the election for the county. RCW 29.62.040; WAC 434-62-070.

In addition to duties after the election, several days before the election the Secretary tests the programming of electronic voting systems used in every county (except those few still using paper ballots), to insure that votes will be tabulated accurately. RCW 29.33.350; WAC 434-34-085 et. seq. The Secretary can also provide assistance to the counties pursuant to chapter 29.60 RCW.

The various counties submit their canvass reports to the Secretary, who conducts a statewide canvass. RCW 29.62.100. The Secretary does so by adding the certified returns from each completed county abstract of votes in order to determine the final results for those offices . . . " WAC 434-62-100. The Secretary uses the certified county results as the basis for the statewide canvass, and compiles a single statewide composite. Id.

The statewide results are then certified by the Secretary, rather than by the individual counties. RCW 29.62.100; WAC 434-62-110. In a statewide primary, the Secretary certifies to each of the 39 county auditors the names of the nominees entitled to appear on the general election ballot. RCW 29.27.050. Following the general election, the governor issues the certificate of election for a statewide officer, RCW 29.27.110, based upon the Secretary's canvass of the final returns. RCW 29.62.120. Invalidation of the primary in Pierce County therefore would trigger a "chain reaction" with sweeping consequences. Even though Ms. Becker does not allege that the vote totals from Pierce

County are incorrect, she urges this Court to strike down the entire process by which the voters statewide chose their state auditor in 1992.

No set of facts consistent with her complaint could be proven that would challenge the actual votes tabulated for each candidate. Orwick v. Seattle, 103 Wn.2d 249, 254, 692 P.2d 792 (1984). Ms. Becker acknowledges that both of the other two members of the board signed the canvass. CP 3. If RCW 29.62.070 applied, it would direct that those other two members conduct the canvass, which in fact they did. Their determination as to how the voters cast their ballots must be accepted by this Court unless impeached by direct attack. Garvey v. Port of Seattle, 27 Wn.2d 685, 692, 179 P.2d 501 (1947).

The county auditor acted properly in participating in the canvass of the September 15, 1992, primary. The statute applies only where "the county auditor is to be nominated or elected," and then only as to "that office." RCW 29.62.030. The

statute did not instruct the county auditor to stand aside when he sought a different office.²

3. THE PUBLIC POLICY SUPPORTING THE FINALITY OF ELECTIONS PRECLUDES INVESTIGATION OF THE 1992 PRIMARY.

This Court should affirm the judgment of the trial court, because RCW 29.62.030 does not apply when a deputy auditor becomes a candidate for state auditor. More fundamental concerns also dictate the same result. By this action, an unsuccessful primary election candidate seeks to overturn the election results, even though the certified nominee has not only proceeded to victory in the general election, but has served in office continuously since January 1993. The substantial public policy in favor of finality of elections mandates dismissal of actions such as this.

Courts universally recognize the strong public policy favoring stability and finality of election

² The nature of the relief Ms. Becker requests also discloses another deficiency. The Secretary, and not the county, certified the final results and the names of nominees to appear on the general election ballot. Certainly the county is a necessary party to this action, but the Secretary is indispensable as to the relief requested. Orwick v. Fox, 58 Wn. App. 71, 79, 828 P.2d 12 (1992).

result. "Courts should be reluctant to upset an election absent some compelling reason to do so." Rochano v. Diskfano, 430 A.2d 765, 770 (R.I. 1981). "The expression of the will of the voters . . . will not be overturned lightly." Schmitt v. McLaughlin, 275 N.W.2d 587, 592 (Minn. 1979). "[T]he primary purpose of the election content provisions is to ascertain the will of the people . . ." Hardeman v. Thomas, 266 Cal. Rptr. 158, 171 (Cal. App. 1989). Ms. Becker therefore bears a heavy burden in seeking to invalidate the expressed will of the voters. Billings v. Hollingsworth, 517 So.2d 568, 569 (Miss. 1987); Miller v. Hill, 698 S.W.2d 372, 375 (Tex. Ct. App. 1985); Saefks v. Yanda Walls, 279 N.W.2d 415, 417 (N.D. 1979).

1. The Results of An Election May Not Be Overturned Unless the Challenger Proves that Errors Occurred that Actually Affect the Result

Ms. Becker bases her challenge solely on the county auditor's participation on the canvassing board. Her complaint may be distilled to the simple proposition that the county auditor should not have signed the canvass report, as to the primary for state auditor.

As Ms. Becker acknowledges, a threshold requirement for contesting an election is that the claimed error must change the result. RCW 29-65-060; RCW 29-65-070. Ms. Becker asserts that this requirement is satisfied because, if Pierce County's votes are excluded from the statewide totals, she would have received the plurality in the other 39 counties. Appellant's Opening Brief at 4. Pierce County voters, however, are entitled to vote for state officers.

Noting that Pierce County provided the margin of victory is not the same as alleging that any Pierce County votes were cast or tabulated incorrectly, Ms. Becker must demonstrate that the certified results were not the true expression of the voters' will. She must establish that, but for the auditor's participation in the canvass, she would have won. Skawiat v. Livingston Parish

Ms. Becker argues in her opening brief that the hypothetical possibility that some elections might be canvassed inaccurately is a substitute for evidence that the election at issue actually was inaccurately tabulated. Just as Washington courts do not issue advisory opinions, Walker v. Murrie, 124 Wn.2d 402, 416 (1994), they do not order remedies for hypothetical errors.

Polisa Jury, 340 So.2d 1045, 1050 (La. Ct. App. 1976). The mere mathematical possibility is not sufficient. Harry V. Mahoney, 482 N.Y.S.2d 158, 158 (N.Y. App. Div. 1984). Ms. Becker therefore does not allege facts sufficient to satisfy this threshold requirement.

Decisions from other states confirm this conclusion. The Kentucky court in Sims v. Abrell, 556 S.W.2d 929 (Ky. Ct. App. 1977), considered an election challenge based on irregularities in the vote of a single precinct. If the votes cast in that precinct were excluded, the results of the election would change. Id. at 931. The court stated that mere irregularities, however, "should not disenfranchise all of the voters in the . . . precinct." Id. at 932. Although the court invalidated specific challenged votes due to fraud, it did not disregard the entire precinct tally. "Because a substantial majority of the votes cast in the . . . precinct were untainted by any fraud or illegality . . . , we would be extremely reluctant to throw out the vote of the entire precinct." Id. at 937. The court therefore

declined to disenfranchise the legal voters because of illegal acts connected with specific ballots. Id. Accord, In Re Neifal, 381 A.2d 74, 77 (N.J. Super. Ct. App. Div. 1976) (holding that the rejection of some legal votes is not sufficient, unless it can be shown that the number was sufficient to change the result).

Courts should "employ every reasonable presumption in favor of sustaining a contested election and . . . mere technical irregularities or illegalities are insufficient to set aside an election unless the errors actually appear to have affected the result of the election." Knight v. State Bd. of Canvassers, 374 S.E.2d 685, 686 (S.C. 1988).⁴ As a Texas court explained:

As a matter of policy, declared election results should be upheld unless there is clear and convincing evidence of an erroneous result. . . . There is a presumption that election officials have done their duty in conducting an election, and the contestant has a heavy

⁴ Accord, In Re Concerned Citizens, 468 N.E.2d 791, 792 (Ohio Comm. Pl. 1984); Bradley v. O'Ables, 457 N.Y.S.2d 139, 139 (N.Y. App. Div. 1982); Nickols v. Henderson, 642 S.W.2d 681, 683 (Mo. Ct. App. 1982); Goodman v. Sims, 620 S.W.2d 857, 859 (Tex. App. 1983).

burden of overcoming the presumption

CHERRY V. CRAIG, 805 S.W.2d 864, 865 (Tex. App. 1991).⁵

In the present action, Ms. Becker's reliance on Pierce County as the source of the margin of victory is insufficient to demonstrate that the voters of Pierce County should be disenfranchised. Nothing about the action of the county auditor calls into question the reliability of the votes

⁵ This does not mean that courts should ignore outright fraud or severe abuses of the electoral process. The public interest demands honest, as well as reliable, election results. Under extreme circumstances, a proven demonstration of major fraud can justify a new election. See, e.g., Marks v. Stinson, 19 F.3d 871 (3rd Cir. 1994) (candidate and election officials conspired to generate illegal absentee votes); Stebbins v. White, 239 Cal. Rptr. 656 (Cal. App. 1987) (candidate dispatched thugs to the homes of absentee voters to coerce votes); Justice Kennedy, while serving on the Ninth Circuit, explained that in the absence of proof that the conduct affected the result, invalidation "has been reserved for instances of willful or severe violations of established constitutional norms." McMichalski v. County of Napa, 709 F.2d 1268, 1273 (9th Cir. 1983) (Kennedy, J., concurring). An election can be invalidated only for "a pervasive error which undermines the organic processes of the ballot." Soules v. Aquilino for Niskoll Comm., 849 F.2d 1179, 1184 (3rd Cir. 1988). It is not an appropriate remedy for a garden variety error. Griffin v. Burns, 570 F.2d 1065, 1076 (1st Cir. 1978).

cast by the voters or of the tabulation of those votes. Sims, 556 S.W.2d at 932.⁶

2. The Public Interest Demands that Election Results be Determined Promptly. This Challenge Comes Far Too Late.

Ms. Becker did not commence this action until 16 months after the primary, and over a year after the successful candidate assumed office. This Court has previously recognized that delay in contesting elections can be barred by the doctrine of laches. Eulaker v. Kaye, 85 Wn.2d 629, 635, 537 P.2d 777 (1975).⁷ As the Ninth Circuit has noted,

4. The Court would reject Ms. Becker's novel theory that the state constitution forbids a member of the canvassing board from serving when he or she is a candidate. Ms. Becker acknowledges that the appellant's opening brief is to the contrary, argument merely extrapolates an "unorthodox conclusion from exceedingly general constitutional language." Id. at 16-19. Since votes for all offices are on the same ballot, it would be unfeasible for separate officers to duplicate the tabulation as to different offices. Generalized language can not be understood to command such a result.

7. The Legislature has required by way of statutes of limitation that election challenges be brought within days, not months or years. RCW 29-04.030 (some subdivisions only); RCW 29-55.020. Ms. Becker's lack of specificity makes application of these statutes absurd, because it is difficult to discern the purported source of her cause of action. Sae Eulaker, 85 Wn.2d at 638. The

"the voiding of a state election is a 'drastic if not staggering' remedy." Soules, 849 P.2d at 1180 quoting Hall v. Southwell, 376 P.2d 659, 662 (5th Cir. 1967). Courts should balance the severity of the alleged infraction against "such countervailing equitable factors as the extremely disruptive effect of election invalidation and the havoc it wreaks upon local political continuity." Id.

Given the harsh consequences of invalidating an election, Ms. Becker could and should have pressed her claims prior to the general election. Strict timeliness is essential, given "the strong public policy favoring stability and finality of election results." Donsdhev v. Attorney General, 584 P.2d 557, 559 (Ariz. 1978). Belated challenges could seriously harm the public interest by interfering with the effective performance of the duties of office, and "seriously erode the stability of state and local governments"

Id. "[I]f aggrieved parties, without explanation,
Legislature has nevertheless recognized the need for rapidity in filing actions such as this.

do not come forward before the election, they will be barred from the equitable relief of overturning the results of the election." SOULSE, 349 F.2d at 1180.

Laches will bar an action where a change in conditions makes it inequitable to consider the matter following plaintiff's delay. Walokin v. QJZMIA Dyster Co., 40 Wn.2d 469, 477, 244 P.2d 273 (1952). The completion of the general election, to which the primary at issue was preliminary, and the inauguration of the winner certainly changes circumstances in reliance upon the results of the primary. For the reasons more fully articulated by Pierce County, the elements of laches are therefore

The Secretary must also note the profound public interest in the confidence that our elections are run honestly. Sus Donohue v. Board of Elections, 435 F. Supp. 957, 967 (S.D.N.Y. 1976) ("It is difficult to imagine a more damaging blow to public confidence in the electoral process than the election of a President whose margin of victory was provided by fraudulent registration or victory ballot-stuffing or other illegal means."). Ms. Becker's delay certainly precludes invalidation of this election, but this Court's opinion should not overlook the public interest in confidence in the result. The complaint does not allege that the tabulated results were incorrect in any way. The Secretary respectfully recommends that this Court should so note, whatever the basis for its ruling.

established. Numerous decisions from other states regarding elections contests support this conclusion. See, e.g., Evans v. State Election Bd., 804 P.2d 1125, 1127 (Okla. 1990); White v. Board of Elections & Ethics, 517 A.2d 1113, 1135 (D.C. App. 1988); Martin v. Soucia, 441 N.E.2d 131, 133 (Ill. App. 1982); Ruonanno, 430 A.2d at 770.

3. The statute at issue is Directory, and Not Mandatory

RCW 29.62.030 requires the other two members of the canvassing board to conduct the canvass if the position of county auditor is on the ballot. Even if one were to assume, solely for the sake of argument, that this statute applied to the primary for state auditor (and it does not), that statute cannot justify the disenfranchisement of all Pierce County voters.

This Court has recognized that statutes that are directory, rather than mandatory, in nature do not justify the harsh consequences of invalidating the governmental task conducted pursuant to them. Nichol v. Lanaster, 97 Wn.2d 620, 623, 647 P.2d 1021 (1982). Legislative intent as to whether a statute is directory or mandatory depends upon "all

the terms and provisions of the act in relation to the subject of the legislation, and consideration of the nature of the act, the general object to be accomplished, and the consequences that would result from construing the particular statute in one way or another." Zalucha v. Carter, 26 Wn.2d 211, 215, 173 P.2d 526 (1946); Michal, 97 Wn.2d at 525-26.

This Court has previously indicated that statutes governing election procedures, in the absence of any actual error in the vote count, are directory only. State ex rel. Doyle v. Superior Court, 138 Wash. 489, 492, 244 P. 702 (1926). Failure of the county auditor to affirmatively stand aside, where the other two members of the board agree as to the canvass and there is no allegation of fraud, can hardly be thought to support a legislative intent that the election be invalidated. See id. The harsh consequence of disenfranchising voters who cast valid ballots that were counted correctly does not follow from the nature of what Ms. Becker claims to be a procedural irregularity.

Courts of other states have so held. The Illinois court reasoned:

Since every error does not warrant the invalidation of an election, it must be determined on appeal whether the statutory provisions that were violated are mandatory or directory. The reason for the distinction is to obtain fair elections without invalidating the will of the people, for although legal safeguards must be faithfully observed, literal compliance with formal steps should not be required if the spirit and intent of the law is not violated.

Mansson v. Eureka Unit District, 388 N.E.2d 273, 275 (Ill. Ct. App. 1979).

Similarly, the Oklahoma court has held that only the most serious election irregularities will support invalidation.

Further, we have recognized provisions of our election laws are mandatory if sought to be enforced before an election, but after an election they normally should be held to be directory only, unless of a character to effect an obstruction to the free and intelligent casting of the vote or the ascertainment of the result . . .

Jackson v. Maloy, 806 P.2d 610, 616 (Okla. 1991) (emphasis by the court). The court reasoned that, based upon the public interest in having votes counted, elections will not be invalidated unless irregularities are "of such a character in either

quality or quantity to prove the outcome of an election cannot be determined." *Id.* at 620.

None of Mr. Becker's allegations challenge the basic integrity of the vote count. "Ordinarily an election should not be declared void unless it is shown that the result is not in accordance with the will of the electorate or that such will cannot be ascertained because of uncertainties." *In Re LAYNE*, 702 P.2d 320, 326 (Kan. 1985).

The county auditor acted properly by participating on the canvassing board pursuant to his duties of office. Even if that conclusion were incorrect, this Court should uphold the canvass based on the directory nature of the statute.

XIII. CONCLUSION

This Court should affirm the judgment of the superior court. RCW 29.62.030 does not require the county auditor to stand aside from the canvass for an office other than county auditor. Candidacy by a member of the canvassing board for another office does not alter this result.

Even if this Court were to somehow conclude that the Pierce County Auditor should not have

participated in the canvass for state auditor, this Court should affirm the dismissal. To allow this action to continue would violate the compelling public policy in favor of the finality of elections. The doctrine of laches bars this action because Ms. Becker waited to file until 16 months had elapsed since the primary at issue. When the matter was finally brought to court, Ms. Becker failed to allege that so much as a single vote was tabulated incorrectly. Finally, the public policy in favor of finality of elections dictates that RCW 29.62.030 must be regarded as directory, rather than mandatory.

Respectfully submitted this 5th day of October, 1994.

CHRISTINE O. GRINGOIRE
Attorney General

John J. Egan
JEREMY T. EVEN
Assistant Attorney General
(206) 536-0726
WSBA NO. 20367

Attorney for
Curtis Ralph Munro,
Secretary of State, State
of Washington

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I, Beth A. Colgan, state and declare as follows:

1. I am one of the attorneys for Intervenor-Respondent Washington State Democratic Central Committee ("WSDCC"), am competent to make this declaration, and do so upon personal knowledge as indicated.

2. WSDCC issued its First Interrogatories and Requests for Production on Petitioner Rossi for Governor Campaign on January 20, 2005; the responses thereto were due on February 22. In its responses, the Rossi Campaign provided stacks of court pleadings, but did not provide a list of individuals the Rossi Campaign contended were illegal voters, including the alleged felon voters. After Rule 37 conferences, on March 3, the Rossi Campaign provided WSDCC with a list of individuals that it alleges were felons who illegally voted in the 2004 General Election. That list contained the names of 1135 individuals. It is my understanding that the Rossi Campaign chose to provide the list to several media outlets prior to producing it to the WSDCC.

3. The Rossi Campaign produced an amended list on March 7, which contained the names of 1131 individuals that the Rossi Campaign alleged were felons who cast illegal votes in the 2004 General Election. The March 7 list appeared to include over 200 individuals who had not been convicted of a felony, but had been adjudicated as a juvenile in juvenile court.

4. A true and correct copy of a letter dated March 17, 2005, from WSDCC's counsel, Kevin J. Hamilton, to Petitioners' counsel, Harry J.F. Korrell, is attached hereto as Exhibit A. A true and correct copy of a letter from Mr. Korrell to Mr. Hamilton, dated March 17, 2005, is attached hereto as Exhibit B. A true and correct copy of a letter from Mr. Hamilton to Mr. Korrell, dated March 21, 2005 is attached as Exhibit C.

1 5. On April 4, in response to discovery requests, WSDCC provided Petitioners
2
3 with a list of individuals that it believed were not properly included on Petitioners' March 7
4 list. On April 7, the Rossi Campaign produced a second amended list that contained the
5 names of 879 individuals that the Rossi Campaign alleges were felons who cast illegal votes
6 in the 2004 General Election (the "List"). However, this List still includes many of the
7 names that WSDCC had identified as errors.
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12 6. A true and correct copy of an email from Mr. Hamilton to Mr. Korrell, dated
13 April 9, 2005, is attached hereto as Exhibit D. To date, Petitioners have not responded to
14 that email.
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18 7. The Declaration of Julie M. Sund and the Affidavit of Christopher L. Yetter
19 filed in support of the Election Contest Petition indicate that the individuals identified as
20 illegal voters by Petitioners were derived primarily from a series of general databases,
21 including a database of felony convictions or juvenile adjudications maintained by the
22 Washington State Patrol and voter files maintained by the Secretary of State and several
23 Washington counties. The voter files contain voting records, including records related to the
24 2004 General Election. The documents included in the voter files vary. WSDCC has
25 obtained copies of these databases from either the agency responsible for maintaining the
26 databases or Petitioners.
27
28

29 8. It is a time-consuming and laborious process to verify whether any alleged
30 individual felon was convicted, whether the person's civil rights have been restored, and
31 whether the person actually voted. At a minimum, it requires reviewing court records and
32 voting records for each individual. Given that the Rossi Campaign produced this most
33 recent List on April 7, WSDCC has not completed its investigation of the accuracy of the
34 List.
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1 9. A true and correct copy of an article by David Postman, *GOP's Felon List*
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3 *May Be Way Off*, The Seattle Times, March 17, 2005, is attached hereto as Exhibit E.

4 10. WSDCC has identified at least seven individuals on the List who were
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6 adjudicated as juveniles. True and correct copies of the Juvenile Court Judgment and
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8 Sentence or the Statement of Juvenile Offender on Plea of Guilty for seven individuals on
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10 the List are attached hereto as Exhibit F. The names of these individuals, the names of
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12 victims and witnesses, and other personal details have been redacted from these documents.
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14 Petitioners have not provided any evidence of an adult conviction for these seven
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16 individuals.
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18 11. The Rossi Campaign listed one individual from Skagit County as a felon who
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20 cast an illegal vote. However, Skagit County has confirmed that the individual was
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22 convicted of a gross misdemeanor rather than a felony. A true and correct copy of a letter
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24 from the Skagit County Prosecuting Attorney to WSDCC's counsel, Mr. Hamilton, dated
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26 March 11, 2005, regarding this individual is attached hereto as Exhibit G. The name of this
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28 individual and other personal information have been redacted from this document.
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30 12. King County has provided Certificate and Order of Discharge papers
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32 restoring the civil rights of three individuals on the List. True and correct copies of the
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34 Certificate and Order of Discharge for each of these individuals are attached hereto as
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36 Exhibit H. The names of these individuals and other personal information have been
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38 redacted from these documents. The Washington State Patrol database indicates that these
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40 three individuals have not been convicted of felonies other than those for which their rights
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42 have been restored.
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44 13. In response to a Public Disclosure Act request, Whatcom County reported
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46 that four individuals on the List requested absentee ballots, but did not return their ballots.
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Whatcom County has also produced poll book pages proving that none of the four individuals voted at the polls. Whatcom County's research shows that these individuals did not vote at all. A true and correct copy of Whatcom County's response, dated March 11, 2005, is attached hereto as Exhibit I. The names of these individuals and other personal information have been redacted from these documents.

14. A true and correct copy of an article by Lewis Kamb, *Felons Testify About Election Voting*, Seattle-Post Intelligencer, March 19, 2005 is attached hereto as Exhibit J.

15. A true and correct copy a letter dated April 11, 2005 from Janine Joly, King County Prosecutor's Office, to Dean Logan, King County Records, Elections and Licensing Services Division, is attached hereto as Exhibit K.

16. A true and correct copy of the Complaint for Declaratory Relief, *Madison v. State*, No. 04-2-33414-4, filed in King County Superior Court on October 21, 2004 is attached hereto as Exhibit L.

I declare subject to penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED and DATED at Seattle, Washington, this 13th day of April, 2005 by
BETH A. COLGAN.

/s/ Beth A. Colgan
Beth A. Colgan

EXHIBIT A



Kevin J. Hamilton
PHONE: 206.359.8741
FAX: 206.359.9741
EMAIL: khamilton@perkinscoie.com

1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
PHONE: 206.359.8000
FAX: 206.359.9000
www.perkinscoie.com

March 17, 2005

VIA FACSIMILE & U.S. MAIL

Mr. Harry J.F. Korrell
Attorney at Law
Davis Wright Tremaine LLP
1501 Fourth Avenue, Suite 2600
Seattle, WA 98101-1688

Re: Borders, et al. v. King County, et al.

Dear Harry:

On March 3, 2005, your client chose to release to the press and others a list of Washington voters that your client claims are felons who voted unlawfully in the November 2004 Governor's election rather than simply provide the information to us in response to our discovery requests. It is now apparent – and apparently admitted by the Rossi campaign – that the list is deeply flawed and contains the names of hundreds of Washington citizens who may have been charged in juvenile court but who have never been convicted of any felony. None of these voters are "felons" and none of them constitute "illegal voters." I write to you today to ask you to remove these names from your list of alleged "illegal votes."

An individual who has been adjudicated as a juvenile offender has not been convicted of an "infamous crime," because such individuals have not been convicted of *any* crime. Under Washington state law, "[a]n order adjudging a child delinquent or dependent under the provisions of [the Juvenile Justice Act] *shall in no case be deemed a conviction of a crime.*" RCW 13.04.240 (emphasis added). This provision, and the legal conclusion that "a juvenile has not committed a crime, including a felony, when he has committed an offense," has been deemed to be so clear and unambiguous on its face that there is no interpretation for a court to perform. *In re Frederick*, 93 Wn.2d 28, 30 (1980) ("The

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Perkins Coie LLP and Affiliates

Mr. Harry J.F. Korrell
March 17, 2005
Page 2

foregoing provisions make clear that a juvenile has not committed a crime, including a felony, when he has committed an offense, 'an act designated as a crime If [sic] committed by an adult.'").

As a result, such individuals never lost their right to vote and their participation in the 2004 General Election was entirely appropriate. Your client (and your agent, the BIAW) have long had access to the public records necessary to confirm these facts.

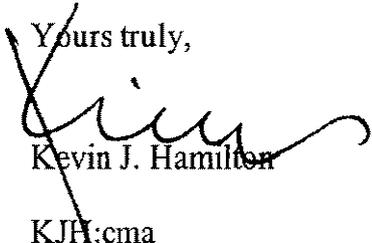
As you are aware, if this matter proceeds to trial, RCW 29A.68.100 will require that you serve a final list of alleged illegal votes. None of the individuals adjudicated as juveniles that currently appear on your list of alleged "illegal voters" should appear on that final list. Indeed, none of these individuals should ever have been so publicly named as "felons," much less accused of illegal conduct with respect to this election.

I stand ready to work with you to resolve this unfortunate dispute as promptly and as efficiently as possible. I have no doubt that there are some issues as to which you and I will be unable to agree. But this is not one of them. As to these voters, the evidence is clear and indisputable.

Please remove these individuals from your list of alleged illegal voters. If we do not hear from you promptly, we will raise the issue directly with the Court. I'm hopeful, however, that we can avoid pointless litigation over issues as to which there does not appear any reasonable basis for dispute.

Thanks in advance for your cooperation.

Yours truly,


Kevin J. Hamilton

KJH:cma

EXHIBIT B



Davis Wright Tremaine LLP

ANCHORAGE BELLEVUE LOS ANGELES NEW YORK PORTLAND SAN FRANCISCO SEATTLE SHANGHAI WASHINGTON, D.C.

HARRY J.F. KORRELL
DIRECT (206) 628-7680
harrykorrell@dwt.com

2600 CENTURY SQUARE
1501 FOURTH AVENUE
SEATTLE, WA 98101-1688

TEL (206) 622-3150
FAX (206) 628-7699
www.dwt.com

March 17, 2005

RECEIVED
MAR 21 2005
PERKINS COIE

Kevin Hamilton, Esq.
Perkins Coie
1201 Third Ave., Suite 4800
Seattle, WA 98101-3099

Re: *Borders v. King County et al.*

Dear Kevin:

I received your letter regarding the inclusion of some people with juvenile records on the list of illegal votes we provided in response to your request. We have been clear with you that our efforts to create the final list of felons and others who voted illegally in the election is on-going. We explained repeatedly that our preference was to provide you with the documents on which we were relying, and the only reason we created and provided you with the list was because your client insisted on such a list and promised discovery motions if we did not provide one. Rather than bother with costly motions that could only delay these proceedings, we provided the list.

We are investigating whether particular people, who were found guilty of offenses before the age of 18, should be excluded from the final list of illegal voters, and we will certainly provide you with a final list before trial as required by the contest statute. To expedite this process, if there are particular names you believe should be removed (for any reason), please share them with us so that we can focus additional efforts on those cases.

I agree that where possible should avoid unnecessary litigation; cooperating to develop a list of illegal votes that we can both agree is accurate would help do that. Is your client willing to work with us to reach a stipulation regarding the many hundreds of illegal votes that were cast and counted in the election? As you said in your letter, there will be some issues on which we do not agree, but this does not seem to be one. There may be some votes the legality of which we disagree about, but surely we can agree on a large number of them. In addition if, as we believe, King County will certify that their records confirm that certain named individuals voted in the election, this is a matter on which a stipulation should be reached.

Kevin Hamilton, Esq.
March 17, 2005
Page 2



Please let me know if you are willing to discuss stipulating to these and other facts regarding the election and the counting of illegal votes so that we can expedite these proceedings.

Very truly yours,

Davis Wright Tremaine LLP

Harry J.F. Korrell

HJFK:mcs

EXHIBIT C



1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
PHONE: 206.359.8000
FAX: 206.359.9000
www.perkinscoie.com

Kevin J. Hamilton
PHONE: 206.359.8741
FAX: 206.359.9741
EMAIL: khamilton@perkinscoie.com

March 21, 2005

VIA FACSIMILE & U.S. MAIL

Mr. Harry J.F. Korrell
Davis Wright Tremaine LLP
1501 Fourth Avenue, Suite 2600
Seattle, WA 98101-1688

Re: Borders, et al. v. King County, et al.

Dear Harry:

Thank you for your letter of March 17, 2005.

While I can appreciate, and share, your interest in streamlining this litigation, it is plainly premature at this point to consider entering a stipulation with respect to specific individuals your client has identified as alleged "illegal voters." We remain deeply troubled by the large number of voters that appear to have been erroneously included in the materials (and lists) you have provided us to date. As our investigation continues into your allegations, it appears likely that additional errors will come to light.

Nonetheless, I do share your interest in finding ways to streamline the litigation. I would propose that, toward that end, we enter a stipulation defining the scope of your burden with respect to these illegal votes, as there does appear to be confusion on this point and by entering such a stipulation, we could avoid the necessity of litigating what appear to be straightforward questions. Thus, I would propose that we stipulate that, with respect to your allegations as they relate to alleged votes by persons disqualified from voting under Article VI, Section 3 of the constitution by reason of conviction of an infamous crime, that the Petitioners must prove (a) by clear and

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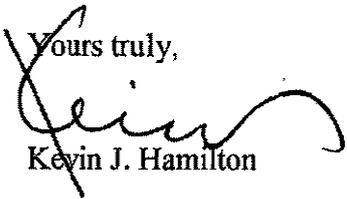
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Mr. Harry J.F. Korrell
March 21, 2005
Page 2

convincing evidence that (b) the person was convicted as an adult (regardless of the individual's age at the time of conviction), (c) of a felony, (d) the individual's sentence was neither suspended nor deferred, (e) the individual's right to vote had not been restored as of November 2, 2004, and (f) that the individual cast a ballot that was counted for either Gregoire or Rossi in the final certified returns of January 11, 2005. I understand that we disagree as to whether the petitioners must also prove specifically for which of the two candidates the ballot was counted but we ought to be able to limit our dispute by stipulating to the rest of the required elements.

Please let me know at your earliest convenience. I would be happy to prepare a proposed stipulation incorporating these elements.

Yours truly,



Kevin J. Hamilton

KJH:cma

EXHIBIT D

Roos, Breena M.

From: O'Sullivan, Kathleen M.
Sent: Tuesday, April 12, 2005 3:33 PM
To: Roos, Breena M.
Subject: FW: Proposed Stipulation

-----Original Message-----

From: Hamilton, Kevin J.
Sent: Saturday, April 09, 2005 1:10 PM
To: @Korrell, Harry
Subject: Proposed Stipulation

Harry,

In the interests of exploring a potential stipulation that might assist us in potentially narrowing the list of motions we file this week, or perhaps narrowing the range of disputed issues, can you pls let me know whether you would be willing to enter into the following stipulation (which would, of course, apply to offsetting illegal votes identified by the WSDCC) with respect to the elements of proof required to show an "illegal vote"?

Thanks
Kevin

In order to determine that a particular vote was an "illegal vote" because it was a "vote cast by a person disqualified under Article VI, section 3 of the state Constitution," RCW 29A.68.020(5)(a)(ii), Petitioners are required to prove all of the following elements:

- (1) the person was convicted as an adult, not merely adjudicated as a juvenile in juvenile court proceedings;
- (2) the person was convicted of a felony (i.e., was not merely convicted of a misdemeanor or a gross misdemeanor);
- (3) the person was not given a deferred sentence (which is only applicable to felony convictions entered prior to July 1, 1984 under RCW 9.95.200 and RCW 9.95.240);
- (4) the person has not been discharged pursuant to RCW 9.94A.637(which requires no action by an offender and occurs automatically in two circumstances:

(a) when an offender completes all nonfinancial requirements and legal financial obligations imposed by the sentence while under the custody or supervision of the DOC, RCW 9.94A.637(1)(a); or

(b) when an offender completes the nonfinancial requirements (but not the legal financial obligations) while under the custody and supervision of the DOC, and the offender subsequently satisfies all legal financial obligations under the sentence, RCW 9.94A.637(1)(b); but which discharge also occurs in the following third scenario: the offender does not complete the nonfinancial requirements of the sentence while under the supervision of the DOC, or is not subject to such supervision, but the offender ultimately completes all financial and nonfinancial requirements of the sentence. RCW 9.94.A.637(1)(c)]

(5) the person cast a ballot in the 2004 General Election; and

(6) the person marked that ballot to indicate a vote for a gubernatorial candidate.

EXHIBIT E



Thursday, March 17, 2005, 12:00 A.M. Pacific

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GOP's felon list may be way off

By David Postman

Seattle Times chief political reporter

The list of alleged felon voters compiled in Dino Rossi's legal challenge to the governor's election mistakenly includes people tried as juveniles who never lost their right to vote.

A spokeswoman for Rossi acknowledged last night that perhaps hundreds of the 1,135 people on the list are there improperly because of juvenile cases.

Mary Lane said Rossi attorneys and researchers will review the names and remove anyone found to be on the list only because of a juvenile offense.

"It could very well be that people we have on our list didn't have their voting rights taken away," Lane said of the juvenile cases.

A partial check by The Seattle Times showed that 165 alleged felon voters in King County had only juvenile cases. The Times was able to check 462 names using a Washington State Patrol database.

An attorney for the Democratic Party said more than 200 juvenile cases were found among the King County names.

The list contains names from 13 counties, though the vast majority are from King.

"They should scrub their list for other errors," said attorney Jenny Durkan, a lawyer for the Democrats. "This is a huge error."

Durkan said Republican attorneys should apologize to the people erroneously listed as voting illegally and amend the list "so these people's names never have to go into an official court file."

Attorneys for Rossi compiled the list of alleged illegal voters as part of his lawsuit asking a Chelan County Superior Court judge to throw out the November election that put Democrat Christine Gregoire in the governor's mansion.

Washington law and the state constitution prohibit felons (convicted in adult court) from voting unless they have had their rights restored. That requires meeting all court-imposed obligations including community service and the payment of restitution and fines.

County election officials across the state often fail to remove felons' names from voter-registration rolls. In some instances, felons reregister. County election officials say they don't have the resources to run a criminal background check on every new voter.

Last month Rossi's attorneys released a list of alleged illegal voters in response to a subpoena from Democrats. That list was mostly made up of felons but also included people alleged to have voted twice and votes cast under the names of dead people.

Assistant Attorney General Jeff Even said yesterday that people tried as juveniles should not be on the list. People found guilty in the juvenile system are not technically convicted of a crime under state law. Rather, that is a civil procedure and would not disqualify someone from voting once they turned 18, he said.

"My view has always been that since those are not criminal proceedings, a juvenile adjudication does not have the effect of disenfranchising because it is not a criminal conviction," said Even, who represents the Secretary of State's Office in the Rossi case.

The state's juvenile-justice law says: "An order of court adjudging a child delinquent or dependent under the provisions of this chapter shall in no case be deemed a conviction of crime."

That was backed up in a 1987 state Supreme Court ruling. In rejecting a claim that juveniles should get jury trials, the court said:

"We have interpreted this provision to mean that a juvenile cannot be convicted of a felony."

Juveniles who were tried and convicted as adults, however, would be disqualified from voting.

Rossi was initially declared the winner of the November election, the closest governor's race in state history. He won the initial count by 261 votes and a machine recount by 42 votes. But after a hand recount, Gregoire was declared the winner by 129 votes.

In Rossi's suit challenging the election, he claims that errors and illegal votes made it impossible to know who is the true winner and that Gregoire should be removed from office.

Among the errors he cites are problems reconciling vote totals and provisional ballots that were improperly counted before being verified. (Earlier this week, King County Elections Director Dean Logan said as many as 660 provisional ballots were counted improperly, up from previous estimates of 348.)

Regarding the voters with juvenile offenses, Lane said she was not sure how those people ended up on the felon list. Those offenses are included in the Washington State Patrol criminal database Rossi used to find felons who voted. But they are coded to denote a juvenile case.

Lane said Rossi's staff continues to collect evidence and will submit the names of additional felon voters.

Times researcher Justin Mayo contributed to this report.

David Postman: 360-943-9882 or dpostman@seattletimes.com

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EXHIBIT F

CERTIFIED COPY

FILED JUN 14 1991



State of Washington v.

NO. 90 804219 -9

STATEMENT OF JUVENILE OFFENDER ON PLEA OF GUILTY

1. My name is _____
2. My age is 18
3. I have been informed and fully understand that I have the right to a lawyer, and that if I cannot afford to pay for a lawyer, the court will provide me with one at no cost. A lawyer can look at the social and legal files in my case, talk to the police, probation counselor, and prosecuting attorney, tell me about the law, help me understand my rights, and help me at trial.
4. My lawyer is Robert W. FETTY.
5. I have been informed and fully understand that I am charged with the offense of

ASSAULT Third Degree

and that the elements of the offense are AN unPermitted Touching - to intentionally ASSAULT DALE E. Reid thereby recklessly inflicting substantial bodily Harm using a weapon

and that I have been given a copy of the charge.

6. I have been informed and fully understand that:
 - (a) I have the right to a speedy and public trial in the county where I reside or where the offense is alleged to have been committed.
 - (b) I have the right to remain silent before and during trial, and I need not testify against myself.
 - (c) I have the right to hear and question witnesses who might testify against me.
 - (d) I have the right to have witnesses testify for me. These witnesses may be required to appear at no cost to me.
 - (e) I have the right to testify on my own behalf.
 - (f) I am presumed innocent until each element of the offense I am charged with is proven beyond a reasonable doubt or I enter a plea of guilty.
 - (g) I have a right to appeal a determination of guilt after a trial.
 - (h) If I plead guilty I give up these rights enumerated in 6(a)-(g).
7. I have been informed and fully understand that the standard sentence for my offense is

3 - 6 MONTHS, 24-40 HRS COMM Service and/or 0 to \$25. and/or 5-10 days confinement

Statement of Juvenile on Plea of Guilty (JuCR 07.7 RCW 13.40.130)

Ju-07.0600 9/87

RC 000621

ORIGINAL LEGAL FILE

Redacted

based upon my criminal history of NONE

8. I have been informed and fully understand that the maximum punishment I can receive is commitment until I am 21 years old, but that I may be sentenced for no longer than the adult maximum sentence for this offense.

9. I have been informed and fully understand that my plea of guilty and the court's acceptance of my plea will become part of my criminal history. I have also been informed and fully understand that if the offense is a felony and I was 15 years of age or older when the offense was committed, then the plea will remain part of my criminal history when I am an adult if I commit another offense prior to my twenty-third birthday.

10. I have been informed and fully understand that if I plead guilty and the court accepts my plea, my criminal history may cause the court to give me a longer sentence for any offenses that I commit in the future.

11. I have been informed and fully understand that the prosecuting attorney will make the following recommendation to the court 3 MOS community supervision,
24 HRS community service, NO FINE,
5 DAYS confinement

12. I have been informed and fully understand that the probation counselor will make the following recommendation to the court

13. I have been informed and fully understand that the court does not have to follow the prosecuting attorney's or the probation counselor's recommendation for my sentence. I have been informed and fully understand that the court must impose a sentence within the standard sentence range unless the court finds substantial and compelling reasons not to do so. If the court goes outside the standard sentence range, either I or the State can appeal that sentence. If the sentence is within the standard range, no one can appeal the sentence.

14. The court has asked me to state in my own words what I did that resulted in my being charged with the offense. This is my statement: on June 9, 1990

I engaged in a Fight with
DATE: REID. I make this ALIBI PLEA
Believing I am NOT Guilty BUT I firmly
Believe that upon hearing the witnesses, a
Judge OR Jury would find me guilty of ASSAULT 3rd

Such Fight occurred in King County,
WASHINGTON

I PLEA guilty TO TAKE ADVANTAGE OF
PROSECUTOR'S Recommendation.

KING COUNTY DEPARTMENT OF PUBLIC SAFETY

CHARGE SHEET

Case No.

9 0

1 5 7 0 0 6

REPORT MADE BY	NAME AND BUSINESS OF VICTIM	DATE OF OFFENSE	NAME OF DEFENDANT	CHARGE
DETECTIVE EARL L. TRIPP 296-7530		06/09/90	(JUVENILES)	ASSAULT 2 nd
		DATE OF ARREST 06/10/90		

JUN 14 1991

NAMES & ADDRESSES OF THE WITNESSES

824-5187

246-7059

246-7059

OFFICER J.H. JUCHMES KCP 296-3333

OFFICER N.N. ELLEDGE KCP 296-3333

RECEIVED

JUN 13 1990

SUMMARY OF THE FACTS

WILL MALENG
PROSECUTING ATTORNEY

✓will testify he was outside talking with witness HOPPER when they were approached by the defendants; that he was the victim of an unprovoked attack by both defendants; that he was struck by a number of beer bottles, causing lacerations to his neck; that he was treated for his injuries at Highline Hospital; and that he provided a statement to Off. ELLEDGE.

✓will testify she was present during the above assault; and that she provided Off. ELLEDGE with a written statement.

✓will testify that he was present during the above assault and that he provided a statement to Off. JUCHMES.

Officer JUCHMES.....will testify he took a written statement from witness WIEST and that he assisted in the arrest of the defendants.

Officer ELLEDGE.....will testify that he obtained statements from victim and witness ; that he advised both defendants of their constitutional rights and obtained written statements from each.

Copies To:

RC 000624

Page

Redacted

Dist. No
L-2

KING COUNTY DEPARTMENT OF PUBLIC SAFETY
FOLLOW-UP REPORT

Case No
9, 0 - 1, 5, 7, 0, 0

PRESENT DATE
06/12/90

TYPE OF CALL ASSAULT, O.D.V.		FCR CODE 604 E_D	DATE OF OCCURRENCE 06/09/90	ORIGINAL INVESTIG. OFFICER ELLEGE
ORIGINALLY REPORTED AS SAME		PREVIOUS FCR - 17014 40th South		VALUE REC'D.
VICTIM	ADDRESS	CITY	STATE	ZIP
STATUS:		OPEN <input type="checkbox"/>	INACTIVE <input type="checkbox"/>	CLOSED <input checked="" type="checkbox"/>
DISPOSITION:		CLEARED BY ARREST <input checked="" type="checkbox"/>	EXCEPTIONAL CLEARANCE <input type="checkbox"/>	ADMINISTRATIVE CLEARANCE <input type="checkbox"/>
PROPERTY:		RECOVERED <input type="checkbox"/>	ADDITIONAL STOLEN <input type="checkbox"/>	FURTHER DESCRIPTION <input type="checkbox"/>
		{ INDICATE ID MARKS-COLORS-SIZES-SERIAL NUMBERS-DISPOSITION-VALUE ETC.		

- E N T R Y**
- SUSPECTS: INCLUDE NAMES, B'A NUMBERS, DESCRIPTIONS, DISPOSITION, CAN VICTIM IDENTIFY, ETC.
 - PERSONS INTERVIEWED: NAMES, ADDRESSES AND TELEPHONE NUMBERS.
 - PROPERTY: INDICATE ID MARKS-COLORS-SIZES-SERIAL NUMBERS-DISPOSITION-VALUE, ETC.
 - ADDITIONAL ENTRIES: SUMMARIZE STEPS OF INVESTIGATION - COMMENCE EACH ENTRY WITH A NO., DATE AND TIME.

1 SUSPECTS:

-
-

2 PERSONS INTERVIEWED:

Foster High School Security 3/243-1771
242-8147

4 ADDITIONAL ENTRIES:

- 06/11/90 0800 hrs. Received and reviewed case.
- 0840 hrs. I telephoned the victim's home and left a message for him to return my call.
- 0905 hrs. Victim called back. He apparently

INVESTIGATING OFFICER DET. KARL L. TRIPP 06/12/90	PERS. NO. 01582	UNIT 171	APPROVED BY:	PERS. NO.
---	--------------------	-------------	--------------	-----------

RC 000625

PAGE 1
OF

Redacted

ASSAULT. O.D.W.

received 16 stitches to the back of his neck. said he provided a written statement to Off. ELLEDGE on 06/10/90. I asked if he knew who had struck him in the head with a bottle and he replied that both had. REID also provided with the full names of both suspects.

7 0930 hrs. I telephone of Foster H.S. Security and asked him to get addresses and date of births for the suspects.

8 0950 hrs. called back with the above information. also said he had been in contact with the suspects' parents and they were aware of the incident. I asked to have the parents call me.

9 1005 hrs. called. Apparently, both suspects were taken to Prct. 4 at 2130 hrs. on 06/10/90, where they gave written statements.

10 06/12/90 0800 hrs. I received a follow-up from Offs. ELLEDGE and JUCHMES, which included victim and suspect statements.

11 1400 hrs. A copy of case to the Juvenile Division of the King County Prosecutor's Office.

CONCLUSION:

This case is CLOSED, CLEARED BY ARREST. A copy of this case to the Prosecutor's Office for final review and filing of charges of Assault 2nd against and)

DET. EARL L. TRIPP 01582 171
06/12/90

RC 000626

CERTIFIED COPY

FILED



SUPERIOR COURT OF WASHINGTON
COUNTY OF KING
JUVENILE COURT

FEB 24 1986

SUPERIOR COURT CLERK
BY [Signature]

State of Washington v.

NO. 85-8-04868-9

STATEMENT OF JUVENILE
OFFENDER ON PLEA OF GUILTY

D.B. 8-15-68

1. My true name is _____
2. My true age is 17 years and I am competent to understand the charge(s) and the consequences of my action.
3. I know that I have the right to a lawyer, and that if I cannot afford to pay for a lawyer, the Court will provide me with one at no cost.
4. My lawyer is MARY WOLNEY
5. The Court has told me that I am charged with the offense(s) of Burglary in the second degree (three counts) and I have been given a copy of the charge(s).

6. The Court has told me and I am aware that:
 - [a] I have the right to hear and question witnesses who might testify against me.
 - [b] I have the right to have witnesses testify for me. These witnesses may be required to appear at no cost to me.
 - [c] I have the right to testify on my own behalf but I do not have to testify on my own behalf, and the fact that I choose not to testify on my own behalf cannot be held against me.
 - [d] The offense(s) I am charged with must be proven beyond a reasonable doubt.
 - [e] I have a right to appeal a conviction after a trial.
 - [f] If I plead guilty I give up these rights, and I cannot change my plea. If the Court in making its disposition enters a disposition outside the standard range, after making a finding of manifest injustice, I understand that either the State or I may appeal.

7. I have been told that the Court will consider my criminal history.
My criminal history is (offense/date):

Indecent Liberties 8/14/83 ; TAKING A MOTOR VEHICLE 10/22/84
Simple Assault 10/22/84

8. I have been told that with my criminal history and present offense(s) I am classified as a [] minor/first offender [] neither a minor/first nor a serious offender [] serious offender.

The Court has told me that the standard sentence range for the charge(s) is _____

Prosecutor's Calculation:	Defense Calculation:
<u>I - 13-16 weeks</u>	<u>I - 8-12 weeks</u>
<u>II - "</u>	<u>II - "</u>
<u>III - "</u>	<u>III - "</u>

(If box is checked) or a term of community supervision for a period of not more than 1 year which may include one or more of the following: [a] up to \$100 fine [b] up to 150 hours of community service [c] attend information and/or counseling [d] detention of up to 30 days (no detention time for minor/first offender).

9. I have been told that the Prosecuting Attorney will take the following action and make the following recommendation to the Court:

I 13-16 weeks
II 13-16 weeks
III 30 days

10. I have been told that the Probation Counselor will take the following action and make the following recommendation to the Court:

Standard range (13-16 weeks) on each count.

11. I have been told that the Court does not have to follow either the Prosecuting Attorney's or the Probation Counselor's recommendation for my sentence, and could commit me to the Department of Institutions until my 21st. birthday. I have also been told that if I plead guilty to this/these offense(s) that it/they will become a part of my criminal history.

12. The Court has asked me to state in my own words what I did that resulted in my being charged with the offense(s). This is my statement.

On July 11, 1985 in King County I entered a building without permission with the intention of stealing something inside.
On July 28 or July 29, 1985 in King County I entered a building (Williams residence) without permission with the intention of stealing something inside.
On August 22, 1985 in King County I entered a building (Castle residence) without permission with the intention of stealing something inside.

13. I plead guilty to the charge(s) as alleged in Count(s) I, II, III

14. I make this plea freely and voluntarily. No one has threatened to harm me or anyone else in order to have me plead guilty.

15. No one has made any promises to make me plead guilty, except as written in this statement.

16. I have read or someone has read to me everything printed above and I have been given a copy of this statement. I have no more questions to ask the Court.

Dated: 2/24/86

JUVENILE OFFENDER'S SIGNATURE

NO. 85-8-0488-4

I have carefully gone over the above enumerated items #1-16 with my client and I believe that he/she fully understands them and that he/she is entering this plea knowingly, intelligently, and voluntarily.

2/24/86 DATE May C. Wolz Attorney for Respondent

Parent, guardian or custodian signature in the event child is under twelve (12) years of age.

Parent, guardian, custodian

The above statement was read by or read to the alleged offender and signed by the juvenile

in the presence of his/her Attorney

Prosecuting Attorney _____ and the undersigned Judge/Court Commissioner in open Court.

Dated: February 24, 1986 Stephen M. Zilly Judge/Court Commissioner

Approved for Entry:
David J. Vogel
Deputy Prosecuting Attorney

May C. Wolz
Lawyer for Respondent

STATE OF WASHINGTON } ss.
County of King }

I, BARBARA MINER, Clerk of the Superior Court
of the State of Washington, for the County of King, do hereby certify
that I have compared the foregoing copy with the original instrument as
the same appears on file and of record in my office, and that the same
is a true and perfect transcript of said original and of the whole thereof.
IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the
Seal of said Superior Court at my office at Seattle this _____
day of _____

FEB 16 2005

20

BARBARA MINER, Superior Court Clerk

By _____

Deputy Clerk

RC 000649

CERTIFIED COPY

FILED
KING COUNTY, WASHINGTON

AUG 10 1993

K.C. SUPERIOR COURT CLERK
BY LINDORE A. PHELPS DEPUTY



SUPERIOR COURT OF WASHINGTON
COUNTY OF KING
JUVENILE COURT

State of Washington v.

NO. 93-8-03029-2

STATEMENT OF JUVENILE
OFFENDER ON PLEA OF GUILTY

7-1-77

1. My name is _____
2. My age is 16
3. I have been informed and fully understand that I have the right to a lawyer, and that if I cannot afford to pay for a lawyer, the court will provide me with one at no cost. A lawyer can look at the social and legal files in my case, talk to the police, probation counselor, and prosecuting attorney, tell me about the law, help me understand my rights, and help me at trial.
4. My lawyer is Ann M. Carey
5. I have been informed and fully understand that I am charged with the offense of Malicious Mischief 2° (As Amended)

and that the elements of the offense are to knowingly and maliciously cause physical damage in excess of \$250. to the property of another

and that I have been given a copy of the charge.

6. I have been informed and fully understand that:
 - (a) I have the right to a speedy and public trial in the county where I reside or where the offense is alleged to have been committed.
 - (b) I have the right to remain silent before and during trial, and I need not testify against myself.
 - (c) I have the right to hear and question witnesses who might testify against me.
 - (d) I have the right to have witnesses testify for me. These witnesses may be required to appear at no cost to me.
 - (e) I have the right to testify on my own behalf.
 - (f) I am presumed innocent until each element of the offense I am charged with is proven beyond a reasonable doubt or I enter a plea of guilty.
 - (g) I have a right to appeal a determination of guilt after a trial.
 - (h) If I plead guilty I give up these rights enumerated in 6(a)-(g).
7. I have been informed and fully understand that the standard sentence for my offense is Minor / First Offender RCW 13.40.020 (14)(c)
3-6 months community supervision
16-32 hours community service
0-925 Fine

RC 000669

Statement of Juvenile on Plea of Guilty
(JUCR 07.7 RCW 13.40.130)

Ju-07 0600 /87

ORIGINAL-LEGAL FILE

Redacted

based upon my criminal history of VJCSA / Possession Marijuana < 40 grams
diversion 10/92

8. I have been informed and fully understand that the maximum punishment I can receive is commitment until I am 21 years old, but that I may be sentenced for no longer than the adult maximum sentence for this offense.

9. I have been informed and fully understand that my plea of guilty and the court's acceptance of my plea will become part of my criminal history. I have also been informed and fully understand that if the offense is a felony and I was 15 years of age or older when the offense was committed, then the plea will remain part of my criminal history when I am an adult if I commit another offense prior to my twenty-third birthday.

10. I have been informed and fully understand that if I plead guilty and the court accepts my plea, my criminal history may cause the court to give me a longer sentence for any offenses that I commit in the future.

11. I have been informed and fully understand that the prosecuting attorney will make the following recommendation to the court 6 months community supervision,
16 hours community service, restitution, VAP.

12. I have been informed and fully understand that the probation counselor will make the following recommendation to the court 60 days

13. I have been informed and fully understand that the court does not have to follow the prosecuting attorney's or the probation counselor's recommendation for my sentence. I have been informed and fully understand that the court must impose a sentence within the standard sentence range unless the court finds substantial and compelling reasons not to do so. If the court goes outside the standard sentence range, either I or the State can appeal that sentence. If the sentence is within the standard range, no one can appeal the sentence.

14. The court has asked me to state in my own words what I did that resulted in my being charged with the offense. This is my statement: On March 5, 1993

I, together with others knowing and maliciously
caused physical damage in excess of \$250.00 to
Washen Island High School, by spray painting it.
This incident happened in King County.

- 15. I plead guilty to the charge.
- 16. I make this plea freely. No one has threatened to harm me or anyone else in order to have me plead guilty.
- 17. No one has made any promises to me to make me plead guilty, except as written in this statement.
- 18. I have read or someone has read to me everything printed above and I have been given a copy of this statement. I have no more questions to ask the court.

Dated 8-10-93

Juvenile

The foregoing statement was read by or to the alleged offender and signed by the offender in the presence of his or her lawyer and the undersigned judge, in open court. The court finds the offender's plea of guilty is knowingly, intelligently, and voluntarily made, that the juvenile has been advised by the court concerning the nature of the offense,, that there is a factual basis for the plea and that the offender is guilty as charged.

[Signature]
Defense Attorney

[Signature]
Prosecuting Attorney
JACK A. RICHEY
SHERIFF COMMISSIONER

Dated: 8-10-93

[Signature]
JUG 10 1993
Judge/Commissioner

If applicable:

I am fluent in the _____ language and I have translated this entire document for the juvenile from English into that language. The juvenile has acknowledged his or her understanding of both the translation and the subject matter of this document. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this _____ day of _____, 19____, at _____, Washington.

Interpreter

STATE OF WASHINGTON } ss.
County of King }

I, BARBARA MINER, Clerk of the Superior Court of the State of Washington, for the County of King, do hereby certify that I have compared the foregoing copy with the original instrument as the same appears on file and of record in my office, and that the same is a true and perfect transcript of said original and of the whole thereof. IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Superior Court at my office at Seattle this _____ day of _____

FEB 16 2005

20
BARBARA MINER, Superior Court Clerk
By _____
Deputy Clerk

RC 000672

CERTIFIED COPY

FILED KING COUNTY, WASHINGTON

AUG 30 1990



SUPERIOR COURT OF WASHINGTON COUNTY OF KING JUVENILE COURT

SUPERIOR COURT CLERK

NO. 90-8-03089-1

State of Washington v.

ORDER OF DISPOSITION (INFORMATION)

I. BASIS

1.1 A dispositional hearing was held in this case on: August 30, 1990

1.2 Persons appearing at the hearing were:

Juvenile (X) Juvenile's lawyer (X) (Deputy) Prosecuting Attorney (X) Probation Counselor (X) Other (X) Bates

II. FINDINGS

Based on the testimony heard and the case record to date: the Court finds:

(X) plea

2.1 The above named juvenile was found guilty by of the offense(s) of:

() the Court Prison 20

2.2 RESTITUTION

- () That damage was done to the victim in the amount of
() The amount of loss cannot be determined at this time.
() That the juvenile has the present ability to pay restitution in the amount of
() That the juvenile does not have the present ability to pay restitution, however that the juvenile will develop the ability to pay restitution.
() That the juvenile does not have the present ability to pay restitution and cannot reasonably acquire the means to pay.

2.3 CATEGORY OF OFFENDER

The juvenile is:

- (X) A minor or first offender
() A middle offender
() A serious offender

2.4 MANIFEST INJUSTICE

() A disposition within the standard range for this offense would effectuate a manifest injustice. Findings of fact and conclusions of law to be presented by (date) 19

3089-1

3.2 CONDITIONS OF PROBATION: That while on community supervision the juvenile offender shall be under the charge of a probation counselor and comply with the following conditions: (1) must have parent/guardian's permission regarding whereabouts, hours, and activities (2) must report any change in residence, school, or work status to probation counselor. (Obtain permission from probation counselor before changing residence) (3) must have probation counselor's permission for out of state travel and (4) must keep all appointments with probation counselor. Must further comply with any conditions set forth in writing, signed by juvenile offender, lawyer and filed herein, during the term of community supervision.

3.3 JURISDICTION

() Jurisdiction is extended to _____ for purposes of restitution/community supervision.
() Jurisdiction is transferred to _____ County for purposes of supervision.

3.4 () The following courts are hereby dismissed _____

3.5 This order shall remain in full force and effect until further order of the Court or until the same is revoked, modified or changed, or terminated by an order of the Court or by law.

3.6 That while detained authorization is granted to provide necessary medical and dental examination and treatment as professionally prescribed.

3.7 NOTICE OF FEES

All payments ordered above are payable through the registry of the Court. A cost of \$5.00 shall be collected in addition to each fee, penalty, fine or cost collected by juvenile courts. (There is no cost on payments under \$25.00.)

3.8 Other: _____

AUG 30 1990

Dated August 30, 1990

JACK A. RICHEY
COURT COMMISSIONER
Judge/Court Commissioner

FINGERPRINT(S)

CERTIFICATE



Dated: 8/30/90
Fingerprints of: _____
Attested by: M. Janice Michels
Clerk

By: Pamela Ann Grebra
Deputy Clerk

I, _____
clerk of this Court, certify that the above is a true copy of the Order of
Disposition in this action on record in my office.

Dated: _____
M. Janice Michels
Clerk
By: _____
Deputy Clerk

STATE OF WASHINGTON } ss.
County of King

I BARBARA MINER, Clerk of the Superior Court of the State of Washington, for the County of King, do hereby certify that I have compared the foregoing copy with the original instrument as the same appears on file and of record in my office, and that the same is a true and perfect transcript of said original and of the whole thereof. IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Superior Court at my office at Seattle this day of FEB 10 2005 20

BARBARA MINER, Superior Court Clerk
By  Deputy Clerk

RC 001846



SUPERIOR COURT OF WASHINGTON
 COUNTY OF KING
 JUVENILE COURT

CERTIFIED COPY
FILED
 COUNTY, WASHINGTON
 DEC 06 1988
 SUPERIOR COURT CLERK
 JOANNE G. BEHAM
 DEPUTY

State of Washington v.

NO. 88-8-04103-4

STATEMENT OF JUVENILE
 OFFENDER ON PLEA OF GUILTY

1. My name is _____
2. My age is 15 yrs
3. I have been informed and fully understand that I have the right to a lawyer, and that if I cannot afford to pay for a lawyer, the court will provide me with one at no cost. A lawyer can look at the social and legal files in my case, talk to the police, probation counselor, and prosecuting attorney, tell me about the law, help me understand my rights, and help me at trial.
4. My lawyer is Chavone
5. I have been informed and fully understand that I am charged with the offense of

Ch I Burg 2^o
Ch II MIP 10 — to be dismissed
Ch III MIP

and that the elements of the offense are to enter and remain unlawfully in a building or dwelling with intent to commit a crime against persons or property.

Ch III Being a person under 21 yrs of age and having in possession intoxicating liquor.

- and that I have been given a copy of the charge.
6. I have been informed and fully understand that:
 - (a) I have the right to a speedy and public trial in the county where I reside or where the offense is alleged to have been committed.
 - (b) I have the right to remain silent before and during trial, and I need not testify against myself.
 - (c) I have the right to hear and question witnesses who might testify against me.
 - (d) I have the right to have witnesses testify for me. These witnesses may be required to appear at no cost to me.
 - (e) I have the right to testify on my own behalf.
 - (f) I am presumed innocent until each element of the offense I am charged with is proven beyond a reasonable doubt or I enter a plea of guilty.
 - (g) I have a right to appeal a determination of guilt after a trial.
 - (h) If I plead guilty I give up these rights enumerated in 6(a)-(g).
 7. I have been informed and fully understand that the standard sentence for my offense is

Ch I 6-9 mos; 32-48 hrs, 0-50 fine, 5-10 days

Ch II 0-3 mos; 0-8 hrs 0-10 fine

(middle offender)

LEGAL FILE COPY

Statement of Juvenile on Plea of Guilty
 (JuCR 07.7 RCW 13.40.130)

Ju-07.0600 9/87

RC 005145

Redacted

based upon my criminal history of theft³ / 10-9-87

8. I have been informed and fully understand that the maximum punishment I can receive is commitment until I am 21 years old, but that I may be sentenced for no longer than the adult maximum sentence for this offense.

9. I have been informed and fully understand that my plea of guilty and the court's acceptance of my plea will become part of my criminal history. I have also been informed and fully understand that if the offense is a felony and I was 15 years of age or older when the offense was committed, then the plea will remain part of my criminal history when I am an adult if I commit another offense prior to my twenty-third birthday.

10. I have been informed and fully understand that if I plead guilty and the court accepts my plea, my criminal history may cause the court to give me a longer sentence for any offenses that I commit in the future.

11. I have been informed and fully understand that the prosecuting attorney will make the following recommendation to the court 6 mos; 32 hrs; 5 days, VAP & Rest

Rehabilitation on ct II

12. I have been informed and fully understand that the probation counselor will make the following recommendation to the court 3 mos; 8 hrs

CT I 6 mos; 32 hrs; 5 days
CT I 3 " ; Conditions

13. I have been informed and fully understand that the court does not have to follow the prosecuting attorney's or the probation counselor's recommendation for my sentence. I have been informed and fully understand that the court must impose a sentence within the standard sentence range unless the court finds substantial and compelling reasons not to do so. If the court goes outside the standard sentence range, either I or the State can appeal that sentence. If the sentence is within the standard range, no one can appeal the sentence.

14. The court has asked me to state in my own words what I did that resulted in my being charged with the offense. This is my statement:

CT I On August 9, 1988, I, along with others entered
Stone Hill Rest. Semmamish H.S. in King County Washington after it was
closed and destroyed and damaged various items of property,
without permission or consent. (ct III) while there I
had in my possession intoxicating liquor. I am
under 21 years of age.

LEGAL FILE COPY

- 15. I plead guilty to the charge.
- 16. I make this plea freely. No one has threatened to harm me or anyone else in order to have me plead guilty.
- 17. No one has made any promises to me to make me plead guilty, except as written in this statement.
- 18. I have read or someone has read to me everything printed above and I have been given a copy of this statement. I have no more questions to ask the court.

Dated 12-6-88

Juvenile

The foregoing statement was read by or to the alleged offender and signed by the offender in the presence of his or her lawyer and the undersigned judge, in open court. The court finds the offender's plea of guilty is knowingly, intelligently, and voluntarily made, that the juvenile has been advised by the court concerning the nature of the offense, that there is a factual basis for the plea and that the offender is guilty as charged.

CBM / NDA
Defense Attorney

Mark G. Watase
Prosecuting Attorney

Dated: 12-6-88

Maurice J. DeLoe
Judge/Commissioner

If applicable:

I am fluent in the _____ language and I have translated this entire document for the juvenile from English into that language. The juvenile has acknowledged his or her understanding of both the translation and the subject matter of this document. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this _____ day of _____, 19____, at _____, Washington.

Interpreter

LEGAL FILE COPY

STATE OF WASHINGTON } ss.
County of King

I, BARBARA MINER, Clerk of the Superior Court of the State of Washington, for the County of King, do hereby certify that I have compared the foregoing copy with the original instrument as the same appears on file and of record in my office, and that the same is a true and perfect transcript of said original and of the whole thereof. IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Superior Court at my office at Seattle this

day of JAN 25 2005

20
BARBARA MINER, Superior Court Clerk

By
Deputy Clerk

RC 005148



SUPERIOR COURT OF WASHINGTON
COUNTY OF KING
JUVENILE COURT

FILED
KING COUNTY, WASHINGTON

() Clerks Action Required
CERTIFIED COPY

JAN 20 1998

State of Washington v.

NO. 97-8-05628-6
SUPERIOR COURT CLERK
BY JOVELITA V. AVILA
DEPUTY
Order of Disposition

DOB:

I. BASIS

1.1 A dispositional hearing was held in this case on: 1/20/98

1.2 Persons appearing at the hearing were:

Juvenile present Probation Counselor Forbes to Torgensen
 Juvenile's Lawyer Faller, V. Other mother
 (Deputy) Prosecuting Attorney Van Nocker, V.

II. FINDINGS

Based on the testimony heard and the case record to date: the Court finds:

() plea of guilty () Alford plea

_____ date _____ date

2.1 The above named juvenile was found guilty by

of the offense(s) of:

the Court Revocation of Deferred Disposition
1/20/98
date

Count I - Residential Burglary

2.2	CATEGORY OF OFFENDER
	C/P The juvenile is:
	<input type="checkbox"/> A minor or first offender
	<input checked="" type="checkbox"/> A middle offender
	<input type="checkbox"/> A serious offender
2.3	MANIFEST INJUSTICE
	<input type="checkbox"/> A disposition within the standard range for this offense would effectuate a manifest injustice.
2.4	OPTION B
	<input checked="" type="checkbox"/> Option B - Reasons as set forth on the record
	<input type="checkbox"/> Option B - Standard Range Suspended
	ACCT
	EXH

RC 005205

[Handwritten signature]

NO. 05628-6

2.5 The Court finds that the standard range of sentence for Count I is 3-6 months of community supervision with 24-40 hours of community service; maximum \$ 25 fine; 5-10 days of confinement; commitment for _____ weeks. The standard range(s) on count(s) are found to be as stated on the record or in the Statement of Juvenile Offender on Plea of Guilty form.

III. ORDER

() SSODA: Respondent is committed to JRA for _____ weeks; however, that commitment is suspended on condition that he/she abide by the following conditions of SSODA.

() OPTION B: Respondent is committed to JRA for the standard range of _____ weeks; however that commitment is suspended upon condition that respondent comply with the conditions listed in Section 3.1.

() CONSECUTIVE TO: _____

3.1 Community Supervision

Count	Count	Count	Count	Remarks
<u>I</u>	_____	_____	_____	Total Months
<u>12</u> months	_____ months	_____ months	_____ months	<u>12</u>
_____ months suspended				

Community Service

<u>40</u> hours	_____ hours	_____ hours	_____ hours	Rate is <u>24</u> hours per month, first due <u>Feb. 20 1998</u>
_____ hours suspended				

For 1 hours of counseling, credit is given for 1 hours of community service.

Credit given for 1 days served.

Confinement

Days <u>10</u>	Days _____	Days _____	Days _____
----------------	------------	------------	------------

Credit given for 10 days served.

To commence on _____

() passes authorized

() _____ days suspended

() Secure detention

() Consecutive

() To be served on weekends

() To be served at JRA

() Respondent is referred for Electronic Home Monitoring

ALL COUNTS WITHIN THIS NUMBER SHALL RUN CONSECUTIVELY

RC 005206

THE RESPONDENT SHALL ABIDE BY THE FOLLOWING TERMS AS DIRECTED BY PROBATION COUNSELOR:

- Counseling, may include Anger Management.
- Drug-Alcohol Information/Evaluation to be completed by Feb 20, 1998
- Follow all treatment recommendations
- Cooperate with urinalysis as directed by JPC.
- Reside in a JPC approved residence and abide by all home rules.
- Abide by a curfew 7pm Sunday thru Thursday, and 10pm Friday and Saturday, or as imposed by JPC/parents.
- Neither use nor possess any weapons, or non-prescribed drugs/alcohol.
- Have no contact directly or indirectly with _____, unless with mother's permission and with supervision;
- Fine is ordered in the amount of \$ _____ due by _____
- The Victim Penalty Assessment is ordered/waived in the amount of \$ 100.00 Payable in the amount of 5.00 per month
- Restitution shall be determined within 30 days or a hearing will be set.
- Restitution hearing is set for _____
- Respondent's presence is waived. * Trust fees waived
- Supervision may be terminated upon completion of court ordered sanctions.

Additional Conditions:

Respondent shall complete an ADD evaluation by Feb. 20 1998. Respondent is ineligible to possess firearms.

3.2 RESTITUTION

The Court Finds:

- That damage was done to the victim(s) in the amount of \$ _____
- The amount of loss cannot be determined at this time.
- That the juvenile has the present ability to pay restitution in the amount of \$ _____
- That the juvenile does not have the present ability to pay restitution, however that the juvenile will develop the ability to pay restitution.
- That the juvenile does not have the present ability to pay restitution and cannot reasonably acquire the means to pay.
- Respondent shall cooperate with VORP.

RC 005207

NO. 05628-6

3.4 CONDITIONS OF SUPERVISION: That while on community supervision the juvenile offender shall be under the charge of a probation counselor and comply with the following conditions: (1) must have parent/guardian's permission regarding whereabouts, hours, and activities (2) must report any change in residence, school, or work status to probation counselor. (Obtain permission from probation counselor before changing residence) (3) must have probation counselor's permission for out of state travel (4) must keep all appointments with probation counselor (5) must enroll in and maintain regular school attendance/GED program with no unexcused absences, tardies, suspensions, expulsions, behavioral referrals, and make best efforts to achieve passing grades and (6) shall commit no new offenses. Must further comply with any conditions set forth in writing, signed by juvenile offender, lawyer and filed herein, during the term of community supervision.

3.5 JURISDICTION
 Jurisdiction is extended to _____ for purposes of restitution/community supervision.
 Jurisdiction is transferred to _____ County.
 _____ retains jurisdiction on this cause number.

3.6 The following courts are hereby dismissed _____

3.7 This order shall remain in full force and effect until further order of the Court or until the same is revoked, modified or changed, or terminated by an order of the Court or by law.

3.8 That while detained authorization is granted to provide necessary medical and dental examination and treatment as professionally prescribed.

3.9 NOTICE OF FEES
All payments ordered above are payable through the registry of the Court. A cost of \$5.00 shall be collected in addition to each fee, penalty, fine or cost collected by juvenile courts. (There is no cost on payments under \$25.00).

3.10 Warrant is quashed/served.

3.11 The Department of Social and Health Services, Juvenile Rehabilitation Administration, shall have the authority to consent to medical, psychological, psychiatric, and dental care, which may be deemed necessary by attending physicians, including such immunization as required of students in the public schools.

Dated: 1/20/98

Richard T. Heck
Judge/Court Commissioner RZ

FINGERPRINT(S)

CERTIFICATE



I, _____
clerk of this Court, certify that the above is a true copy of the
Order of Disposition in this action on record in my office.

RC 005208

Dated: _____

Fingerprints of: _____

Attested by: _____

M. Janice Michels

CLERK

By JOVELITA V. AVILA

DEPUTY CLERK

Dated: _____

M. Janice Michels

CLERK

By _____

DEPUTY CLERK

ORDER OF DISPOSITION (INFORMATION)
(JuCR 7.12; RCW 13.40.120, 160, 180, 190)

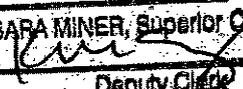
JU.07.0710 5/95 WPF

ORIGINAL-LEGAL FILE

Redacted

STATE OF WASHINGTON } ss.
County of King

I, BARBARA MINER, Clerk of the Superior Court of the State of Washington, for the County of King, do hereby certify that I have compared the foregoing copy with the original instrument as the same appears on file and of record in my office, and that the same is a true and perfect transcript of said original and of the whole thereof. IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Superior Court at my office at Seattle this _____ day of FEB 08 2005

20
BARBARA MINER, Superior Court Clerk
By: 
Deputy Clerk

RC 005209


SUPERIOR COURT OF WASHINGTON
COUNTY OF KING
JUVENILE COURT

CERTIFIED
Copies Action Required
COPY

State of Washington v.

JUN 12 1995

NO. 95-8-01831-1

DOB:

JUVENILE COURT CLERK
 BY JOVELITA V. AVILA
 DEPUTY

Order of Disposition

DIAB/ICR 6-12-95

I. BASIS

- 1.1 A dispositional hearing was held in this case on: June 12, 1995
- 1.2 Persons appearing at the hearing were:
- Juvenile _____
 - Juvenile's Lawyer Thoeny
 - (Deputy) Prosecuting Attorney SKINNER
 - Probation Counselor Rossiter
 - Other Kather

II. FINDINGS

Based on the testimony heard and the case record to date: the Court finds:

plea of guilty () Alford plea

- 2.1 The above named juvenile was found guilty by _____ of the offense(s) of:
- () the Court
- CT I, II, III, Forgery date _____

- 2.2 CATEGORY OF OFFENDER
- The juvenile is:
- () A minor or first offender
 - A middle offender
 - () A serious offender

- 2.3 MANIFEST INJUSTICE
- () A disposition within the standard range for this offense would effectuate a manifest injustice.

- 2.4 OPTION B
- Option B - Reasons as set forth on the record
 - () Option B - Standard Range Suspended

RC 005003

[Handwritten signature]

2.5 The Court finds that the standard range of sentence for Count II is 6-9 months of community supervision with 40-50 hours of community service; maximum \$ 0-50 fine; 16-20 days of confinement; commitment for _____ weeks. The standard range(s) on count(s) are found to be as stated on the record or in the Statement of Juvenile Offender on Plea of Guilty form.

III. ORDER

- () SSODA: Respondent is committed to JRA for _____ weeks; however, that commitment is suspended on condition that he/she abide by the following conditions of SSODA.
- () OPTION B: Respondent is committed to JRA for the standard range of _____ weeks; however that commitment is suspended upon condition that respondent comply with the conditions listed in Section 3.1.
- () CONSECUTIVE TO: _____

3.1 Community Supervision

Count <u>II</u>	Count <u>III</u>	Count _____	Count _____	Remarks
<u>6</u> months	<u>6</u> months	_____ months	_____ months	Total Months
_____ months suspended				<u>12</u>

Community Service

_____ hours _____ hours _____ hours _____ hours

_____ hours suspended

Rate is _____ hours per month, first due _____

- () For _____ hours of counseling, credit is given for _____ hours of community service.
- () Credit given for _____ days served.

Confinement

Days _____ Days _____ Days _____ Days _____

- () Credit given for _____ days served.
- () _____ days suspended
- () Consecutive
- () To be served at JRA
- () Secure detention
- () To be served on weekends
- () Respondent is referred for Electronic Home Monitoring

To commence on _____

() passes authorized

ALL COUNTS WITHIN THIS NUMBER SHALL RUN CONSECUTIVELY

RC 005004

NO. 1831-1

THE RESPONDENT SHALL ABIDE BY THE FOLLOWING TERMS AS DIRECTED BY PROBATION COUNSELOR:

- Counseling, may include Anger Management.
- Drug-Alcohol Information/Evaluation to be completed by _____
- Follow all treatment recommendations
- Cooperate with urinalysis as directed by JPC.
- Reside in a JPC approved residence and abide by all home rules.
- Abide by a curfew _____ Sunday thru Thursday, and _____ Friday and Saturday, or as imposed by JPC/parents.
- Neither use nor possess any weapons, or non-prescribed drugs/alcohol.
- Have no contact directly or indirectly with _____
- Fine is ordered in the amount of \$ _____, due by _____.
- The Victim Penalty Assessment is ordered/waived in the amount of \$ _____.
- Restitution shall be determined within 30 days or a hearing will be set.
- Restitution hearing is set for _____
- Respondent's presence is waived.
- Supervision may be terminated upon completion of court ordered sanctions.

Additional Conditions:

3.2 RESTITUTION

The Court Finds:

- That damage was done to the victim(s) in the amount of \$ _____.
- The amount of loss cannot be determined at this time.
- That the juvenile has the present ability to pay restitution in the amount of \$ _____.
- That the juvenile does not have the present ability to pay restitution, however that the juvenile will develop the ability to pay restitution.
- That the juvenile does not have the present ability to pay restitution and cannot reasonably acquire the means to pay.
- Respondent shall cooperate with VORP.

RC 005005

NO. 1831-1

2.5 The Court finds that the standard range of sentence for Count II is commitment for 3 weeks. The standard range(s) on count(s) _____ are found to be as stated on the record or in the Statement of Juvenile Offender on Plea of Guilty form.

ORDER

3.2 COMMITMENT
Count II (X) The juvenile is committed to the Department of Social and Health Services, Division of Juvenile Rehabilitation, for a period of 30 days weeks.

Count III (X) The juvenile is committed to the Department of Social and Health Services, Division of Juvenile Rehabilitation, for a period of 30 days weeks.

Count _____ () The juvenile is committed to the Department of Social and Health Services, Division of Juvenile Rehabilitation, for a period of _____ weeks.

3.3 Credits not given for time served 11 days

3.4 The following counts are hereby dismissed I

3.5 The Department of Social and Health Services, Juvenile Rehabilitation Administration, shall have the authority to consent to medical, psychological, psychiatric, and dental care which may be deemed necessary by attending physicians, including such immunization as required of students in the public schools.

3.6 That this order shall remain in full force and effect until further order of the Court or until the same is revoked, modified, or changed, or terminated by an order of the Court or by law.

3.7 The Victim Penalty Assessment is ordered/waived in the amount of \$ _____

3.8 Other: _____

Dated: 6/12/95

Mary Jo Burns
Judge/Court Commissioner

FINGERPRINT(S)

CERTIFICATE

Dated: _____
Fingerprints of: _____
Attested by: _____

M. Janice Michels

CLERK

By JOVELITA V. AVILA

JOVELITA V. AVILA
DEPUTY CLERK

Presented by: _____

Approved/Copy Received: _____

DEPUTY PROSECUTING ATTORNEY

ORDER OF DISPOSITION (INFORMATION)
(JCR 7.12; RCW 13.40.120, 160, 180, 190)

I, _____
clerk of this Court, certify that the above is a true copy of the Order of Disposition in this action on record in my office.

Dated: _____

M. Janice Michels

CLERK

By _____
DEPUTY CLERK

RC 005006

PROBATION COUNSELOR

RESPONDENT

LAWYER FOR RESPONDENT

ORIGINAL-LEGAL FILE

JU.07.0710 5/95 WPF

Redacted

STATE OF WASHINGTON } ss.
County of King

I, BARBARA MINER, Clerk of the Superior Court of the State of Washington, for the County of King, do hereby certify that I have compared the foregoing copy with the original instrument as the same appears on file and of record in my office, and that the same is a true and perfect transcript of said original and of the whole thereof. IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Superior Court at my office at Seattle this

JAN 27 2005

By _____
BARBARA MINER, Superior Court Clerk
Deputy Clerk

RC 005007

EXHIBIT G

**SKAGIT COUNTY PROSECUTING ATTORNEY
THOMAS E. SEGUINE**

CHIEF CIVIL DEPUTY
DON L. ANDERSON

CIVIL DIVISION
605 SOUTH THIRD
MOUNT VERNON, WA 98273
PHONE: (360) 336-9460
FAX: (360) 336-9497
OFFICE HOURS: 8:30-4:30

CIVIL LITIGATOR
PAUL H. REILLY
CIVIL DEPUTY
MELINDA B. MILLER

March 11, 2005

RECEIVED

MAR 14 2005

PERKINS COIE

Kevin Hamilton
Perkins Coie
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099

RE: Public Disclosure Request -- election information

Dear Mr. Hamilton:

Thank you for your public records request to Ms. Norma Hickock-Brummett, Skagit County Auditor, dated March 8, 2005. For clarification purposes, I feel it is necessary to inform you that _____, the only name on your attached list in which you are requesting information, was convicted of a gross misdemeanor, not a felony. Therefore, she was eligible to vote in the 2004 General Election. I have attached a corrected copy of the conviction report (a public document) which was received from the Clerk's Office. In addition, I have provided the following information in response to your request:

Request # 1: *A copy of any poll book page from the 2004 general election on which the named individual is listed.*

Response: The materials requested are enclosed as Attachment # 1.

Request # 2 *To the extent that any page produced in response to request number 1 does not identify the precinct with which the poll book page is associated, please provide sufficient additional documentation to connect the poll book page with its proper precinct.*

Response: You will note that the precinct information you have requested is identified in the document responsive to your request number 1 and provided to you as Attachment #1.

Redacted

Request # 3 *To the extent that any poll book page produce in response to request number 1 indicates that the individual received a provisional ballot, please produce a copy of the envelope in which the provisional ballot was returned to your office, showing the name and signature of the individual and any other explanatory information contained on the envelope (or any other provisional ballot information provided by the voter), and any other information submitted by the voter in connection with the provisional ballot, as well as any documents establishing whether the provisional ballot was eventually counted or rejected.*

Response: No provisional ballot was issued. Please see the corrected conviction report attached.

Request # 4 *A copy of the envelope in which any absentee ballot issued to or voted by the named individual was returned to your office, showing the name and signature of the individual.*

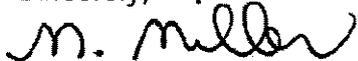
Response: An absentee ballot was not issued for this individual.

Request # 5 *To the extent that any envelope is produced in response to request number 4, please produce additional documentation sufficient to establish whether the absentee ballot was eventually counted or rejected.*

Response: Please see response to request #4.

Thank you for your interest in Skagit County records. If you have any questions or concerns, please do not hesitate to contact me at (360) 336-9460.

Sincerely,



Melinda B. Miller
Civil Deputy

MBM/cmp

cc: Prosecuting Attorney's Office
 Skagit County Auditor's Office

**Corrected Copy
of Conviction
Report**

S049
08-29-2002

SKAGIT COUNTY SUPERIOR COURT
CONVICTED FELON REPORT
FOR ACTIVITY FROM 08/22/2002 THROUGH 08/28/2002

PAGE

PERSON IDENTIFICATION

SID #.....:
DEF01
BIRTH DATE:
GENDER.....: Female
RACE.....: White
ADDRESS.....:

AGE AT COMPLETION...: SKAGIT COUNTY, WASH.
FILED

WA 98221

SEP 23 2002

PHYLLIS COOLE-MCKEEHEN, CO. CLERK
By MCZ Deputy

CASE #.....: 02-1-00228-4

CASE RESOLUTION.....:
CASE COMPLETION.....:

08/22/2002 GUILTY PLEA
08/22/2002 JUDGMENT/ORDER/DECREE FILED

CHARGE INFORMATION

RS	CNT	RCW/CODE	DESCRIPTION	INFO/VIOL. DATE	SEVERITY CATEGORY
	1	9A.52.025	INFORMATION APD 01-A06159 RESIDENTIAL BURGLARY	04/18/2002	
	1	9A.52.025	AMENDED INFORMATION RESIDENTIAL BURGLARY	07/18/2001	FELONY
6	1	9A.52.030 9A.20.020	SECOND AMENDED INFORMATION BURGLARY 2ND DEGREE CRIMINAL ATTEMPT	06/14/2002 07/18/2001 08/22/2002	FELONY FELONY

Pled to Attempt

=====**END OF CASE**=====

3-7-05
Report sent in error. Def+ pled to attempt and should be a gross misd.

TO THE AUDITOR OF
YOU ARE HEREBY NOTIFIED, PURSUANT TO RCW 10.64.021,
THAT THE ABOVE NAMED DEFENDANT WAS CONVICTED
OF A FELONY, IN SKAGIT COUNTY SUPERIOR COURT ON
THE ABOVE COMPLETION DATE NOTED.

Phyllis Coole-McKeen, Skagit County Clerk
S. Allen Deputy Clerk

Redacted

EXHIBIT H

FILED

04 JAN 22 AM 11:11

JUD. CLERK
SUPERIOR COURT CLERK
SEATTLE, WA

KING COUNTY FILITROR, ELECTIONS
AND LICENSING SERVICES
JAN 14 2005
RECEIVED

744137/OMMU/Haggerty

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

STATE OF WASHINGTON

Cause No.: 95-1-03517-1 SEA (A)

Plaintiff

v.

CERTIFICATE AND ORDER OF
DISCHARGE

Defendant

DOC No. 744137

C/PROC
CUST
CASH
JUDG
DISB
CRIM
SCOTG
ENR

THIS MATTER having come on regularly before the above-entitled Court pursuant to RCW 9.94A.637, the Court having been notified by the Secretary of the Department of Corrections or his designee that the above-named defendant has completed the requirements of his/her sentence, and there appearing to be no reason why the defendant should not be discharged, and the Court having reviewed the records and file herein, and being fully advised in the premises, Now, Therefore,

IT IS HEREBY CERTIFIED that the defendant has completed the requirements of the sentence imposed and that all court-ordered monetary obligations, including any assessed interest, have been met to the Court's satisfaction.

IT IS HEREBY ORDERED that this document be considered a satisfaction of judgment and that the defendant be **DISCHARGED** from the confinement and supervision of the Secretary of the Department of Corrections.

IT IS FURTHER ORDERED that the defendant's civil rights lost by operation of law upon conviction be **HEREBY RESTORED**. This restoration of civil rights specifically does not include the right to ship, transport, possess, or receive firearms. Legal advice should be obtained.

DONE IN OPEN COURT this 23 day of December, 2003

William L. Downing
William L. Downing
HONORABLE

Presented by:

Laura E. Poellet
DEPUTY PROSECUTING ATTORNEY 29137

Siobhan Haggerty
Siobhan Haggerty
COMMUNITY CORRECTIONS OFFICER I

Distribution: ORIGINAL - Court COPY - Prosecuting Attorney, File, Offender

SEH:seh

42

RECEIVED

KING COUNTY RECORDS, ELECTIONS
AND LICENSING SERVICES

JAN 18 2005

RECEIVED

FILED

2004 JUL -9 AM 9:47

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

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SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

Defendant,

NO. 89-1-01875-2 SEA

CERTIFICATE AND ORDER FOR
DISCHARGE UNDER RCW §9.94A.637

[CLERK'S ACTION REQUIRED]

THIS MATTER having come on regularly before the undersigned judge of the above-entitled court upon the motion of the State of Washington, Plaintiff, for an order of discharge under 9.94A.637, and the court being fully notified that the defendant has complied with the requirements of his/her sentence imposed under the above cause, and there appearing to be no reason why the defendant should not be discharged, and the Court having reviewed the records and file herein, and being fully advised in the premises;

Now, therefore,

IT IS HEREBY CERTIFIED that the defendant has completed the requirements of the sentence imposed and that all court-ordered monetary obligations, including any assessed interest, have been met to the Court's satisfaction.

	C/PROC
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	CASH
	JUDG
	DISB
	CRIM
<input checked="" type="checkbox"/>	ACCTG
	EXH

CERTIFICATE AND ORDER FOR DISCHARGE

Norm Malang, Prosecuting Attorney
 W554 King County Courthouse
 516 Third Avenue
 Seattle, Washington 98104
 (206) 296-9000
 FAX (206) 296-0955

JAN 18 2005
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IT IS HEREBY ORDERED that this document be considered a satisfaction of judgment and that the defendant be DISCHARGED from the confinement and supervision of the Secretary of the Department of Corrections.

IT IS FURTHER ORDERED that the defendant's civil rights lost by operation of law upon conviction be HEREBY RESTORED. This restoration of civil rights specifically does not include the right to ship, transport, possess, or receive firearms.

DONE IN OPEN COURT this 7 day of July, 2004.

Paris Kallas

JUDGE PARIS KALLAS

Presented by:

[Signature]
JEFFREY M. GREGORY WSBA#30384
Deputy Prosecuting Attorney

CERTIFICATE AND ORDER FOR DISCHARGE

Norm Maleng, Prosecuting Attorney
W554 King County Courthouse
316 Third Avenue
Seattle, Washington 98104
(206) 296-9000
FAX (206) 296-0955

FILED

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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

KING COUNTY RECORDS, ELECTIONS
AND LICENSING SERVICES
JAN 14 2005
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837254/KC OMMU/Martin
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STATE OF WASHINGTON] Cause No.: A) 01-1-09526-5 SEA
Plaintiff]
v.] CERTIFICATE AND ORDER OF
] DISCHARGE
Defendant]
] DOC No. 837254

THIS MATTER having come on regularly before the above-entitled Court pursuant to RCW 9.94A.637, the Court having been notified by the Secretary of the Department of Corrections or his designee that the above-named defendant has completed the requirements of his/her sentence, and there appearing to be no reason why the defendant should not be discharged, and the Court having reviewed the records and file herein, and being fully advised in the premises, Now, Therefore,

IT IS HEREBY CERTIFIED that the defendant has completed the requirements of the sentence imposed and that all court-ordered monetary obligations, including any assessed interest, have been met to the Court's satisfaction.

IT IS HEREBY ORDERED that this document be considered a satisfaction of judgment and that the defendant be DISCHARGED from the confinement and supervision of the Secretary of the Department of Corrections.

IT IS FURTHER ORDERED that the defendant's civil rights lost by operation of law upon conviction be HEREBY RESTORED. This restoration of civil rights specifically does not include the right to ship, transport, possess, or receive firearms. Legal advice should be obtained.

DONE IN OPEN COURT this 17th day of July, 2003

Anthony P. Martnik
Anthony P. Martnik
HONORABLE

Presented by:

Laura E. Felled
DEPUTY PROSECUTING ATTORNEY 29137

Robert M. Martin
Robert M. Martin
COMMUNITY CORRECTIONS OFFICER 2

Distribution: ORIGINAL -- Court copy -- Prosecuting Attorney, File, Offender

MMU:RM

EXHIBIT I

**WHATCOM COUNTY
AUDITOR'S OFFICE**

Whatcom County Courthouse
311 Grand Avenue, Suite 103
Bellingham, WA 98225-4038

Email: Auditor@co.whatcom.wa.us

Internet: www.co.whatcom.wa.us/auditor

March 11, 2005

Kevin J. Hamilton
Perkins Coie
1201 Third Ave #4800
Seattle, WA 98101-3099

Re: Public Disclosure Request
Identified Felon Voters

Dear Mr. Hamilton:

In response to your request for information on the identified felon voters that the Rossi Campaign has supplied, attached you will find:

1. Exhibit A – Listing of Voters and their status
6 of these 13 were in fact entitled to vote
4 voted when not entitled; however 3 of these the auditor had no notification of being a felon.
2. Copies of the poll book pages where any of the voters would have been listed
3. Copies of the signed envelopes for any absentees received from the voters listed, indicating by a "P" that they were posted and counted.

If there is other information which you may require, please let me know.

Sincerely,



Debbie Adelstein
Chief Deputy Auditor

Enclosures

Cc: Randy Watts, Chief Civil Deputy



SHIRLEY FORSLOF
COUNTY AUDITOR

DEBBIE ADELSTEIN
CHIEF DEPUTY

Phone: 360-676-6740

FAX: 360-738-4556

RECEIVED
MAR 14 2005
PERKINS COIE

EXHIBIT A
FELON HISTORY INQUIRY

Reg No	Last Name	First Name	Precinct Code	Precinct Name	Felon Showing in History	Superior Court Report	Would Auditor's office know	Entitled to Vote	Voted?
263212			033	Bellingham 13	No	Felon report issued - 2003	Should	No	Absentee issued but not returned
167437			007	Bellingham 71	No	No felon report generated - program error (RCW unrecognized)	No	No	Voted at Polling Place
144503			135-1	Gierthaven	No	Certificate for restoration of rights issued - 1986	Yes	Yes	Voted by Absentee Ballot
253621			033	Ferndale Twp 1	Yes 10/2003; activated	No felon report generated	No	No	Absentee issued but not returned
251856			171-1	Park	10/22/03	Certificate for restoration of rights issued - 1998	Yes	Yes	Voted at Polling Place
258224			117-1	Ferndale City 3	No	Certificate for restoration of rights issued - 1995	Yes	Yes	Voted by Absentee Ballot
263586			161-1	Mt View 3	No	Conviction not in our county	No	No	Voted by Absentee Ballot
260228			162	Mt View 4	No	Felon report issued - 2001	Should	No	Voted by Absentee Ballot
201072			033	Bellingham 13	Yes 2002; activated 9/23/02	No felony, gross misdemeanor (fr from PA)	Yes	Yes	Voted by Absentee Ballot
228075			140	Lummi Res. South	No	Conviction not in our county 1996 & 1998	No	No	Voted at Polling Place
168820			122	Ferndale Twp 2	No	Felon report issued - 2001	Should	No	Absentee issued but not returned
171232			155-1	Marista 1	No	Case dismissed	Yes	Yes	Absentee issued but not returned
162054			108	Delta	Yes-2000 ; activated 3/9/00; Rights Restored 8/03	Certificate for restoration of rights issued - 1999	Yes	Yes	Voted at Polling Place
FRGM-THIS LIST:									
6	Entitled to vote								
4	Voted when not entitled to vote								
3	Auditor's Office should have known								
1	Actually voted who was not entitled that the Auditor should have known about								

Redacted

Active Voter Roster List
General Election

I hereby declare under penalty of perjury that I am a registered voter of the State of Washington, qualified to cast a ballot at this election and I further declare that I have NOT voted another

Ballot Number	Name	Address	City	State	Zip	Registration Status	Signature	Signature Date
256904	Gremes, Marylou D							
256124	Grimm, Greg W							
272713	Grimm, Travis M							
211007	Grimm, Travis M							
253821	Grimm, Travis M							
182787	Grimm, Travis M							
148098	Grimm, Travis M							
287343	Grimm, Travis M							
111064	Grimm, Travis M							
111065	Grimm, Travis M							
257834	Grimm, Travis M							
255344	Grimm, Travis M							
38631	Grimm, Travis M							
38632	Grimm, Travis M							
207442	Grimm, Travis M							
262203	Grimm, Travis M							
241022	Grimm, Travis M							
121	Grotzke, Kirk J							
121	Grotzke, Susan K							
125	Grove, Diana L							
125	Grove, Rodney N							
127	Gullien, Kristina M							
124	Gulbranson, Colleen M							
124	Gulbranson, Colleen M							

Redacted

Active Voter Roster List General Election

READ BEFORE SIGNING: I hereby declare under penalty of perjury that I am a registered voter of the State of Washington, qualified to cast a ballot at this election and I further declare that I have NOT voted another ballot for this election.

REGISTERED VOTER - WASHINGTON

120	Noteboom, Leroy M	Absentee Voter - Provisional Required	<input type="checkbox"/>	34173
Femdale Twp 1, 2, 4, E				
129	Noteboom, Marjory A	Absentee Voter - Provisional Required	<input type="checkbox"/>	90235
Femdale Twp 1, 2, 4, E				
129	Noteboom, Nicola A	<i>Nicola A Noteboom</i>	<input checked="" type="checkbox"/>	270698
Femdale Twp 1, 2, 4, E				
125	Núñez, Jesus E	Absentee Voter - Provisional Required	<input type="checkbox"/>	194167
Femdale Twp 1, 2, 4, E, 5636 Orchard Dr				
121	Núñez, Margaret A	Absentee Voter - Provisional Required	<input type="checkbox"/>	272833
Femdale Twp 1, 2, 4, E				
125	Núñez, Tania M	Absentee Voter - Provisional Required	<input type="checkbox"/>	257042
Femdale Twp 1, 2, 4, E				
129	Nunnenkamp, Kimberly	Absentee Voter - Provisional Required	<input type="checkbox"/>	270096
Femdale Twp 1, 2, 4, E				
122	Nye, S	Absentee Voter - Provisional Required	<input type="checkbox"/>	177832
Femdale Twp 1, 2, 4, E				
125	Nygren, David E	Absentee Voter - Provisional Required	<input type="checkbox"/>	24174
Femdale Twp 1, 2, 4, E				
128	Nygroh, Nancy L	Absentee Voter - Provisional Required	<input type="checkbox"/>	74176
Femdale Twp 1, 2, 4, E				
124	Nyman, Stephen	<i>Stephen Nyman</i>	<input checked="" type="checkbox"/>	47109
Femdale Twp 1, 2, 4, E				
124	O'Connell, Jason T	Absentee Voter - Provisional Required	<input type="checkbox"/>	296550
Femdale Twp 1, 2, 4, E				
122	Allegza "Aliqazal"	Absentee Voter - Provisional Required	<input type="checkbox"/>	198293
Femdale Twp 1, 2, 4, E				
128	O'Brien, Robert R	Absentee Voter - Provisional Required	<input type="checkbox"/>	201245
Femdale Twp 1, 2, 4, E				
122	Obra, Mellani R	Absentee Voter - Provisional Required	<input type="checkbox"/>	201590
Femdale Twp 1, 2, 4, E				
122	O'Brien, Shawn R	<i>Shawn R O'Brien</i>	<input checked="" type="checkbox"/>	30700
Femdale Twp 1, 2, 4, E				
122	O'Brien, Neva B	Absentee Voter - Provisional Required	<input type="checkbox"/>	16293
Femdale Twp 1, 2, 4, E				

Redacted

Date: 11/02/2004

Active Voter Roster List

General Election

Registration Closes: 10/02/2004

NOTICE TO VOTER - READ BEFORE SIGNING: I hereby declare under penalty of perjury that I am a registered voter of the State of Washington, qualified to cast a ballot at this election and I further declare that I have NOT voted another ballot for this election.

Ballot #	Name	Address	Registration Status	Signature	Handwritten ID	Barcode
154	Richardson, Kevin G		Absentee Voter - Provisional Required			200051
155	Richardson, Sharon K		Absentee Voter - Provisional Required			104006
156	Richardson, Thomas G		Absentee Voter - Provisional Required			273370
157	Richardson, Lisa		Absentee Voter - Provisional Required			177041
158	Richey, John H		Absentee Voter - Provisional Required			15720
159	Richey, Karen E		Absentee Voter - Provisional Required			15721
160	Richmond, Martha		Absentee Voter - Provisional Required			203068
161	Richter, Anthony R		Absentee Voter - Provisional Required			208556
162	Richter, Nancy J		Absentee Voter - Provisional Required			208556
163	Rigg, Elisha		Absentee Voter - Provisional Required			208556
164	Riddle, Rosalene G		Absentee Voter - Provisional Required	<i>Rosalene G Riddle</i>	044	223842
165	Riddle, William B		Absentee Voter - Provisional Required	<i>William B Riddle</i>	017	30068
166	Ridge, Meagan L		Absentee Voter - Provisional Required			30067
167	Allgood "Illegal Unwieldy Falsi Voter"		Absentee Voter - Provisional Required			276413
168	Ridley, Karen A		Absentee Voter - Provisional Required			11223
169	Ripke-Fausel, Rachel D		Absentee Voter - Provisional Required	<i>Karen Ridley</i>	027	10437
170	Ripley, Adria E		Absentee Voter - Provisional Required	<i>Adria E Ripley</i>	064	207303
171			Absentee Voter - Provisional Required			127413

Redacted

EXHIBIT J

SEATTLE POST-INTELLIGENCER

http://seattlepi.nwsourc.com/local/216736_voters19.html

Felons testify about election voting**Hearing will decide validity of 99 voter registrations**

Saturday, March 19, 2005

By LEWIS KAMB

SEATTLE POST-INTELLIGENCER REPORTER

There was Arthur Welsh, 56, who four years ago got mad when his car was impounded. So, he ripped down a junkyard fence to get it back.

He got caught, pleaded guilty and served some time. And come last November, Welsh said, he voted for Dino Rossi.

There was Frederick Lamar, 47, an admitted drug runner who served six months for a controlled-substance violation five years ago. Four months ago, Lamar said, he voted for Christine Gregoire.

And there was Mark Knutson, who once spent 76 days in jail for possession of contraband and finished up probation in 2002. In 2004, Knutson said, he cast a ballot, but not a vote for governor. "I didn't like either one of them," he said.

All three men were among 10 of 99 people convicted of felonies who showed up for a hearing in Seattle yesterday to respond to prosecutors' challenge that all should have their King County voter registrations revoked.

Prosecutors say all 99 individuals, identified from a list of 105 names generated by The Seattle Times, were improperly registered and illegally voted in last year's election.

Each had lost the right to vote when convicted, prosecutors say, yet none has since gone through the process to get that right legally restored by obtaining a "certificate of restoration."

Yesterday's hearing specifically focused on fact-finding in relation to individual cases. King County Elections Director Dean Logan took evidence from prosecutor Janine Joly, as well as written affidavits and testimony from those under challenge who provided them.

Logan will consider all when deciding -- likely sometime next week -- how many of the 99 voter registrations in question should be canceled.

Although focused on specific registration challenges, yesterday's hearing also had undercurrents to another legal challenge: The lawsuit now awaiting trial in Chelan County that contests Gregoire's 129-vote victory over Rossi in last year's gubernatorial election.

Rossi and Republicans claim that illegal ballots and other voting irregularities statewide, and particularly in King County, tainted the election so that no one can be sure who really won.

To support their case, Republicans have submitted a list of more than 1,100 names of alleged felons

around the state who they claim had been stripped of voting rights but voted in the election anyway. Democrats and the media have found several apparent errors, but Republicans contend that there are by far enough illegal votes to prove their case.

At least 69 residents on the Republicans' list are among those whose registrations also are now under challenge in King County. And that's partially what brought David McDonald, the lead attorney for Democrats, to yesterday's hearing: To learn for whom any potentially illegal votes -- now the heart of the GOP's case -- were cast.

"At least two (felons) said they didn't even vote for governor," McDonald noted after the hearing. "That's something Republicans still have to show: That not only did they cast ballots, but that they actually voted in the governor's election."

Republicans reject that. "Washington has a secret ballot, so there's no way to tell how anyone voted after the fact," Rossi spokeswoman Mary Lane said. "And we're quite confident that the judge won't base his decision on the word of felons."

Although Republicans had argued that if the number of improper votes found statewide exceeds the margin of Gregoire's victory, the result should be set aside; the judge now handling the election contest has rejected that argument in pretrial hearings.

Instead, Chelan County Superior Court Judge John Bridges ruled that the GOP needs to show that Gregoire apparently received enough improper votes to make the difference in the election -- but he hasn't spelled out how Republicans may demonstrate that.

Six of the 10 felons at yesterday's hearing agreed later to reveal for whom they voted: One said he voted for Rossi; two said Gregoire; two said they didn't vote for governor; one said he couldn't remember.

Nearly all of those who testified -- and seven others who submitted affidavits -- said they simply didn't know they weren't supposed to vote.

Kenneth Mason, 48, of Seattle noted that his right to vote was automatically stripped when he pleaded guilty to second-degree theft four years ago. Mason has since completed his sentence.

"So shouldn't it be automatic that you give it back?" he asked.

If he had known he wasn't legally qualified to do so, Mason added, "I wouldn't have voted at all."

While he and others may see their registrations revoked, whether they will actually be charged with a crime for voting is unclear.

Those who vote illegally can be charged with a class C felony, punishable by up to a year in jail and a \$10,000 fine, said Dan Donohoe, a spokesman for the county prosecutor's office.

But to win a conviction, prosecutors must show that a person knowingly voted illegally. And, judging by yesterday's testimony, that may be difficult to prove.

"I didn't hear anything today that any one knowingly or intentionally violated the law," Logan said after the hearing.

"What I heard was surprise about what it takes for people to get their voting rights restored."

.....
P-I reporter Phuong Cat Le contributed to this report. P-I reporter Lewis Kamb can be reached at 206-448-8336 or lewiskamb@seattlepi.com

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EXHIBIT K

OFFICE OF THE PROSECUTING ATTORNEY
KING COUNTY, WASHINGTON
CIVIL DIVISION

Norm Maleng
Prosecuting Attorney

550 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9015
FAX (206) 296-0191

April 11, 2005

Dean Logan, Director
King County Records, Elections and Licensing Services Division
500 Fourth Avenue, Room 553
Seattle, Washington 98104

Re: Voter Registration Challenge – Amber Serrano (DOB: 10/19/77)
Voter Identification No. 30385209

Dear Mr. Logan:

On March 31, 2005, you presided over a voter registration challenge regarding Amber Serrano. The challenge was filed by the King County Prosecutor's Office and was based on a Judgment and Sentence that listed Cynthia Vivette Cornethan a.k.a. Amber M. Serrano as the defencant. Based on the evidence presented and the argument of the Prosecuting Attorney's Office, you ordered that Ms. Serrano's voter registration be cancelled.

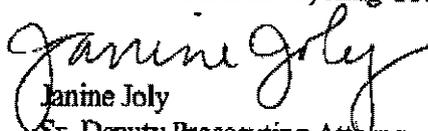
Last week Ms. Serrano informed your office that she was a victim of identity theft a few years ago and that she is still dealing with the repercussions of that incident. It appears that the individual who stole Ms. Serrano's identity was Ms. Cornethan and that she was using Ms. Serrano's name at the time charges were filed against her. In further researching this matter, it is now clear that Ms. Serrano's voter registration should not have been cancelled based on the felony conviction that was presented to you. According to our records, Ms. Serrano has never been convicted of a felony.

I am requesting that you reinstate Ms. Serrano's voter registration based on the fact that the cancellation was not warranted. I have apologized to Ms. Serrano for the inconvenience and I also apologize for any inconvenience this has caused for you or your staff. If you have any questions, please do not hesitate to contact me.

Thank you for your assistance.

Sincerely,

For NORM MALENG, King County Prosecuting Attorney's Office


Janine Joly
Sr. Deputy Prosecuting Attorney

cc: Amber Serrano
27319 24th Place South
Federal Way, Washington 98003

EXHIBIT L

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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

DANIEL MADISON, SEBRINA MOORE,
LARENCE BOLDEN, BEVERLY DUBOIS,
and DANIELLE GARNER,

Plaintiffs,

v.

STATE OF WASHINGTON; GARY LOCKE,
Governor, and SAM REED, Secretary of State,
in their official capacities,

Defendants.

No.

**COMPLAINT FOR DECLARATORY
RELIEF**

I. INTRODUCTION

1. This lawsuit seeks declaratory relief to invalidate Washington statutes that condition restoration of ex-felons' voting rights on the payment of legal financial obligations. By denying the vote to those who have not paid these financial obligations, the State violates the fundamental right to vote and discriminates among citizens on the basis of wealth. The lawsuit does not challenge the State statutes disenfranchising convicted felons while they are in prison, the State's ability to impose legal financial obligations at the time of sentencing, or its ability to collect those debts by methods other than the refusal to restore voting rights upon completion of the non-financial terms of the sentence. It does challenge the systematic disenfranchisement of those ex-felons who have not paid their outstanding legal financial obligations.

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II. JURISDICTION AND VENUE

2. The superior court has personal and subject matter jurisdiction over claims for declaratory relief against the State and state officers. RCW 7.24.010. Plaintiffs have arranged for timely service of process on the attorney general pursuant to RCW 7.24.110.

3. Venue is proper in this court because one or more plaintiffs reside in King County. RCW 4.92.010(1).

III. PARTIES

4. Plaintiff Daniel Madison is a citizen of the United States and a resident of the State of Washington and of King County. Before being convicted of a felony in Washington State, he was registered to vote and regularly exercised his right to vote. In 1996 he was convicted of a felony. He thereafter completed all nonfinancial terms of his sentence. Mr. Madison was released from jail in 1996, and from all remaining forms of community custody or supervision in 1998. His sentence included an order to pay a total of \$583.25, including \$483.25 for restitution and \$100 for a victim assessment fee. To date, Mr. Madison, who is indigent, has paid \$260 toward these legal financial obligations, but he still owes more than \$300. Mr. Madison wishes to vote in upcoming elections, but is unable to do so because his outstanding legal financial obligations make it illegal for him to sign the oath required for voter registration under RCW 29A.08.230.

5. Plaintiff Sebrina Moore is a citizen of the United States and a resident of the State of Washington and of King County. Before being convicted of a felony in Washington State, she was registered to vote and regularly exercised her right to vote. When she was registered to vote, Ms. Moore also volunteered as a poll watcher. In 1999 she was convicted of a felony. She thereafter completed all nonfinancial terms of her sentence. Ms. Moore was released from prison in 2001, and from all remaining forms of community custody or supervision in 2001. Her sentence included an order to pay a total of \$3,668,707 in restitution. To date, she has paid \$5,296.14 toward these legal financial obligations, but with accrued interest and late fees she still owes in excess of \$6 million. Ms. Moore wishes to vote in

1 upcoming elections, but is unable to do so because her outstanding legal financial obligations
2 make it illegal for her to sign the oath required for voter registration under RCW 29A.08.230.

3 6. Plaintiff Larence Bolden is a citizen of the United States and a resident of the
4 State of Washington and of King County. Before being convicted of a felony in Washington
5 State, he was registered to vote and regularly exercised his right to vote. He was convicted of
6 felonies in 1985, 1986, and 2002. He thereafter completed all terms of his 1985 and 1986
7 sentences, and all nonfinancial terms of his 2002 sentence. Mr. Bolden was released from jail
8 in 2002, and from all remaining forms of community custody or supervision in 2003. His
9 sentence included an order to pay a \$500 victim assessment fee. To date, Mr. Bolden, who is
10 indigent, has paid \$20 toward these legal financial obligations, but, with late fees, still owes
11 \$580. Mr. Bolden wishes to vote in upcoming elections, but is unable to do so because his
12 outstanding legal financial obligations make it illegal for him to sign the oath required for voter
13 registration under RCW 29A.08.230.

14 7. Plaintiff Beverly DuBois is a citizen of the United States and a resident of the
15 State of Washington and of Spokane County. Before being convicted of a felony in
16 Washington State, she was registered to vote and regularly exercised her right to vote. In 2002
17 she was convicted of a felony. She thereafter completed all nonfinancial terms of her sentence.
18 Ms. DuBois was released from jail in 2003, and from all remaining forms of community
19 custody or supervision in 2004. Her sentence included an order to pay a total of \$1,610,
20 including a \$500 victim assessment fee, \$110 in court costs, and \$1,000 to the Stevens County
21 Drug Enforcement Fund. To date Ms. DuBois, who is indigent, has paid \$130 toward these
22 legal financial obligations, but with accrued interest she still owes \$1,083.30. Ms. DuBois
23 wishes to vote in upcoming elections, but is unable to do so because her outstanding legal
24 financial obligations make it illegal for her to sign the oath required for voter registration under
25 RCW 29A.08.230.

26 8. Plaintiff Dannielle Garner is a citizen of the United States and a resident of the
27 State of Washington and of Snohomish County. Before being convicted of a felony in
28 Washington State, she was registered to vote and regularly exercised her right to vote. In 2002

1 she was convicted of a felony. She thereafter completed all nonfinancial terms of her sentence.
2 Ms. Garner was released from jail in 2003, and from all remaining forms of community
3 custody or supervision in 2003. Her sentence included an order to pay a total of \$610,
4 including a \$500 a victim assessment fee and \$110 in court fees. To date, Ms. Garner, who is
5 indigent, has paid \$200 toward these legal financial obligations, but with accrued interest she
6 still owes \$520.68. Ms. Garner wishes to vote in upcoming elections, but is unable to do so,
7 because her outstanding legal financial obligations make it illegal for her to sign the oath
8 required for voter registration under RCW 29A.08.230.

9 9. Defendant State of Washington (“the State”) is responsible for enforcing and
10 defending the laws of the State of Washington, including the Washington Constitution.

11 10. Defendant Gary Locke is the Governor of the State of Washington, and as the
12 chief executive officer has ultimate responsibility for implementing Washington law. He is
13 sued in his official capacity. Defendant Locke acted under the color of state law during the
14 course of the actions alleged herein.

15 11. Defendant Sam Reed is the Secretary of State for the State of Washington, and
16 therefore is the State’s chief elections officer (RCW 29A.04.230), responsible for
17 implementing voting regulations throughout the state (RCW 29A.04.610). He is sued in his
18 official capacity. Defendant Reed acted under color of state law during the course of the
19 actions alleged herein.

20 IV. RELEVANT ALLEGATIONS

21 12. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

22 13. Article I, § 19 of the Washington Constitution guarantees the right to vote in
23 Washington, and provides that “[a]ll elections shall be free and equal, and no power, civil or
24 military, shall at any time interfere to prevent the free exercise of the right of suffrage.”

25 14. Article VI, § 3 of the Washington Constitution prohibits all persons convicted of
26 “infamous crimes” from voting until they have their civil rights restored. Today, all felonies
27 are considered “infamous crimes.” RCW 29A.04.079.

1 15. No one may register to vote without signing an oath stating: "I am not presently
2 denied my civil rights as a result of being convicted of a felony." RCW 29A.08.230.
3 Washington voters convicted of felonies are removed from the voter registration rolls.
4 RCW 29A.08.520.

5 16. A person convicted of a felony under the Washington Sentencing Reform Act of
6 1981 may restore their civil rights, including the right to vote, only after completing "all the
7 requirements of the sentence, including any and all legal financial obligations."
8 RCW 9.94A.637. Once a person convicted of a felony has completed all terms of their
9 sentence, they may receive a "certificate of discharge" restoring their civil rights.

10 17. All felony sentences include one or more legal financial obligations.
11 RCW 9.94A.030(27) (definition); RCW 9.94A.505(4) & (7); RCW 9.94A.760. Numerous
12 statutes and court rules result in imposition of legal financial obligations. A partial list of legal
13 financial obligations includes a victim penalty assessment fee of \$500 per cause number,
14 whether or not the crime had a victim (RCW 7.68.035); a penalty of up to \$100 in cases of
15 domestic violence (RCW 10.99.080); orders of restitution that cannot be reduced or waived on
16 the basis of the defendant's indigency (RCW 9.94A.753); county or interlocal drug fund
17 penalties (RCW 9.94A.030(27)); trial costs including fees for court-appointed attorneys, costs
18 of defense, or jury fees, *id.*; costs of incarceration (RCW 9.94A.760(2)); costs of community
19 supervision (RCW 9.94A.780); and the costs of putting one's DNA into a law enforcement
20 database (RCW 43.43.7541). The number and amount of legal financial obligations have
21 continuously grown over the last twenty years.

22 18. Interest accrues on unpaid financial obligations at 12% per year from the date of
23 judgment. RCW 10.82.090; RCW 4.56.110(3); RCW 19.52.020(1). Sentencing courts are
24 restricted in their ability to waive interest. RCW 10.82.090(2). The sentencing court or the
25 Washington Department of Corrections sets a minimum monthly payment for the felon, but this
26 payment is not required to meet or exceed the rate at which interest accrues.
27 RCW 9.94A.760(1), (5)-(7); RCW 9.94A.753(2) (restitution).

1 19. In addition to the interest that accumulates on legal financial obligations, many
2 counties also charge late fees on the unpaid financial obligations. RCW 19.16.500. King
3 County, for example, imposes a 100% late fee on legal financial obligations, up to \$100 per
4 year.

5 20. Even felons who have fully paid their legal financial obligations face challenges
6 in restoring their voting rights. Washington counties have no consistent set of procedures to
7 follow in determining whether a felon has satisfied his or her legal financial obligations. This
8 has led to confusion and error in the procedures used by counties.

9 21. The Washington Department of Corrections estimates that as of December 2001,
10 46,500 convicted felons remained disenfranchised solely because of pending legal financial
11 obligations. Many of these are permanently disenfranchised due to their inability to pay.

12 22. Washington's laws governing restoration of voting rights distinguish between
13 two groups of ex-felons: those who have paid all of their legal financial obligations and are
14 allowed to vote, and those who have not and are not allowed to vote.

15 23. Washington's laws governing restoration of voting rights to ex-felons violate
16 several provisions of the United States Constitution and the Washington Constitution.
17 Plaintiffs have no adequate remedy at law for the deprivation of their rights and privileges.

18 V. CLAIMS FOR RELIEF

19 24. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

20 25. The State denies Plaintiffs certain fundamental rights, privileges or immunities,
21 and protections of equality, including the right to vote.

22 26. Plaintiffs seek declaratory relief on grounds including but not limited to the
23 following:
24

25 **A. Violation of the U.S. Constitution, Amendment XIV, and 42 U.S.C. § 1983**

26 27. The Equal Protection Clause of the Fourteenth Amendment to the Constitution
27 of the United States provides:
28

1 No State shall ... deny to any person within its jurisdiction the equal protection
2 of the laws.

3 28. State restrictions that deny the fundamental right to vote based upon the failure
4 to pay legal financial obligations unlawfully deprive Plaintiffs, who are citizens of the United
5 States, of the equal protection of the laws.

6 29. Because such voting restrictions violate the Equal Protection Clause of the
7 Fourteenth Amendment, Plaintiffs are entitled to a judgment declaring such restrictions
8 unconstitutional and void.

9 30. Defendants' actions taken under color of state law violate the Equal Protection
10 Clause of the Fourteenth Amendment to the United States Constitution, and are thus made
11 actionable through 42 U.S.C. § 1983.

12
13 **B. Violation of Washington Const. Art. I, § 19**

14 31. Washington Const. Art. I, § 19 provides:

15 All elections shall be free and equal, and no power, civil or military, shall at any
16 time interfere to prevent the free exercise of the right of suffrage.

17 32. State restrictions that deny the fundamental right to vote based upon the failure
18 to pay legal financial obligations unlawfully deny the free exercise of the right of suffrage
19 afforded by Washington Const. Art. I, § 19.

20 33. Because such voting restrictions violate Washington Const. Art. I, § 19,
21 Plaintiffs are entitled to a judgment declaring such restrictions unconstitutional and void.

22
23 **C. Violation of Washington Const. Art. I, § 12**

24 34. Washington Const. Art. I, § 12 provides:

25 No law shall be passed granting to any citizen, class of citizens, or corporation
26 other than municipal, privileges or immunities which upon the same terms shall
27 not equally belong to all citizens, or corporations.

1 35. State restrictions that deny the fundamental right to vote based upon the failure
2 to pay legal financial obligations unlawfully deny rights, privileges, immunities and the
3 protections of equality afforded by Washington Const. Art. I, § 12.

4 36. Because such voting restrictions violate Washington Const. Art. I, § 12,
5 Plaintiffs are entitled to a judgment declaring such restrictions unconstitutional and void.

6
7 **VI. ENTITLEMENT TO DECLARATORY RELIEF**

8 37. Plaintiffs incorporate all preceding paragraphs as if fully set forth herein.

9 38. For reasons including but not limited to those stated herein, an actual dispute
10 exists between Plaintiffs and the State, which parties have genuine and opposing interests,
11 which interests are direct and substantial, and of which a judicial determination will be final
12 and conclusive.

13 39. Plaintiffs are barred by the statutory scheme outlined above from attempting to
14 register to vote, and any such attempt would be illegal and futile.

15 40. Plaintiffs are, therefore, entitled to a declaratory judgment that the State laws
16 restricting their civil rights, including the right to vote, based on non-payment of legal financial
17 obligations are unconstitutional, as well as such other and further relief as may follow from the
18 entry of such a declaratory judgment.

19 **VII. PRAYER FOR RELIEF**

20 WHEREFORE, Plaintiffs respectfully pray for the following relief:

21 A. Entry of a declaratory judgment that Washington's laws that withhold
22 restoration of civil rights to ex-felons based solely upon their failure to pay legal financial
23 obligations violate Plaintiffs' rights under the federal and state constitutions;

24 B. Entry of a declaratory judgment that Plaintiffs are entitled to register to vote and
25 are eligible to sign the oath required under RCW 29A.04.079;
26
27
28

1 C. An award to Plaintiffs of their expenses, costs, fees, and other disbursements
2 associated with the filing and maintenance of this action, including reasonable attorneys' fees
3 under 42 U.S.C. § 1988 or other applicable law;

4 D. That the Court exercise continuing jurisdiction during the enforcement of its
5 judgment;

6 E. Such other and further relief as may follow from the entry of a declaratory
7 judgment; and

8 F. Any further relief that this Court may deem just and proper.

9
10 DATED this ___ day of _____, 2004.

11
12 HELLER EHRMAN WHITE & McAULIFFE LLP

13 By: _____
14 Peter A. Danelo (WSBA No. 1981)
15 Molly A. Terwilliger (WSBA No. 28449)
16 Darwin P. Roberts (WSBA No. 32539)

17 On behalf of the American Civil Liberties Union of
18 Washington

19 AMERICAN CIVIL LIBERTIES UNION
20 OF WASHINGTON
21 Aaron H. Caplan, WSBA #22525

22 THE VOTING RIGHTS PROJECT OF THE
23 AMERICAN CIVIL LIBERTIES UNION
24 Neil Bradley, subject to *pro hac vice* admission

25 Attorneys for Plaintiffs

26 10/21/04 1:05 PM ()

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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 GRANTING
WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE'S MOTION
IN LIMINE TO EXCLUDE EVIDENCE
OF PETITIONERS' ERRONEOUSLY
LISTED "ILLEGAL CONVICTED
FELON VOTERS"

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THIS MATTER comes before the Court on Washington State Democratic Central Committee's Motion in Limine to Exclude Evidence of Petitioners' Erroneously Listed "Illegal Convicted Felon Voters." The Court having reviewed Washington State Democratic Central Committee's Motion in Limine to Exclude Evidence of Petitioners' Erroneously Listed "Illegal Convicted Felon Voters," and any other briefing filed in support of or opposition thereto, and any reply, and all declarations filed in support of or in opposition to the Motion, and being fully advised in the premises, now, therefore, it is hereby ORDERED that:

Washington State Democratic Central Committee's Motion in Limine to Exclude Evidence of Petitioners' Erroneously Listed "Illegal Convicted Felon Voters" is hereby GRANTED.

The Court hereby excludes any evidence of illegal votes cast by a felon unless Petitioners prove that the person:

- (1) was convicted as an adult, not adjudicated as a juvenile;
- (2) was convicted of a felony (i.e., was not convicted of a misdemeanor or gross misdemeanor);
- (3) was not given a deferred sentence;
- (4) has not been discharged pursuant to RCW 9.94A.637;
- (5) cast a ballot in the 2004 General Election; and
- (6) marked that ballot to indicate a vote for a gubernatorial candidate.

ENTERED this ____ day of _____ 2005.

The Honorable John E. Bridges

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Presented by:

s/ Kevin J. Hamilton

Kevin J. Hamilton, WSBA # 15648
William C. Rava, WSBA # 29948
PERKINS COIE LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099

Attorneys for Intervenor-Respondent
Washington State Democratic Central
Committee

SPEIDEL LAW FIRM

Russell J. Speidel, WSBA # 12838
7 North Wenatchee Avenue, Suite 600
Wenatchee, WA 98807

JENNY A. DURKAN

Jenny A. Durkan, WSBA # 15751
c/o Perkins Coie LLP
1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099



William C. Rava
PHONE: 206.359.6338
FAX: 206.359.7338
EMAIL: wrava@perkinscoie.com

1201 Third Avenue, Suite 4800
Seattle, WA 98101-3099
PHONE: 206.359.8000
FAX: 206.359.9000
www.perkinscoie.com

April 13, 2005

Via Electronic Delivery

The Honorable John E. Bridges
Chelan County Superior Court
Department No. 3
401 Washington Street
Wenatchee, WA 98807

Re: *Borders v. King County, et al.*
Chelan County Superior Court Cause No. 05-2-00027-3

Dear Judge Bridges:

Pursuant to LR 5(d)(5), enclosed with this letter are copies of out-of-state cases and Washington Attorney General opinions, referred to by Washington State Democratic Central Committee's Motion in Limine to Exclude Evidence of Petitioners' Erroneously Listed "Illegal Convicted Felon Voters," filed today.

Yours truly,


William C. Rava

cc: All parties and counsel of record

WCR:ccs

Enclosures

[15934-0006/SL050960.037]

ANCHORAGE · BEIJING · BELLEVUE · BOISE · CHICAGO · DENVER · HONG KONG · LOS ANGELES
MENLO PARK · OLYMPIA · PHOENIX · PORTLAND · SAN FRANCISCO · SEATTLE · WASHINGTON, D.C.

Perkins Coie LLP and Affiliates



Supreme Court of the United States
Morris A. KENT, Jr., Petitioner,
v. THE UNITED STATES.
No. 104.

Argued Jan. 19, 1966.
Decided March 21, 1966.

Prosecution for housebreaking, robbery and rape. The United States District Court for the District of Columbia entered judgments of conviction on counts of housebreaking and robbery and the defendant appealed. The United States Court of Appeals for the District of Columbia Circuit, 119 U.S.App.D.C. 378, 343 F.2d 247, affirmed and certiorari was granted. The Supreme Court, Mr. Justice Fortas, held that under District of Columbia Juvenile Court Act allowing Juvenile Court to waive jurisdiction over juvenile after full investigation, as a condition to a valid waiver order, juvenile was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably were considered by court, and to a statement of reasons for the Juvenile Court's decision.

Reversed and remanded.

Mr. Justice Stewart, Mr. Justice Black, Mr. Justice Harlan and Mr. Justice White dissented.

West Headnotes

[1] Criminal Law 412(4)

110k412(4) Most Cited Cases

Statements elicited from 16-year-old minor by police while minor was subject to the jurisdiction of juvenile court were inadmissible in subsequent criminal prosecution. D.C.Code 1961, § § 11-1551, 16-2306.

[2] Criminal Law 261(1)

110k261(1) Most Cited Cases

In case of adults, arraignment before a magistrate for determination of probable cause and advice to arrested person as to his rights are provided by law, and are regarded as fundamental. D.C.Code 1961, § 11-1553; Fed.Rules Crim.Proc. rule 5(a, b), 18 U.S.C.A.

[3] Criminal Law 1144.1

110k1144.1 Most Cited Cases

(Formerly 110k1144)

[3] Criminal Law 1144.17

110k1144.17 Most Cited Cases

Supreme Court must assume that juvenile court judge denied, sub silentio, motions by minor's counsel for a hearing, for hospitalization for psychiatric observation, for access to social service file and for leave to prove that petitioner was a fit subject for rehabilitation under the juvenile court's jurisdiction.

[4] Indictment and Information 144.2

210k144.2 Most Cited Cases

(Formerly 210k144)

Order of Juvenile Court of the District of Columbia waiving its jurisdiction and transferring petitioner for trial in the United States District Court was reviewable on a motion to dismiss the indictment in the District Court. D.C.Code 1961, § 11-1553.

[5] Infants 68.7(2)

211k68.7(2) Most Cited Cases

(Formerly 211k68)

District of Columbia statute contemplates that Juvenile Court should have considerable latitude within which to determine whether it should retain jurisdiction over a child or, subject to statutory delimitation, should waive jurisdiction. D.C.Code 1961, § 11-1553.

[6] Infants 68.7(2)

211k68.7(2) Most Cited Cases

(Formerly 211k68)

The latitude accorded to District of Columbia Juvenile Court with respect to whether it should retain jurisdiction over child or waive it assumes procedural regularity sufficient in particular circumstances to satisfy basic requirements of due process and fairness, as well as compliance with the statutory requirement of a full investigation. D.C.Code 1961, § 11-1553.

[7] Infants 68.7(3)

211k68.7(3) Most Cited Cases

(Formerly 211k68)

The requirement of a full investigation by District of Columbia Juvenile Court before a waiver of jurisdiction prevents a routine waiver and requires a judgment in each case based on inquiry not only into the facts of the alleged offense but also into the question of whether the *parens patriae* plan of procedure is desirable and proper in particular case. D.C.Code 1961, § 11-1553.

[8] Infants  **68.7(2)**211k68.7(2) Most Cited Cases

(Formerly 211k68)

Statute respecting right of District of Columbia Juvenile Court to waive jurisdiction gives court a substantial degree of discretion as to factual considerations to be evaluated, weight to be given to them, and conclusion reached, but this does not confer upon the Juvenile Court a license for arbitrary procedure. D.C.Code 1961, § 11-1553.

[9] Infants  **68.7(3)**211k68.7(3) Most Cited Cases

(Formerly 211k68)

Statute authorizing District of Columbia Juvenile Court to waive jurisdiction over child does not permit the Juvenile Court to determine in isolation and without participation or any representation of child the critically important question of whether child will be deprived of special protections and provisions of the Juvenile Court Act. D.C.Code 1961, § 11-1553.

[10] Infants  **68.7(3)**211k68.7(3) Most Cited Cases

(Formerly 211k68)

District of Columbia Juvenile Court Act permitting waiver of Juvenile Court's jurisdiction over child did not authorize court, in total disregard of motion for hearing filed by counsel and without any hearing or statement or reasons, to decide that the 16-year-old minor should be taken from the receiving home for children and transferred to jail along with adults, and that minor, charged with housebreaking, robbery and rape, be exposed to the possibility of a death sentence instead of treatment for a maximum, in the particular case, of five years, until he was 21. D.C.Code 1961, § 11-1551, 11-1553.

[11] Infants  **68.7(3)**211k68.7(3) Most Cited Cases

(Formerly 211k68)

District of Columbia Juvenile Court Act did not permit Juvenile Court to waive jurisdiction over juvenile without hearing, without effective assistance of counsel, and without a statement or reasons for waiver and in total disregard of counsel's motion for hearing. D.C.Code 1961, § 11-1553.

[12] Infants  **131**211k131 Most Cited Cases

(Formerly 211k16)

Theory of District of Columbia Juvenile Court Act is

rooted in social welfare philosophy rather than in the corpus juris. D.C.Code 1961, § 11-1553.

[13] Infants  **194.1**211k194.1 Most Cited Cases

(Formerly 211k194, 211k16.5)

The District of Columbia Juvenile Court is theoretically engaged in determining needs of child and of society rather than adjudicating criminal conduct, and the objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. D.C.Code 1961, § 11-1553.

[14] Infants  **131**211k131 Most Cited Cases

(Formerly 211k16.5)

In District of Columbia Juvenile Court proceedings state is *parens patriae* rather than prosecuting attorney and judge.

[15] Infants  **68.7(1)**211k68.7(1) Most Cited Cases

(Formerly 211k68)

The District of Columbia Juvenile Court's waiver of jurisdiction over 16-year-old defendant charged with housebreaking, robbery and rape was a critically important action determining vitally important statutory rights of juvenile. D.C.Code 1961, § 11-1553.

[16] Infants  **68.7(3)**211k68.7(3) Most Cited Cases

(Formerly 211k68)

Under District of Columbia Juvenile Court Act allowing Juvenile Court to waive jurisdiction over juvenile after full investigation, as a condition to a valid waiver order, juvenile, charged with housebreaking, robbery and rape, was entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably were considered by court, and to a statement of reasons for the Juvenile Court's decision. D.C.Code 1961, § 11-1553.

[17] Federal Courts  **455.1**170Bk455.1 Most Cited Cases

(Formerly 170Bk455, 106k383(1))

While Supreme Court does not ordinarily review decisions of the United States Court of Appeals for the District of Columbia Circuit which are based upon

statutes limited to the District, Supreme Court will not defer to decisions on local law where to do so would require adjudication of difficult constitutional questions.

[18] Infants  68.5

211k68.5 Most Cited Cases

(Formerly 211k68)

The District of Columbia Juvenile Court Act confers on child a right to avail himself of that court's exclusive jurisdiction, and it is implicit in the scheme that noncriminal treatment is to be the rule and adult criminal treatment the exception which must be governed by the particular factors of individual cases. D.C.Code 1961, § 11-1553.

[19] Infants  68.7(4)

211k68.7(4) Most Cited Cases

(Formerly 211k68)

The statement of reasons which District of Columbia Juvenile Court must give for its waiver of jurisdiction order need not be formal or necessarily include conventional findings of fact, but should be sufficient to demonstrate that the statutory requirement of full investigation has been met and that the question has received careful consideration of the Juvenile Court, and statement must set forth basis for order with sufficient specificity to permit meaningful review. D.C.Code 1961, § 11-1553.

[20] Constitutional Law  255(4)

92k255(4) Most Cited Cases

(Formerly 92k255)

[20] Infants  68.7(3)

211k68.7(3) Most Cited Cases

(Formerly 211k68)

An opportunity for a hearing, which may be informal, must be given child by the District of Columbia Juvenile Court prior to entry of a waiver order, and child is entitled to counsel who is entitled to see child's social records, and while hearing need not conform to all the requirements of a criminal trial or even of the usual administrative hearing, it must measure up to the essentials of due process and fair treatment. D.C.Code 1961, § 11-1553.

[21] Infants  68.7(1)

211k68.7(1) Most Cited Cases

(Formerly 211k68)

The role of counsel in representing child in proceedings respecting waiver of District of Columbia

Juvenile Court's jurisdiction is not limited to merely presenting to court anything on behalf of child which might help court in arriving at decision and if staff's submissions include materials which are susceptible to challenge or impeachment, it is precisely the role of counsel to denigrate such matter. D.C.Code 1961, § 11-1553.

[22] Evidence  83(1)

157k83(1) Most Cited Cases

There is no irrebuttable presumption of accuracy attached to District of Columbia Juvenile Court's staff reports. D.C.Code 1961, § 11-1586 and (b).

[23] Infants  68.7(3)

211k68.7(3) Most Cited Cases

(Formerly 211k68)

While District of Columbia Juvenile Court judge may receive ex parte analyses and recommendations from his staff concerning matter of waiver of jurisdiction over infant he may not for purpose of decision receive and rely on secret information whether emanating from its staff or otherwise, and Juvenile Court is governed in this respect by the established principles which control courts and quasi-judicial agencies of government.

[24] Infants  68.7(3)

211k68.7(3) Most Cited Cases

(Formerly 211k68)

The consideration by United States District Court for the District of Columbia and the denial of a motion to dismiss indictment against minor on grounds of invalidity of waiver order of Juvenile Court did not cure the invalid proceedings before the Juvenile Court which had entered order of waiver of jurisdiction of defendant without hearing and without giving stated reasons. D.C.Code 1961, § 11-1553.

[25] Infants  68.8

211k68.8 Most Cited Cases

(Formerly 211k68)

Where juvenile had passed the age of 21 and the District of Columbia Juvenile Court, which had followed improper procedure in waiving jurisdiction, could no longer exercise jurisdiction over him, under the circumstances the Supreme Court would vacate order of Court of Appeals and judgment of District Court and remand case to District Court for a hearing de novo on waiver, consistent with opinion, and if that court found waiver to be inappropriate, petitioner's conviction must be vacated, but if waiver was proper

when originally made, District Court would then proceed with such further proceedings as may be warranted, and enter an appropriate judgment.

****1048 *542** Myron G. Ehrlich and Richard Arens, Washington, D.C., for petitioner.

Theodore G. Gilinsky, Washington, D.C., for respondent.

Mr. Justice FORTAS delivered the opinion of the Court.

This case is here on certiorari to the United States Court of Appeals for the District of Columbia Circuit. The facts and the contentions of counsel raise a number ***543** of disturbing questions concerning the administration by the police and the Juvenile Court authorities of the District of Columbia laws relating to juveniles. Apart from raising questions as to the adequacy of custodial and treatment facilities and policies, some of which are not within judicial competence, the case presents important challenges to the procedure of the police and Juvenile Court officials upon apprehension of a juvenile suspected of serious offenses. Because we conclude that the Juvenile Court's order waiving jurisdiction of petitioner was entered without compliance with required procedures, we remand the case to the trial court.

Morris A. Kent, Jr., first came under the authority of the Juvenile Court of the District of Columbia in 1959. He was then aged 14. He was apprehended as a result of several housebreakings and an attempted purse snatching. He was placed on probation, in the custody of his mother who had been separated from her husband since Kent was two years old. Juvenile Court officials interviewed Kent from time to time during the probation period and accumulated a 'Social Service' file.

On September 2, 1961, an intruder entered the apartment of a woman in the District of Columbia. He took her wallet. He raped her. The police found in the apartment latent fingerprints. They were developed and processed. They matched the fingerprints of Morris Kent, taken when he was 14 years old and under the jurisdiction of the Juvenile Court. At about 3 p.m. on September 5, 1961, Kent was taken into custody by the police. Kent was then 16 and therefore subject to the 'exclusive jurisdiction' of the Juvenile Court. D.C.Code s 11--907 (1961), now s 11--1551

(Supp. IV, 1965). He was still on probation to that court as a result of the 1959 proceedings.

[1] Upon being apprehended, Kent was taken to police headquarters where he was interrogated by police officers. ***544** It appears that he admitted his involvement in the offense which led to his apprehension and volunteered information as to similar offenses involving housebreaking, robbery, and rape. His interrogation proceeded from about 3 p.m. to 10 p.m. the same evening. [FN1]

FN1. There is no indication in the file that the police complied with the requirement of the District Code that a child taken into custody, unless released to his parent, guardian or custodian, 'shall be placed in the custody of a probation officer or other person designated by the court, or taken immediately to the court or to a place of detention provided by the Board of Public Welfare, and the officer taking him shall immediately notify the court and shall file a petition when directed to do so by the court.' D.C.Code s 11--912 (1961), now s 16--2306 (Supp. IV, 1965).

Some time after 10 p.m. petitioner was taken to the Receiving Home for Children. The next morning he was released to the police for further interrogation at police headquarters, which lasted until 5 p.m. [FN2]

FN2. The elicited statements were not used in the subsequent trial before the United States District Court. Since the statements were made while petitioner was subject to the jurisdiction of the Juvenile Court, they were inadmissible in a subsequent criminal prosecution under the rule of Harling v. United States, 111 U.S.App.D.C. 174, 295 F.2d 161 (1961).

The record does not show when his mother became aware that the boy was in custody but shortly after 2 p.m. on September 6, 1961, the day following ****1049** petitioner's apprehension, she retained counsel.

Counsel, together with petitioner's mother, promptly conferred with the Social Service Director of the Juvenile Court. In a brief interview, they discussed the possibility that the Juvenile Court might waive jurisdiction under D.C.Code s 11-914 (1961), now s 11--1553 (Supp. IV, 1965) and remit Kent to trial by

the District Court. Counsel made known his intention to oppose waiver.

[2] Petitioner was detained at the Receiving Home for almost a week. There was no arraignment during this *545 time, no determination by a judicial officer of probable cause for petitioner's apprehension.[FN3]

FN3. In the case of adults, arraignment before a magistrate for determination of probable cause and advice to the arrested person as to his rights, etc., are provided by law and are regarded as fundamental. Cf. Fed.Rules Crim.Proc. 5(a), (b); Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479. In Harling v. United States, supra, the Court of Appeals for the District of Columbia has stated the basis for this distinction between juveniles and adults as follows:

'It is, of course, because children are, generally speaking, exempt from criminal penalties that safeguards of the criminal law, such as Rule 5 and the exclusionary Mallory rule, have no general application in juvenile proceedings.' 111 U.S.App.D.C., at 176, 295 F.2d, at 163.

In Edwards v. United States, 117 U.S.App.D.C. 383, 384, 330 F.2d 849, 850 (1964) it was said that: '* * * special practices * * * follow the apprehension of a juvenile. He may be held in custody by the juvenile authorities--and is available to investigating officers--for five days before any formal action need be taken. There is no duty to take him before a magistrate, and no responsibility to inform him of his rights. He is not booked. The statutory intent is to establish a non-punitive, non-criminal atmosphere.'

We indicate no view as to the legality of these practices. Cf. Harling v. United States, supra, 111 U.S.App.D.C., at 176, 295 F.2d, at 163, n. 12.

During this period of detention and interrogation, petitioner's counsel arranged for examination of petitioner by two psychiatrists and a psychologist. He thereafter filed with the Juvenile Court a motion for a hearing on the question of waiver of Juvenile Court jurisdiction, together with an affidavit of a psychiatrist certifying that petitioner 'is a victim of severe

psychopathology' and recommending hospitalization for psychiatric observation. Petitioner's counsel, in support of his motion to the effect that the Juvenile Court should retain jurisdiction of petitioner, offered to prove that if petitioner were given adequate treatment in a hospital under the aegis of the Juvenile Court, he would be a suitable subject for rehabilitation.

*546 At the same time, petitioner's counsel moved that the Juvenile Court should give him access to the Social Service file relating to petitioner which had been accumulated by the staff of the Juvenile Court during petitioner's probation period, and which would be available to the Juvenile Court judge in considering the question whether it should retain or waive jurisdiction. Petitioner's counsel represented that access to this file was essential to his providing petitioner with effective assistance of counsel.

[3] The Juvenile Court judge did not rule on these motions. He held no hearing. He did not confer with petitioner or petitioner's parents or petitioner's counsel. He entered an order reciting that after 'full investigation, I do hereby waive' jurisdiction of petitioner and directing that he be 'held for trial for (the alleged) offenses under the regular procedure of the U.S. District Court for the District of Columbia.' He made no findings. He did not recite any reason for the waiver.[FN4] He made no reference **1050 to the motions filed by petitioner's counsel. We must assume that he denied, sub silentio, the motions for a hearing, the recommendation for hospitalization for psychiatric observation, the request for access to the Social Service file, and the offer to prove that petitioner was a fit subject for rehabilitation under the Juvenile Court's jurisdiction.[FN5]

FN4. At the time of these events, there was in effect Policy Memorandum No. 7 of November 30, 1959, promulgated by the judge of the Juvenile Court to set forth the criteria to govern disposition of waiver requests. It is set forth in the Appendix. This Memorandum has since been rescinded. See United States v. Caviness, 239 F.Supp. 545, 550 (D.C.D.C.1965).

FN5. It should be noted that at this time the statute provided for only one Juvenile Court judge. Congressional hearings and reports attest the impossibility of the burden which

he was supposed to carry. See Amending the Juvenile Court Act of the District of Columbia. Hearings before Subcommittee No. 3 of the House Committee on the District of Columbia, 87th Cong., 1st Sess. (1961); Juvenile Delinquency, Hearings before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary, 86th Cong., 1st Sess. (1959--1960); Additional Judges for Juvenile Court, Hearing before the House Committee on the District of Columbia, 86th Cong., 1st Sess. (1959); H.R.Rep.No.1041, 87th Cong., 1st Sess. (1961); S.Rep.No.841, 87th Cong., 1st Sess. (1961); S.Rep.No.116, 86th Cong., 1st Sess. (1959). The statute was amended in 1962 to provide for three judges for the court. 76 Stat. 21; D.C.Code s 11--1502 (Supp. IV, 1965).

***547** Presumably, prior to entry of his order, the Juvenile Court judge received and considered recommendations of the Juvenile Court staff, the Social Service file relating to petitioner, and a report dated September 8, 1961 (three days following petitioner's apprehension), submitted to him by the Juvenile Probation Section. The Social Service file and the September 8 report were later sent to the District Court and it appears that both of them referred to petitioner's mental condition. The September 8 report spoke of 'a rapid deterioration of (petitioner's) personality structure and the possibility of mental illness.' As stated, neither this report nor the Social Service file was made available to petitioner's counsel.

The provision of the Juvenile Court Act governing waiver expressly provides only for 'full investigation.' It states the circumstances in which jurisdiction may be waived and the child held for trial under adult procedures, but it does not state standards to govern the Juvenile Court's decision as to waiver. The provision reads as follows:

'If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order ***548** such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; or such other court may exercise the powers

conferred upon the juvenile court in this subchapter in conducting and disposing of such cases.' [FN6]

FN6. D.C.Code s 11--914 (1961), now s 11--1553 (Supp. IV, 1965).

Petitioner appealed from the Juvenile Court's waiver order to the Municipal Court of Appeals, which affirmed, and also applied to the United States District Court for a writ of habeas corpus, which was denied. On appeal from these judgments, the United States Court of Appeals held on January 22, 1963, that neither appeal to the Municipal Court of Appeals nor habeas corpus was available. In the Court of Appeals' view, the exclusive method of reviewing the Juvenile Court's waiver order was a motion to dismiss the indictment in the District Court. Kent v. Reid, 114 U.S.App.D.C. 330, 316 F.2d 331 (1963).

Meanwhile, on September 25, 1961, shortly after the Juvenile Court order ****1051** waiving its jurisdiction, petitioner was indicted by a grand jury of the United States District Court for the District of Columbia. The indictment contained eight counts alleging two instances of housebreaking, robbery, and rape, and one of housebreaking and robbery. On November 16, 1961, petitioner moved the District Court to dismiss the indictment on the grounds that the waiver was invalid. He also moved the District Court to constitute itself a Juvenile Court as authorized by D.C.Code s 11--914 (1961), now s 11--1553 (Supp. IV, 1965). After substantial delay occasioned by petitioner's appeal and habeas corpus proceedings, the District Court addressed itself to the motion to dismiss on February 8, 1963. [FN7]

FN7. On February 5, 1963, the motion to the District Court to constitute itself a Juvenile Court was denied. The motion was renewed orally and denied on February 8, 1963, after the District Court's decision that the indictment should not be dismissed.

***549** The District Court denied the motion to dismiss the indictment. The District Court ruled that it would not 'go behind' the Juvenile Court judge's recital that his order was entered 'after full investigation.' It held that 'The only matter before me is as to whether or not the statutory provisions were complied with and the Courts have held * * * with reference to full investigation, that that does not mean a quasi judicial or judicial hearing. No hearing is required.'

On March 7, 1963, the District Court held a hearing on petitioner's motion to determine his competency to stand trial. The court determined that petitioner was competent. [FN8]

FN8. The District Court had before it extensive information as to petitioner's mental condition, hearing upon both competence to stand trial and the defense of insanity. The court had obtained the 'Social Service' file from the Juvenile Court and had made it available to petitioner's counsel. On October 13, 1961, the District Court had granted petitioner's motion of October 6 for commitment to the Psychiatric Division of the General Hospital for 60 days. On December 20, 1961, the hospital reported that 'It is the concensus (sic) of the staff that Morris is emotionally ill and severely so * * * we feel that he is incompetent to stand trial and to participate in a mature way in his own defense. His illness has interfered with his judgment and reasoning ability * * *.' The prosecutor opposed a finding of incompetence to stand trial, and at the prosecutor's request, the District Court referred petitioner to St. Elizabeths Hospital for psychiatric observation. According to a letter from the Superintendent of St. Elizabeths of April 5, 1962, the hospital's staff found that petitioner was 'suffering from mental disease at the presen time, Schizophrenic Reaction, Chronic Undifferentiated Type,' that he had been suffering from this disease at the time of the charged offenses, and that 'if committed by him (those criminal acts) were the product of this disease.' They stated, however, that petitioner was 'mentally competent to understand the nature of the proceedings against him and to consult properly with counsel in his own defense.'

*550 At trial, petitioner's defense was wholly directed toward proving that he was not criminally responsible because 'his unlawful act was the product of mental disease or mental defect.' Durham v. United States, 94 U.S.App.D.C. 228, 241, 214 F.2d 862, 875, 45 A.L.R.2d 1430 (1954). Extensive evidence, including expert testimony, was presented to support this defense. The jury found as to the counts alleging rape

that petitioner was 'not guilty by reason of insanity.' Under District of Columbia law, this made it mandatory that petitioner be transferred to St. Elizabeths Hospital, a mental institution, until his sanity is restored. [FN9] On the six counts of housebreaking and robbery, the jury found that petitioner was guilty. [FN10]

FN9. D.C.Code s 24--301 (1961).

FN10. The basis for this distinction--that petitioner was 'sane' for purposes of the housebreaking and robbery but 'insane' for the purposes of the rape--apparently was the hypothesis, for which there is some support in the record, that the jury might find that the robberies had anteceded the rapes, and in that event, it might conclude that the housebreakings and robberies were not the products of his mental disease or defect, while the rapes were produced thereby.

**1052 Kent was sentenced to serve five to 15 years on each count as to which he was found guilty, or a total of 30 to 90 years in prison. The District Court ordered that the time to be spent at St. Elizabeths on the mandatory commitment after the insanity acquittal be counted as part of the 30- to 90-year sentence. Petitioner appealed to the United States Court of Appeals for the District of Columbia Circuit. That court affirmed. 119 U.S.App.D.C. 378, 343 F.2d 247 (1964). [FN11]

FN11. Petitioner filed a petition for rehearing en banc, but subsequently moved to withdraw the petition in order to prosecute his petition for certiorari to this Court. The Court of Appeals permitted withdrawal. Chief Judge Bazelon filed a dissenting opinion in which Circuit Judge Wright joined. 119 U.S.App.D.C., at 395, 343 F.2d, at 264 (1964).

*551 Before the Court of Appeals and in this Court, petitioner's counsel has urged a number of grounds for reversal. He argues that petitioner's detention and interrogation, described above, were unlawful. He contends that the police failed to follow the procedure prescribed by the Juvenile Court Act in that they failed to notify the parents of the child and the Juvenile Court itself, note 1, supra; that petitioner was deprived of his liberty for about a week without a determination

of probable cause which would have been required in the case of an adult, see note 3, supra; that he was interrogated by the police in the absence of counsel or a parent, cf. Harling v. United States, 111 U.S.App.D.C. 174, 176, 295 F.2d 161, 163, n. 12 (1961), without warning of his right to remain silent or advice as to his right to counsel, in asserted violation of the Juvenile Court Act and in violation of rights that he would have if he were an adult; and that petitioner was fingerprinted in violation of the asserted intent of the Juvenile Court Act and while unlawfully detained and that the fingerprints were unlawfully used in the District Court proceeding. [FN12]

FN12. Cf. Harling v. United States, 111 U.S.App.D.C. 174, 295 F.2d 161 (1961); Bynum v. United States, 104 U.S.App.D.C. 368, 262 F.2d 465 (1958). It is not clear from the record whether the fingerprints used were taken during the detention period or were those taken while petitioner was in custody in 1959, nor is it clear that petitioner's counsel objected to the use of the fingerprints.

These contentions raise problems of substantial concern as to the construction of and compliance with the Juvenile Court Act. They also suggest basic issues as to the justifiability of affording a juvenile less protection than is accorded to adults suspected of criminal offenses, particularly where, as here, there is an absence of any indication that the denial of rights available to adults was offset, mitigated or explained by action of the Government, as *parens patriae*, evidencing the special *552 solicitude for juveniles commanded by the Juvenile Court Act. However, because we remand the case on account of the procedural error with respect to waiver of jurisdiction, we do not pass upon these questions. [FN13]

FN13. Petitioner also urges that the District Court erred in the following respects: (1) It gave the jury a version of the 'Allen' charge. See Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528.

(2) It failed to give an adequate and fair competency hearing.

(3) It denied the motion to constitute itself a juvenile court pursuant to D.C.Code s 11--914 (1961), now s 11--1553. (Supp. IV, 1965.)

(4) It should have granted petitioner's motion for acquittal on all counts, n.o.v., on the

grounds of insanity.

We decide none of these claims.

It is to petitioner's arguments as to the infirmity of the proceedings by which the Juvenile Court waived its otherwise exclusive jurisdiction that we address our **1053 attention. Petitioner attacks the waiver of jurisdiction on a number of statutory and constitutional grounds. He contends that the waiver is defective because no hearing was held; because no findings were made by the Juvenile Court; because the Juvenile Court stated no reasons for waiver; and because counsel was denied access to the Social Service file which presumably was considered by the Juvenile Court in determining to waive jurisdiction.

[4] We agree that the order of the Juvenile Court waiving its jurisdiction and transferring petitioner for trial in the United States District Court for the District of Columbia was invalid. There is no question that the order is reviewable on motion to dismiss the indictment in the District Court, as specified by the Court of Appeals in this case. *Kent v. Reid*, supra. The issue is the standards to be applied upon such review.

[5][6][7][8][9][10] We agree with the Court of Appeals that the statute contemplates that the Juvenile Court should have considerable *553 latitude within which to determine whether it should retain jurisdiction over a child or--subject to the statutory delimitation [FN14]--should waive jurisdiction. But this latitude is not complete. At the outset, it assumes procedural regularity sufficient in the particular circumstances to satisfy the basic requirements of due process and fairness, as well as compliance with the statutory requirement of a 'full investigation.' Green v. United States, 113 U.S.App.D.C. 348, 308 F.2d 303 (1962). [FN15] The statute gives the Juvenile Court a substantial degree of discretion as to the factual considerations to be evaluated, the weight to be given them and the conclusion to be reached. It does not confer upon the Juvenile Court a license for arbitrary procedure. The statute does not permit the Juvenile Court to determine in isolation and without the participation or any representation of the child the 'critically important' question whether a child will be deprived of the special protections and provisions of the Juvenile Court Act. [FN16] It does not authorize the Juvenile Court, in total disregard of a motion for hearing filed by counsel, and without any hearing or statement or reasons, to decide--as in this case--that

the child will be taken from the Receiving Home for Children *554 and transferred to jail along with adults, and that he will be exposed to the possibility of a death sentence [FN17] instead of treatment for a maximum, in Kent's case, of five years, until he is 21. [FN18]

FN14. The statute is set out at p. 1050, supra.

FN15. 'What is required before a waiver is, as we have said, 'full investigation.' * * * It prevents the waiver of jurisdiction as a matter of routine for the purpose of easing the docket. It prevents routine waiver in certain classes of alleged crimes. It requires a judgment in each case based on 'an inquiry not only into the facts of the alleged offense but also into the question whether the *parens patriae* plan of procedure is desirable and proper in the particular case.' Pee v. United States, 107 U.S.App.D.C. 47, 50, 274 F.2d 556, 559 (1959). Green v. United States, supra, at 350, 308 F.2d, at 305.

FN16. See Watkins v. United States, 119 U.S.App.D.C. 409, 413, 343 F.2d 278, 282 (1964); Black v. United States, 122 U.S.App.D.C. 393, 355 F.2d 104 (1965).

FN17. D.C.Code s 22--2801 (1961) fixes the punishment for rape at 30 years, or death if the jury so provides in its verdict. The maximum punishment for housebreaking is 15 years, D.C.Code s 22--1801 (1961); for robbery it is also 15 years, D.C.Code s 22--2901 (1961).

FN18. The jurisdiction of the Juvenile Court over a child ceases when he becomes 21. D.C.Code s 11--907 (1961), now s 11--1551 (Supp. IV, 1965).

[11] We do not consider whether, on the merits, Kent should have been transferred; but there is no place in our system of law for reaching a result of such tremendous consequences without ceremony--without hearing, without effective assistance of counsel, without a **1054 statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children, as reflected in the District of Columbia's Juvenile Court Act, permitted this

procedure. We hold that it does not.

[12][13][14] 1. The theory of the District's Juvenile Court Act, like that of other jurisdictions, [FN19] is rooted in social welfare philosophy rather than in the *corpus juris*. Its proceedings are designated as civil rather than criminal. The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is *parens patriae* rather than prosecuting attorney and judge. [FN20] But the admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness.

FN19. All States have juvenile court systems. A study of the actual operation of these systems is contained in Note, Juvenile Delinquents: The Police, State Courts, and Individualized Justice, 79 Harv.L.Rev. 775 (1966).

FN20. See Handler, The Juvenile Court and the Adversary System: Problems of Function and Form, 1965 Wis.L.Rev. 7.

2. Because the State is supposed to proceed in respect of the child as *parens patriae* and not as adversary, courts have relied on the premise that the proceedings are 'civil' in nature and not criminal, and have asserted that the child cannot complain of the deprivation of important rights available in criminal cases. It has been asserted that he can claim only the fundamental due process right to fair treatment. [FN21] For example, it has been held that he is not entitled to bail; to indictment by grand jury; to a speedy and public trial; to trial by jury; to immunity against self-incrimination; to confrontation of his accusers; and in some jurisdictions (but not in the District of Columbia, see Shioutakon v. District of Columbia, 98 U.S.App.D.C. 371, 236 F.2d 666 (1956), and Black v. United States, supra) that he is not entitled to counsel. [FN22]

FN21. Pee v. United States, 107 U.S.App.D.C. 47, 274 F.2d 556 (1959).

FN22. See Pee v. United States, supra, at 54, 274 F.2d, at 563; Paulsen, Fairness to the

Juvenile Offender, 41 Minn.L.Rev. 547 (1957).

While there can be no doubt of the original laudable purpose of juvenile courts, studies and critiques in recent years raise serious questions as to whether actual performance measures well enough against theoretical purpose to make tolerable the immunity of the process from the reach of constitutional guaranties applicable to adults. [FN23] There is much evidence that some juvenile courts, including that of the District of Columbia, lack *556 the personnel, facilities and techniques to perform adequately as representatives of the State in a *parens patriae* capacity, at least with respect to children charged with law violation. There is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children. [FN24]

[FN23]. Cf. Harling v. United States, 111 U.S.App.D.C. 174, 177, 295 F.2d 161, 164 (1961).

[FN24]. See Handler, *op. cit. supra*, note 20; Note, *supra*, note 19; materials cited in note 5, *supra*.

This concern, however, does not induce us in this case to accept the invitation [FN25] to rule that constitutional guaranties which would be applicable to adults charged with the serious offenses for **1055 which Kent was tried must be applied in juvenile court proceedings concerned with allegations of law violation. The Juvenile Court Act and the decisions of the United States Court of Appeals for the District of Columbia Circuit provide an adequate basis for decision of this case, and we go no further.

[FN25]. See brief of amicus curiae. 16--2313, 11--1586 (Supp. IV, 1965).

[15] 3. It is clear beyond dispute that the waiver of jurisdiction is a 'critically important' action determining vitally important statutory rights of the juvenile. The Court of Appeals for the District of Columbia Circuit has so held. See Black v. United States, *supra*; Watkins v. United States, 119 U.S.App.D.C. 409, 343 F.2d 278 (1964). The statutory scheme makes this plain. The Juvenile Court is vested with 'original and exclusive jurisdiction' of

the child. This jurisdiction confers special rights and immunities. He is, as specified by the statute, shielded from publicity. He may be confined, but with rare exceptions he may not be jailed along with adults. He may be detained, but only until he is 21 years of age. The court is admonished by the statute to give preference to retaining the child in the custody of his parents 'unless his welfare and the safety and protection *557 of the public can not be adequately safeguarded without * * * removal.' The child is protected against consequences of adult conviction such as the loss of civil rights, the use of adjudication against him in subsequent proceedings, and disqualification for public employment. D.C.Code ss 11--907, 11--915, 11--927, 11--929 (1961). [FN26]

[FN26]. These are now, without substantial changes, ss 11--1551, 16-- 2307, 16--2308, 16--2313, 11--1586 (Supp. IV, 1965).

[16][17] The net, therefore, is that petitioner--then a boy of 16--was by statute entitled to certain procedures and benefits as a consequence of his statutory right to the 'exclusive' jurisdiction of the Juvenile Court. In these circumstances, considering particularly that decision as to waiver of jurisdiction and transfer of the matter to the District Court was potentially as important to petitioner as the difference between five years' confinement and a death sentence, we conclude that, as a condition to a valid waiver order, petitioner as entitled to a hearing, including access by his counsel to the social records and probation or similar reports which presumably are considered by the court, and to a statement of reasons for the Juvenile Court's decision. We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel. [FN27]

[FN27]. While we 'will not ordinarily review decisions of the United States Court of Appeals (for the District of Columbia Circuit), which are based upon statutes * * * limited (to the District) * * *,' Del Vecchio v. Bowers, 296 U.S. 280, 285, 56 S.Ct. 190, 192, 80 L.Ed. 229, the position of that court, as we discuss *infra*, is self-contradictory. Nor have we deferred to decisions on local law where to do so would require adjudication of difficult constitutional questions. See District of Columbia v. Little, 339 U.S. 1, 70 S.Ct. 468, 94 L.Ed. 599.

The Court of Appeals in this case relied upon Wilhite v. United States, 108 U.S.App.D.C. 279, 281 F.2d 642 (1960). In that case, the Court of Appeals held, for purposes of a determination as to waiver of jurisdiction, *558 that no formal hearing is required and that the 'full investigation' required of the Juvenile Court need only be such 'as is needed to satisfy that court * * * on the question of waiver.' [FN28] (Emphasis supplied.) The authority of Wilhite, however, is substantially undermined by other, more recent, decisions of the Court of Appeals.

FN28. The panel was composed of Circuit Judges Miller, Fahy and Burger. Judge Fahy concurred in the result. It appears that the attack on the regularity of the waiver of jurisdiction was made 17 years after the event, and that no objection to waiver had been made in the District Court.

**1056 In Black v. United States, decided by the Court of Appeals on December 8, 1965, the court [FN29] held that assistance of counsel in the 'critically important' determination of waiver is essential to the proper administration of juvenile proceedings. Because the juvenile was not advised of his right to retained or appointed counsel, the judgment of the District Court, following waiver of jurisdiction by the Juvenile Court, was reversed. The court relied upon its decision in Shioutakon v. District of Columbia, 98 U.S.App.D.C. 371, 236 F.2d 666 (1956), in which it had held that effective assistance of counsel in juvenile court proceedings is essential. See also McDaniel v. Shea, 108 U.S.App.D.C. 15, 278 F.2d 460 (1960). In Black, the court referred to the Criminal Justice Act, enacted four years after Shioutakon, in which Congress provided for the assistance of counsel 'in proceedings before the juvenile court of the District of Columbia.' D.C.Code s 2--2202 (1961). The court held that 'The need is even greater in the adjudication of waiver (than in a case like Shioutakon) since it contemplates the imposition of criminal sanctions.' 122 U.S.App.D.C., at 395, 355 F.2d, at 106.

FN29. Bazelon, C.J., and Fahy and Leventhal, JJ.

In Watkins v. United States, 119 U.S.App.D.C. 409, 343 F.2d 278 (1964), decided in November 1964, the *559 Juvenile Court had waived jurisdiction of

appellant who was charged with housebreaking and larceny. In the District Court, appellant sought disclosure of the social record in order to attack the validity of the waiver. The Court of Appeals held that in a waiver proceeding a juvenile's attorney is entitled to access to such records. The court observed that

'All of the social records concerning the child are usually relevant to waiver since the Juvenile Court must be deemed to consider the entire history of the child in determining waiver. The relevance of particular items must be construed generously. Since an attorney has no certain knowledge of what the social records contain, he cannot be expected to demonstrate the relevance of particular items in his request.

'The child's attorney must be advised of the information upon which the Juvenile Court relied in order to assist effectively in the determination of the waiver question, by insisting upon the statutory command that waiver can be ordered only after 'full investigation,' and by guarding against action of the Juvenile Court beyond its discretionary authority.' 119 U.S.App.D.C., at 413, 343 F.2d, at 282.

The court remanded the record to the District Court for a determination of the extent to which the records should be disclosed.

The Court of Appeals' decision in the present case was handed down on October 26, 1964, prior to its decisions in Black and Watkins. The Court of Appeals assumed that since petitioner had been a probationer of the Juvenile Court for two years, that court had before it sufficient evidence to make an informed judgment. It therefore concluded that the statutory requirement of a 'full investigation' had been met. It noted the absence of *560 'a specification by the Juvenile Court Judge of precisely why he concluded to waive jurisdiction.' 119 U.S.App.D.C., at 384, 343 F.2d at 253. While it indicated that 'in some cases at least' a useful purpose might be served 'by a discussion of the reasons motivating the determination,' id., at 384, 343 F.2d, at 253, n. 6, it did not conclude that the absence thereof invalidated the waiver.

As to the denial of access to the social records, the Court of Appeals stated that 'the statute is ambiguous.' It said that petitioner's claim, in essence, is 'that counsel should have the opportunity to challenge them, presumably in a manner akin to cross-examination.' Id., at 389, 343 F.2d, at 258. It held, however, that this

is 'the kind of adversarial tactics which the system is designed to avoid.' **1057 It characterized counsel's proper function as being merely that of bringing forward affirmative information which might help the court. His function, the Court of Appeals said, 'is not to denigrate the staff's submissions and recommendations.' Ibid. Accordingly, it held that the Juvenile Court had not abused its discretion in denying access to the social records.

[18] We are of the opinion that the Court of Appeals misconceived the basic issue and the underlying values in this case. It did note, as another panel of the same court did a few months later in *Black and Watkins*, that the determination of whether to transfer a child from the statutory structure of the Juvenile Court to the criminal processes of the District Court is 'critically important.' We hold that it is, indeed, a 'critically important' proceeding. The Juvenile Court Act confers upon the child a right to avail himself of that court's 'exclusive' jurisdiction. As the Court of Appeals has said, '(I)t is implicit in (the Juvenile Court) scheme that non-criminal treatment is to be the rule--and the adult criminal treatment, the exception which must be governed *561 by the particular factors of individual cases.' *Harling v. United States*, 111 U.S.App.D.C. 174, 177--178, 295 F.2d 161, 164--165 (1961).

[19] Meaningful review requires that the reviewing court should review. It should not be remitted to assumptions. It must have before it a statement of the reasons motivating the waiver including, of course, a statement of the relevant facts. It may not 'assume' that there are adequate reasons, nor may it merely assume that 'full investigation' has been made. Accordingly, we hold that it is incumbent upon the Juvenile Court to accompany its waiver order with a statement of the reasons or considerations therefor. We do not read the statute as requiring that this statement must be formal or that it should necessarily include conventional findings of fact. But the statement should be sufficient to demonstrate that the statutory requirement of 'full investigation' has been met; and that the question has received the careful consideration of the Juvenile Court; and it must set forth the basis for the order with sufficient specificity to permit meaningful review.

[20] Correspondingly, we conclude that an opportunity for a hearing which may be informal, must be given the child prior to entry of a waiver order.

Under *Black*, the child is entitled to counsel in connection with a waiver proceeding, and under *Watkins*, counsel is entitled to see the child's social records. These rights are meaningless--an illusion, a mockery--unless counsel is given an opportunity to function.

The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice. Appointment of counsel without affording an opportunity for hearing on a 'critically important' decision is tantamount to denial of counsel. There is no justification *562 for the failure of the Juvenile Court to rule on the motion for hearing filed by petitioner's counsel, and it was error to fail to grant a hearing.

We do not mean by this to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment. *Pee v. United States*, 107 U.S.App.D.C. 47, 50, 274 F.2d 556, 559 (1959).

With respect to access by the child's counsel to the social records of the child, we deem it obvious that since these are to be considered by the Juvenile Court in making its decision to waive, they must be made available to the child's counsel. This is what the Court of Appeals itself held in *Watkins*. There is no doubt as to the statutory basis for this conclusion, as the Court of Appeals pointed out in *Watkins*. We cannot agree with the Court of Appeals in the present case that the statute is 'ambiguous.' The statute **1058 expressly provides that the record shall be withheld from 'indiscriminate' public inspection, 'except that such records or parts thereof shall be made available by rule of court or special order of court to such persons * * * as have a legitimate interest in the protection* * * of the child * * *.' D.C.Code s 11-- 929(b) (1961), now s 11--1586(b) (Supp. IV, 1965). (Emphasis supplied.) [FN30] The Court of Appeals has held in *Black*, and we agree, that counsel must be afforded to the child in waiver proceedings. Counsel, therefore, *563 have a 'legitimate interest' in the protection of the child, and must be afforded access to these records. [FN31]

[FN30] Under the statute, the Juvenile Court has power by rule or order, to subject the examination of the social records to

conditions which will prevent misuse of the information. Violation of any such rule or order, or disclosure of the information 'except for purposes for which *** released,' is a misdemeanor. D.C.Code s 11--929 (1961), now, without substantial change, s 11--1586 (Supp. IV, 1965).

FN31. In *Watkins*, the Court of Appeals seems to have permitted withholding of some portions of the social record from examination by petitioner's counsel. To the extent that *Watkins* is inconsistent with the standard which we state, it cannot be considered as controlling.

[21][22][23] We do not agree with the Court of Appeals' statement, attempting to justify denial of access to these records, that counsel's role is limited to presenting 'to the court anything on behalf of the child which might help the court in arriving at a decision; it is not to denigrate the staff's submissions and recommendations.' On the contrary, if the staff's submissions include materials which are susceptible to challenge or impeachment, it is precisely the role of counsel to 'denigrate' such matter. There is no irrebuttable presumption of accuracy attached to staff reports. If a decision on waiver is 'critically important' it is equally of 'critical importance' that the material submitted to the judge--which is protected by the statute only against 'indiscriminate' inspection--be subjected, within reasonable limits having regard to the theory of the Juvenile Court Act, to examination, criticism and refutation. While the Juvenile Court judge may, of course, receive ex parte analyses and recommendations from his staff, he may not, for purposes of a decision on waiver, receive and rely upon secret information, whether emanating from his staff or otherwise. The Juvenile Court is governed in this respect by the established principles which control courts and quasi-judicial agencies of the Government.

[24] For the reasons stated, we conclude that the Court of Appeals and the District Court erred in sustaining the validity of the waiver by the Juvenile Court. The Government urges that any error committed by the Juvenile *564 Court was cured by the proceedings before the District Court. It is true that the District Court considered and denied a motion to dismiss on the grounds of the invalidity of the waiver order of the Juvenile Court, and that it considered and denied a motion that it should itself, as

authorized by statute, proceed in this case to 'exercise the powers conferred upon the juvenile court.' D.C.Code s 11--914 (1961), now s 11--1553 (Supp. IV, 1965). But we agree with the Court of Appeals in *Black*, that 'the waiver question was primarily and initially one for the Juvenile Court to decide and its failure to do so in a valid manner cannot be said to be harmless error. It is the Juvenile Court, not the District Court, which has the facilities, personnel and expertise for a proper determination of the waiver issue.' 122 U.S.App.D.C., at 396, 355 F.2d, at 107. [FN32]

FN32. It also appears that the District Court requested and obtained the Social Service file and the probation staff's report of September 8, 1961, and that these were made available to petitioner's counsel. This did not cure the error of the Juvenile Court. Perhaps the point of it is that it again illustrates the maxim that while nondisclosure may contribute to the comfort of the staff, disclosure does not cause heaven to fall.

****1059** [25] Ordinarily we would reverse the Court of Appeals and direct the District Court to remand the case to the Juvenile Court for a new determination of waiver. If on remand the decision were against waiver, the indictment in the District Court would be dismissed. See *Black v. United States*, supra. However, petitioner has now passed the age of 21 and the Juvenile Court can no longer exercise jurisdiction over him. In view of the unavailability of a redetermination of the waiver question by the Juvenile Court, it is urged by petitioner that the conviction should be vacated and the indictment dismissed. In the circumstances of this case, and in light of the remedy which the Court of Appeals fashioned in ***565** *Black*, supra, we do not consider it appropriate to grant this drastic relief. [FN33] Accordingly, we vacate the order of the Court of Appeals and the judgment of the District Court and remand the case to the District Court for a hearing de novo on waiver, consistent with this opinion. [FN34] If that court finds that waiver was inappropriate, petitioner's conviction must be vacated. If, however, it finds that the waiver order was proper when originally made, the District Court may proceed, after consideration of such motions as counsel may make and such further proceedings, if any, as may be warranted, to enter an appropriate judgment. Cf. *Black v. United States*, supra.

FN33. Petitioner is in St. Elizabeths Hospital for psychiatric treatment as a result of the jury verdict on the rape charges.

FN34. We do not deem it appropriate merely to vacate the judgment and remand to the Court of Appeals for reconsideration of its present decision in light of its subsequent decisions in *Watkins and Black*, supra. Those cases were decided by different panels of the Court of Appeals from that which decided the present case, and in view of our grant of certiorari and of the importance of the issue, we consider it necessary to resolve the question presented instead of leaving it open for further consideration by the

Reversed and remanded.

APPENDIX TO OPINION OF THE COURT

Policy Memorandum No. 7, November 30, 1959.

The authority of the Judge of the Juvenile Court of the District of Columbia to waive or transfer jurisdiction to the U.S. District Court for the District of Columbia is contained in the Juvenile Court Act (s 11--914 D.C.Code, 1951 Ed.). This section permits the Judge to waive jurisdiction 'after full investigation' in the case of any child 'sixteen years of age or older (who is) charged with an offense which would amount to a felony in the case of an adult, or any child charged with an *566 offense which if committed by an adult is punishable by death or life imprisonment.'

The statute sets forth no specific standards for the exercise of this important discretionary act, but leaves the formulation of such criteria to the Judge. A knowledge of the Judge's criteria is important to the child, his parents, his attorney, to the judges of the U.S. District Court for the District of Columbia, to the United States Attorney and his assistants and to the Metropolitan Police Department, as well as to the staff of this court, especially the Juvenile Intake Section.

Therefore, the Judge has consulted with the Chief Judge and other judges of the U.S. District Court for the District of Columbia, with the United States Attorney, with representatives of the Bar, and with other groups concerned and has formulated the following criteria and principles concerning waiver of jurisdiction which are consistent with the basic aims and purpose of the Juvenile Court Act.

An offense falling within the statutory limitations (set forth above) will be waived if it has prosecutive merit and if it is heinous or of an aggravated character, or--even though less serious--if it represents **1060 a pattern of repeated offenses which indicate that the juvenile may be beyond rehabilitation under Juvenile Court procedures, or if the public needs the protection afforded by such action.

The determinative factors which will be considered by the Judge in deciding whether the Juvenile Court's jurisdiction over such offenses will be waived are the following:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.

*567 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.

3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.

4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).

5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.

6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.

7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.

8. The prospects for adequate protection of the public

and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

It will be the responsibility of any officer of the Court's staff assigned to make the investigation of any complaint in which waiver of jurisdiction is being considered to develop fully all available information which may bear upon the criteria and factors set forth above. Although not all such factors will be involved in an individual case, the Judge will consider the relevant factors in a *568 specific case before reaching a conclusion to waive juvenile jurisdiction and transfer the case to the U.S. District Court for the District of Columbia for trial under the adult procedures of that Court.

Mr. Justice STEWART, with whom Mr. Justice BLACK, Mr. Justice HARLAN and Mr. Justice WHITE join, dissenting.

This case involves the construction of a statute applicable only to the District of Columbia. Our general practice is to leave undisturbed decisions of the Court of Appeals for the District of Columbia Circuit concerning the import of legislation governing the affairs of the District. General Motors Corp. v. District of Columbia, 380 U.S. 553, 556, 85 S.Ct. 1156, 14 L.Ed.2d 68. It appears, however, that two cases decided by the Court of Appeals subsequent to its decision in the present case may have considerably modified the court's construction of the statute. Therefore, I would vacate this judgment and remand the case to the Court of Appeals for reconsideration in the light of its subsequent decisions, Watkins v. United States, 119 U.S.App.D.C. 409, 343 F.2d 278, and Black v. United States, 122 U.S.App.D.C. 393, 355 F.2d 104.

383 U.S. 541, 11 Ohio Misc. 53, 86 S.Ct. 1045, 16 L.Ed.2d 84

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Court of Appeals of Texas,
Waco.
Damon CHUMNEY, Appellant,
v.
Bill CRAIG, et al., Appellees.
No. 10-90-174-CV.

Feb. 21, 1991.
Rehearing Overruled March 14, 1991.

Challenge was brought to election approving creation of county hospital district. The 220th Judicial District Court, Hamilton County, Robert C. Wright, J., denied relief and appeal was taken. The Court of Appeals, Vance, J., held that: (1) contestant had standing to bring suit; (2) temporary directors of hospital district appointed under 1989 amendment to enabling act had authority to call 1990 election; (3) published notice substantially complied with statutory notice provision; and (4) contestant failed to support his challenge to voters' qualifications.

Affirmed.

Cummings, J., filed dissenting opinion.

West Headnotes

[1] Elections 295(1) 144k295(1) Most Cited Cases

As matter of policy, declared election results should be upheld unless there is clear and convincing evidence of erroneous result.

[2] Elections 291 144k291 Most Cited Cases

There is presumption that election officials have done their duty in conducting election, and contestant has heavy burden of overcoming presumption that officials discharged their duty properly in receiving or rejecting ballot.

[3] Health 234 198Hk234 Most Cited Cases

(Formerly 204k2 Hospitals)

Voter had standing to contest election approving creation of county hospital district, despite contention that there was no proof that he was qualified voter based on fact that his name was spelled differently on

petition than it was on his voter's registration card; voter was sufficiently identified.

[4] Names 16(1) 269k16(1) Most Cited Cases

Under rule of idem sonans, if name, as spelled in legal document, though different from correct spelling thereof, conveys to ear, when pronounced according to commonly accepted method, sound practically identical to correct name as commonly pronounced, then name thus given is sufficient identification of individual referred to, and no advantage can be taken of clerical error.

[5] Declaratory Judgment 393 118Ak393 Most Cited Cases

Reviewing court would not address trial court's conclusions concerning its inability to grant declaratory relief in action challenging county hospital district election where contestant also sought relief under Election Code, same issues would have been presented whether action was brought under Election Code or Uniform Declaratory Judgments Act, contestant would have same burden of proof in declaratory judgment action as under Election Code, and Election Code afforded contestant all rights and potential relief he could have received under Uniform Declaratory Judgments Act. V.T.C.A., Election Code § 221.012(b); V.T.C.A., Civil Practice & Remedies Code §§ 37.003, 37.004.

[6] Health 260 198Hk260 Most Cited Cases

(Formerly 204k2 Hospitals)

Temporary directors of county hospital district appointed under 1989 amendment to 1987 Enabling Act setting forth procedure to establish county hospital district had authority to call 1990 election for creation of district, despite contestant's contention that temporary directors appointed under 1987 act should have called election. Acts 1987, 70th Leg., 2nd C.S., p. 130, ch. 42, § § 2.01, 2.02; Acts 1989, 71st Leg., p. 1960, ch. 591, § § 1, 4.

[7] Health 260 198Hk260 Most Cited Cases

(Formerly 204k2 Hospitals)

Where statute conferred unlimited authority upon directors of county hospital district to order election for creation of district, directors were, as matter of law, acting within their authority when they called election,

88 Ohio St.3d 258, 725 N.E.2d 271, 2000-Ohio-325
(Cite as: 88 Ohio St.3d 258, 725 N.E.2d 271)

irrespective of any deficiencies in petition. Acts 1987, 70th Leg., 2nd C.S., p. 130, ch. 42, § 3.02(a).

[8] Health  233

198Hk233 Most Cited Cases

(Formerly 204k2 Hospitals)

That official notice of election for creation of county hospital district was first published in newspaper 30 days, rather than "at least 35 days" prior to election, as was required by statute, did not invalidate election inasmuch as notice substantially complied with statutory requirements and contestant failed to show that failure to strictly comply with notice provision materially interfered with election and right of electors to freely participate therein. Acts 1987, 70th Leg., 2nd C.S., p. 130, ch. 42, § 3.04.

[9] Health  234

198Hk234 Most Cited Cases

(Formerly 204k2 Hospitals)

Substantial compliance with statutory election notice provision was not affirmative defense to be pleaded and proved in action challenging election but, rather, contestant had burden to prove that there was failure to substantially comply with statutory provision or that failure to strictly comply with provision materially interfered with election and right of electors to freely participate therein.

[10] Health  233

198Hk233 Most Cited Cases

(Formerly 204k2 Hospitals)

Contestant challenging election approving creation of county hospital district had no valid objections based on qualifications of voters where contestant failed to show that illegal votes were cast and that if any were cast, different and correct result would have been reached by not counting illegal votes.

[11] Health  233

198Hk233 Most Cited Cases

(Formerly 204k2 Hospitals)

Regardless of whether election contestant should have shown how alleged irregularities directly affected particular votes, he had burden of showing that outcome of election was not true outcome because of such irregularities. V.T.C.A., Election Code § 221.003.

[12] Health  233

198Hk233 Most Cited Cases

(Formerly 204k2 Hospitals)

Wording of ballot proposition was sufficient as matter of law where it was prescribed by enabling statute. Acts 1987, 70th Leg., 2nd C.S., p. 130, ch. 42, § 3.06. *865 Martin L. Peterson and Garry Lewellen, McMillan & Lewellen, Stephenville, for appellant.

Nancy L. Anglin and W. Ralph Canada, Jr., Hopkins & Sutter, Dallas, for appellees.

Before THOMAS, C.J., and CUMMINGS and VANCE, JJ.

OPINION

VANCE, Justice.

On May 5, 1990, voters in commissioners' precincts one, two, and four of Hamilton County created the Hamilton County Hospital District. Damon Chumney brought suit against Bill Craig, the presiding officer of the temporary board of directors of the district, contesting the election. C.M. Hatch intervened in the suit as a party contestee. After a nonjury trial, the court denied all relief sought by Chumney and filed findings of fact and conclusions of law. Chumney brings eleven points of error challenging the court's decision. We will affirm.

[1][2] Chumney claims that the trial court should have voided the election because of certain alleged irregularities which occurred during the election process. As a matter of policy, declared election results should be upheld unless there is clear and convincing evidence of an erroneous result. Jordan v. Westbrook, 443 S.W.2d 616, 617 (Tex.Civ.App.--San Antonio 1969, no writ). There is a presumption that election officials have done their duty in conducting an election, and the contestant has a heavy burden of overcoming the presumption that the officials discharged their duty properly in receiving or rejecting a ballot. Id.

The Texas legislature passed an enabling act in 1987 which set forth the procedure to *866 establish the Hamilton County Hospital District. See Act of August 3, 1987, 70th Leg., 2d C.S., ch. 42, 1987 Tex.Gen.Laws 130, amended by Act of June 14, 1989, 71st Leg., R.S., ch. 591, 1989 Tex.Gen.Laws 1960. Under the 1987 act, a five-member temporary board of directors was appointed by the commissioners court of Hamilton County, and a proposition for the creation of a hospital district was placed before the voters. The

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(Cite as: 88 Ohio St.3d 258, 725 N.E.2d 271)

electorate rejected the proposition and, thus, the district was not created. In 1989, the legislature amended the 1987 act, providing a lower maximum tax rate and different boundaries for the district and making procedural adjustments necessary to effect these two substantive changes. *See id.* Under this amendment, a five-member board of directors was appointed by the commissioners court, and on May 5, 1990, the board again submitted the issue of the creation of a hospital district to the electorate. This time the proposition passed and the district was created.

[3][4] Craig and Hatch challenge Chumney's "standing" to contest the election, asserting that there was no proof that he was "a qualified voter of the territory covered by [the] election." *See* Tex.Elec.Code Ann. § 233.002 (Vernon 1986). At trial, Chumney produced his voter's registration card showing him to be a qualified voter in Hamilton County and testified that he resided within precinct four, a precinct included in the district. Craig and Hatch complain that, because his name was shown in the petition as "Damond Chumney" and the name on his registration card was "Damon L. Chumney," there was no proof that "Damond Chumney" was a qualified voter. Before trial, Chumney sought a trial amendment changing the contestant's name in the petition to "Damon Chumney." Although the court granted his request, the amendment was never filed of record. Despite Chumney's failure to file the amendment, there was no fatal variance between the pleadings and the proof. Under the rule of *idem sonans*, if a name, as spelled in a legal document, though different from the correct spelling thereof, conveys to the ear, when pronounced according to the commonly accepted method, a sound practically identical to the correct name as commonly pronounced, then the name thus given is a sufficient identification of the individual referred to, and no advantage can be taken of the clerical error. Dingler v. State, 705 S.W.2d 144, 145 (Tex.Crim.App.1984); Means v. Protestant Episcopal Church Council, 503 S.W.2d 591, 592 (Tex.Civ.App.-- Houston 1973, writ ref'd n.r.e.). We believe that the rule applies in this instance and hold that Chumney had standing to bring the suit. *See id.*

[5] Chumney sought relief under the Election Code as well as under the Uniform Declaratory Judgments Act. *See* Tex.Elec.Code Ann. § 221.012(b) (Vernon 1986); Tex.Civ.Prac. & Rem.Code Ann. §§ 37.003, 37.004

(Vernon 1986). The court concluded, however, that it could not grant declaratory relief because of a defect of parties and that it lacked jurisdiction to hear the declaratory judgment action because the unconstitutionality of an enabling statute is not a proper subject of inquiry in an election contest. Chumney alleges, in points eight and nine, that the court erred in these conclusions because he had served all necessary parties and because he had abandoned his claim that the enabling act was unconstitutional. We do not consider these conclusions because Chumney, as we have already stated, had standing to bring the suit under the Election Code. *See* Tex.Elec.Code Ann. § 233.002 (Vernon 1986). Had the court concluded that this was a proper declaratory action, the same issues would have been presented that were before it in Chumney's action brought under the Election Code. Chumney would have had the same burden of proof in a declaratory judgment action as under the Election Code. *See* McCart v. Cain, 416 S.W.2d 463, 465 (Tex.Civ.App.--Fort Worth 1967, writ ref'd). The Election Code afforded him all of the rights and potential relief he could have received under the Uniform Declaratory Judgments Act, so the court's conclusions concerning its inability to grant declaratory relief are immaterial. Accordingly, we overrule points eight and nine.

[6] *867 In point one, Chumney relies on Countz v. Mitchell, 120 Tex. 324, 38 S.W.2d 770 (1931), claiming that the election was void because it was not called by "the authority designated by law." He asserts that the temporary directors appointed under the 1987 act should have called the May 1990 election rather than the directors who were appointed after the 1989 amendment. The 1987 act provides in part:

SECTION 2.01. APPOINTMENT OF TEMPORARY DIRECTORS. On the effective date of this Act, the commissioners court of Hamilton County shall appoint five persons to serve as temporary directors of the district. The court shall appoint one person from each commissioner precinct and one person to represent the district at large.

SECTION 2.02. VACANCY IN OFFICE. A vacancy in the office of temporary director shall be filled by appointment made by the commissioners court of Hamilton County. A person appointed to fill a vacancy for a commissioner precinct must be a resident of that commissioner precinct.

Act of August 3, 1987, 70th Leg., 2d C.S., ch. 42, §§ 2.01, 2.02, 1987 Tex.Gen.Laws 130, 131. The 1989

amendment provides in part:

SECTION 2.01. APPOINTMENT OF TEMPORARY DIRECTORS. On the effective date of this Act, the commissioners court of Hamilton County shall appoint five persons to serve as temporary directors of the district. The court shall appoint one person from each commissioner precinct *included in the district* and *two persons* to represent the district at large....

SECTION 4. On the effective date of this Act, the commissioners court shall name a person to serve as a temporary director to represent the district at large. At the time the commissioners court names this person, the person serving as a representative from commissioners precinct 3 is removed as a temporary director.

Act of June 14, 1989, 71st Leg., R.S., ch. 591, § 1, sec. 2.01, 4, 1989 Tex.Gen.Laws 1960.

Under section 2.01 of the 1987 act, the commissioners court appointed Everett Vandiver to represent precinct one, Paul Schwalbe to represent precinct two, Barry Christian to represent precinct three, David Lengefeld to represent precinct four, and Rusty Harris (who also lived in precinct three) to represent the district at large. After the 1989 amendment, the commissioners court appointed Ramon Haile, Bill Craig, Faye Schrank, David Lengefeld, and T.P. Medlock as temporary directors, and these directors called the May 1990 election. Although we cannot ascertain from the record what areas the new directors represented, we presume that Lengefeld continued to represent precinct four.

Chumney maintains that the new temporary directors should not have been appointed because section 4 of the amendment directed the commissioners court to appoint one additional person to represent the district at large, thereby removing the temporary director representing precinct three. In construing section 4, we should look diligently for the intention of the legislature. *See Burton v. Ferrill*, 531 S.W.2d 197, 199 (Tex.Civ.App.--Eastland 1975, writ *dism'd*). Our construction of the statute should not render it absurd or meaningless if we can ascertain a rational, expressive and wholesome meaning from the language used. *See id.* Section 4 of the amendment can be interpreted to direct that only one different temporary director should have been appointed. If the commissioners court had followed this interpretation, however, two other directors would of necessity also have been replaced. Harris, who originally represented

the district at large, resided in precinct three and could no longer serve as a temporary director, and Schwalbe, who originally represented precinct two, had died. Lengefeld was appointed both times, so no question exists about his authority to serve as a temporary director. Only one director could have continued to serve, and did not, after the amendment--Everett Vandiver. Vandiver testified that after the 1987 election the *868 temporary directors "disbanded" and that he believed his term as director had ended.

"A statute should not be shorn of its effectiveness if its purpose can be achieved by a reasonable interpretation." *See id.* We do not interpret section 4 of the amendment to require that the original directors continue their service after the amendment. We believe that its purpose was to assure that nonresidents of the district not serve as directors. Nowhere did section 4 provide that the other original directors must continue their service, nor did it address the fact that a resident of precinct three was serving as the director at large. Because amended section 2.01 required the commissioners court to appoint five persons, without addressing any continued service of original directors, the commissioners court followed the amended statute explicitly. We hold that there was no violation of the statute's requirements.

Additionally, assuming that the original directors were to continue their service, the commissioners court had the authority under section 2.02 of the 1987 act to fill vacancies. *See Act of August 3, 1987, 70th Leg., 2d C.S., ch. 42, § 2.02, 1987 Tex.Gen.Laws 130, 131.* The precinct-two position was vacant because Schwalbe had died. The precinct-three position and the at-large position became vacant because the amending act removed precinct three from the district. Because section 2.02 gave no guidance on what constituted a vacancy, the commissioners court could have treated the precinct-one position as vacated due to Vandiver's belief that his term had ended. Therefore, under this section, the commissioners court could have filled Vandiver's, Schwalbe's, and Harris's positions. Because Christian was replaced by a new at-large director, and Lengefeld remained a director, the same directors who were actually appointed would have served if, as Chumney insists, the commissioners court had treated the original directors as still continuing their service. Thus, all five directors can be deemed to have been properly serving at the time they called the second election.

The facts of the Countz case distinguish it from this situation. In Countz, the issue was whether a judge had the authority to call an election to form a high school district when the applicable statute required that the county board of trustees call the election. Countz, 38 S.W.2d at 770. Here, persons duly appointed by the commissioners court, acting as temporary directors, called the May 1990 election. This is not a case where a judge or a different authority, other than the temporary directors, called the election. We therefore hold that the temporary directors appointed under the 1989 amendment had the authority to call the May 1990 election. We overrule point one.

[7] Points two and three concern the sufficiency of the petition presented to the directors before they called the election. Chumney alleges that: (1) the directors called the election based upon a petition, rather than ordering the election under section 3.02(a) of the 1987 act; (2) the petition was perhaps "deficient" in its form; and (3) there was insufficient evidence showing that the signers of the petition were registered voters. See Act of August 3, 1987, 70th Leg., 2d C.S., ch. 42, § 3.02(a), 1987 Tex.Gen.Laws 130, 131. Irrespective of any deficiencies in the petition, the statute gave the temporary directors unconditional authority to order an election. See *id.* Section 3.02(b) merely specified when the temporary directors were *required* to call an election. Because section 3.02(a) conferred unlimited authority upon the directors to order the election, the directors were, as a matter of law, acting within their authority when they called the election. We overrule points two and three.

[8] In point four, Chumney claims that the evidence was insufficient to support the court's finding that the "published notices of the election substantially complied" with the notice provision of section 3.04 of the 1987 act. See Act of August 3, 1987, 79th Leg., 2d C.S., ch. 42, § 3.04, 1987 Tex.Gen.Laws 130, 131. Section 3.04 provides:

The temporary directors shall give notice of the election by publishing a substantial copy of the election order in a newspaper *869 with general circulation in the proposed district once a week for two consecutive weeks. The first publication must appear at least 35 days before the date set for the election.

Id. Here, the official notice of the election was first published in *The Hamilton Herald-News* thirty days, rather than "at least thirty-five days," prior to the

election.

[9] In point seven, Chumney misplaces the burden of proof when he states that the court "erred in relying on the doctrine of substantial compliance as a basis to uphold the election, because such theory was not pleaded." Substantial compliance was not an affirmative defense to be pleaded and proved in this case. Rather, Chumney had the burden to prove: (1) that there was a failure of substantial compliance with the statutory provision or (2) that the failure of strict compliance with the notice provision materially interfered with the election and the right of the electors freely to participate therein. See Setliff v. Gorrell, 466 S.W.2d 74, 78 (Tex.Civ.App.--Amarillo 1971, no writ); Pollard v. Snodgrass, 203 S.W.2d 641, 644 (Tex.Civ.App.--Amarillo 1947, no writ).

In Turner v. Lewie, 201 S.W.2d 86, 88-89 (Tex.Civ.App.--Fort Worth 1947, writ *dism'd*), the court stated: "It is usually held that the required notice of a special election constitutes a condition upon which authority is granted to hold the election and that there must be a *substantial compliance* with the law." (Emphasis added). Substantial compliance is sufficient unless the contestant shows that the failure of strict compliance materially interfered with the election and the right of the electors freely to participate therein. Pollard, 203 S.W.2d at 644; see also Branauum v. Patrick, 643 S.W.2d 745 (Tex.App.--San Antonio 1982, no writ); Royalty v. Nicholson, 411 S.W.2d 565 (Tex.Civ.App.--Houston [1st Dist.] 1967, writ *ref'd n.r.e.*). The court in Turner voided the election in question, holding that substantial compliance with a publication requirement did not exist where *no* notice was published. *Id.* To be in strict compliance with the statute's notice provision, the directors should have published the official notice no later than the March 29 weekly issue of the *Herald-News*, whereas it actually appeared in the next issue. There was evidence that when the directors placed the official notice in the April 5 issue they relied upon a time-table prepared by the Secretary of State's office which provided for thirty days notice before the election. The only matters in the election order not covered in the March 29 issue (described below) were the exact wording of the proposition and the specific location of the voting boxes, information which appeared in the official notice in the April 5 issue.

We hold that the April 5 notice substantially complied

with the statute's notice provision. See Act of August 3, 1987, 79th Leg., 2d C.S., ch. 42, § 3.04, 1987 Tex.Gen.Laws 130, 131; Pollard, 203 S.W.2d at 644 (holding that five days notice of a special election, instead of the required six days notice, substantially complied with the statute "in view of the fact that no voter was deprived of his privilege of suffrage by virtue of the short delay in posting the notices ..."). Chumney presented no proof that the failure of strict compliance with the notice provision materially interfered with the election and the right of the electors freely to participate therein. The evidence revealed that this was a highly publicized election: a front-page story covering the election appeared in seven out of the eight weekly issues of the *Herald-News* preceding the election; more than half of the front page, including the lead story, in the March 29 issue concerned the election, giving the date of the election, the boundaries of the district, the amount of taxes that could be levied by the district and explanations of differences between the current proposal and the election held two years before; a town hall meeting was held two weeks before the election; an "open forum" was held at the Farm Bureau's offices two weeks before the election; and letters to the editor were published in the *Herald-News*. Because we hold that the April 5 notice substantially complied with the statute and because Chumney presented no evidence that the failure of strict compliance with the notice provision *870 materially interfered with the election and the right of the electors freely to participate therein, points four and seven are overruled. See Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex.1986); Pollard, 203 S.W.2d at 644.

[10] Chumney's points five and eleven address the qualifications of the voters. In point five, he maintains that the court erred in finding that the evidence did not sufficiently establish that votes of unqualified persons were cast and counted in the election. In point eleven, he attacks the court's conclusion that, because all qualified voters residing within the proposed hospital district were eligible to vote, election officials did not have to test or examine the qualifications of the voters. As Craig and Hatch point out in their brief, even if Chumney were correct in his argument that only property owners were entitled to vote and that the election officials should have tested the voters' qualifications, the record does not contain any evidence that any such voter--a person not owning taxable property--cast a ballot in the election. Further, the record does not reflect that

votes by unqualified persons affected the outcome of the election. The contestant in an election contest has the burden of proving illegality or fraud. Medrano v. Gleinser, 769 S.W.2d 687, 688 (Tex.App.--Corpus Christi 1989, no writ); Goodman v. Wise, 620 S.W.2d 857, 859 (Tex.Civ.App.--Corpus Christi 1981, writ ref'd n.r.e.). He must prove not only that voting irregularities occurred but also that they did in fact materially affect the results of the election. Goodman, 620 S.W.2d at 859.

[11] Citing no authority, Chumney alleges in point ten that, because the wording in section 221.003 of the 1985 Election Code differs from the "predecessor statutes," a contestant's burden of proof has changed. Specifically, he claims that a contestant need not show that defects in the election process "directly affected particular votes in order to support a conclusion that the true result cannot be determined." Section 221.003 provides:

(a) The tribunal hearing an election contest shall attempt to ascertain whether *the outcome of the contested election*, as shown by the final canvass, is *not the true outcome* because:

- (1) illegal votes were counted; or
- (2) an election officer or other person officially involved in the administration of the election:
 - (A) prevented eligible voters from voting;
 - (B) failed to count legal votes; or
 - (C) engaged in other fraud or illegal conduct or made a mistake.

(b) In this title, "illegal vote" means a vote that is not legally countable.

(c) This section does not limit a provision of this code or another statute expanding the scope of inquiry in an election contest.

Tex.Elec.Code Ann. § 221.003 (Vernon 1986) (emphasis added).

Whether or not Chumney should have shown how these alleged irregularities "directly affected particular votes," he had the burden of showing that the outcome of the election was not the "true outcome" because of such irregularities. See *id.* We believe that the prior cases establishing how an election contestant meets his burden of proof remain viable in light of Medrano. See Medrano, 769 S.W.2d at 688. In Medrano, the court cited cases decided prior to the enactment of the 1985 Election Code as authority for its holding that "the burden of proving illegality in an election contest is on the contestant, who must prove that illegal votes were cast in the election being

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contested and that a different and correct result would have been reached by not counting the illegal votes." *Id.* Because Chumney failed to show that illegal votes were cast, i.e., votes cast by persons who did not own property, and that if any were cast, a different and correct result would have been reached by not counting the illegal votes, we overrule points five, ten and eleven. See *id.*

[12] Chumney complains in his sixth point that the court's finding that the "ballot proposition was worded with sufficient definiteness and certainty as to fairly portray *871 the chief features thereof in words of plain meaning, so that it could be understood by the persons entitled to vote," is against the great and overwhelming weight of the evidence. Chumney admits that the ballot submitted the proposition in the statute's exact language. He believes, however, that the "same was nevertheless fraught, by reason of lack of certainty, with the danger of misleading the voters." The wording of the ballot proposition was sufficient as a matter of law, however, because it was prescribed by the enabling statute. See Act of August 3, 1987, 70th Leg., 2d C.S., ch. 42, § 3.06, 1987 Tex.Gen.Laws 130, 131; Wright v. Board of Trustees of Tatum Indep. School Dist., 520 S.W.2d 787, 792 (Tex.Civ.App.--Tyler 1975, writ dismissed). We overrule Chumney's point six.

For the reasons stated, we affirm the judgment.

CUMMINGS, Justice, dissenting.

The issue before us is whether the special election of May 5, 1990, creating a Hamilton County Hospital District (HCHD) was conducted in accordance with the law concerning special elections.

As outlined in the majority opinion, enabling legislation was passed in 1987 setting forth the procedure to establish the HCHD. Following that procedure, the County Judge appointed five temporary directors who called for an election on the issue. The voters rejected the formation of a hospital district at that election.

The next important event was that the ten-member board of directors of the charitable hospital corporation obtained an amendment to the enabling act, effective June 14, 1989, which changed or amended the original 1987 enabling act in two ways:

1. Changed the boundaries of the HCHD by

- eliminating County Commissioner Precinct No. 3.
2. Changed the maximum tax rate from 75¢ to 25¢.

All of the changes in the enabling act were made *without giving any notice* to the County Judge or Commissioners' Court of Hamilton County, the temporary directors of the hospital district or to the general public. No newspaper or media coverage was ever provided to the voters of Hamilton County concerning these changes when the legislation was passed in May 1989 or when the legislation became effective on June 14, 1989. The opponents of the hospital district were not made legally aware of these changes until the notice of election was published in the Hamilton Herald News on April 5, 1990, only 30 days prior to the election in question.

The notice provision of the enabling act provided:

SECTION 3.04. NOTICE. The temporary directors shall give notice of the election by publishing a substantial copy of the election order in a newspaper with general circulation in the proposed district once a week for two consecutive weeks. The first publication *must appear at least 35 days before* the date set for the election. Act of August 3, 1987, 70th Leg., 2d C.S., ch. 42, 1987 Tex.Gen.Laws 130.

(Emphasis added).

It was stipulated by the parties that only 30 days notice was given instead of the 35 days required by the act. So, only 30 days prior to the election on May 5, 1990, the opponents of the proposition first learned that Commissioners' Precinct 3 had been eliminated from the proposed hospital district. Precinct 3, according to the evidence, was an area where major opposition to the hospital district had been in the first election because the Hico hospital already served that area. It is apparent the opponents of the hospital district found out only 30 days prior to the election that they could not count on the voters in Precinct 3 who had previously voted against the creation of the hospital district.

The question before us is to determine whether the 30 days notice given was substantial compliance with the notice requirement of *at least 35 days*.

The majority follows Appellees' contention that the matter of publishing notices is only directory and not mandatory, thus allowing the treatment of irregularities as *872 informalities which do not

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vitiating the election. Appellees cite several cases in support of the contention that the matter of legal notice in this case is only directory, but all of said cases are distinguishable because they involved general law elections.

In Turner v. Lewie, the court noted the distinction between general law elections and special law elections, where it stated:

Laws requiring notice of general elections, held on days fixed by law, are usually held to be directory only, because it is presumed that time and place of the election is known to all without special notice. But the rule is different as to special elections. It is usually held that the required notice of a special election constitutes a condition upon which authority is granted to hold the election, and that there must be substantial compliance with the law. It has often been held that failure to give the required notice invalidates the special election.

Turner v. Lewie, 201 S.W.2d 86, 88-89 (Tex.Civ.App.--Fort Worth 1947, writ dismissed).

The Appellees and the majority opinion seem to follow the rule that irregularities in an election will not invalidate the election if voters had notice of the election through other means than legal notice, such as newspaper articles, and that to invalidate such an election it must be shown that the result of the election would have been different but for the irregularities complained of. In Turner the court refused to follow that rule and stated what I believe to be the proper rule, as follows:

The proceedings of the election, and those leading up to it, must themselves give sufficient notice regarding the election and its purposes. It is not enough that some or even all of the voters learned of the election through reading news items, or by conversations with other citizens, or by hearing of it through any means other than the notices required to be given by the statutes regulating the election. If there is not a substantial compliance with the law in the proceedings leading up to the election, there is no valid election. The will of the majority of the voters might be expressed in any number of ways, as in a mass meeting, or by petition, and yet not amount to an election. Our system of government depends for its existence on orderly elections, held strictly in accordance with the law, and surrounded by all of the safeguards which the lawmakers have seen fit to impose. It is important that the voters receive legal notice of the election and the purposes

for which it is to be held.
Id. at 89 (emphasis added).

Further, in Coffee v. Lieb the court stated:

'Where, as is usually the case in special elections, the time and place for holding the same are not fixed by law but are to be fixed by some authority named in the statute after the happening of a condition precedent, the statutes as to giving notice thereof are considered mandatory, and a failure to give notice or issue proclamation of such an election will render it a nullity.'

Coffee v. Lieb, 107 S.W.2d 406, 410 (Tex.Civ.App.--Eastland 1937, no writ) (emphasis added).

Appellees rely on Pollard v. Snodgrass, 203 S.W.2d 641, 644 (Tex.Civ.App.--Amarillo 1947, writ dismissed), which was a special local-option election wherein the notice of election was required to be posted six days prior to the election. Appellees herein stated that only five days' notice was given and the court held that to be substantial compliance. Appellees contend that Pollard holds that variances greater than 15% constitute substantial compliance. I find the court's reasoning to be more narrow than Appellees contend. The court found that "the time of actual posting and that provided by the statute could not have been more than a few hours," and the court held that was substantial compliance. Id. at 644.

In Coffee, six days' notice was required by statute for a special election involving local option and the clerk only posted notice three days prior to the election. The court found that not to be substantial compliance and held the election to be void.

*873 In Pickard, the Kentucky court followed that same law as the Texas rule for special elections and the opinion states: "Where a special election is required by statute to be advertised a given time before the day of election, such advertisement is 'mandatory' and election is void unless there is a substantial compliance with the statute." Pickard v. Cross, 292 Ky. 70, 165 S.W.2d 986 (1942). The Kentucky court, in holding the election void for failing to substantially comply with the notice requirement, cited Pendley v. Butler County, 229 Ky. 45, 16 S.W.2d 500 (Ky.Ct.App.1929), a case where there was a thirty-day notice requirement for a special election and only twenty-seven days was given. That Kentucky court found there was not substantial compliance with the

notice requirement and voided the election.

Texas courts have consistently held in special elections that legal notice provisions are mandatory and require substantial compliance with the law. Branauum v. Patrick, 643 S.W.2d 745, 749-50 (Tex.Civ.App.--San Antonio 1982, no writ); Christy v. Williams, 292 S.W.2d 348, 350 (Tex.Civ.App.--Galveston 1956), writ *dism'd w.o.j.*, 156 Tex. 555, 298 S.W.2d 565 (1957); Turner v. Lewie, 201 S.W.2d 86, 88-89 (Tex.Civ.App.--Fort Worth 1947, writ *dism'd*); Coffee v. Lieb, 107 S.W.2d 406, 410 (Tex.Civ.App.--Eastland 1937, no writ); Op.Tex.Att'y Gen. No. JM-747 (1987); 31 Tex.Jr.3d Elections § 107 (1984). Turner held that our system of government depends for its existence on orderly elections, held strictly in accordance with the law. Turner, 201 S.W.2d at 89. Turner also rules out consideration of other means of disseminating notice of an election to the voters than that prescribed by statute. Id. Accordingly, all the other publicity concerning the election should not be considered by the court in determining whether there was substantial compliance. The Pendley case is closest to the facts of this case, where the court found that twenty-seven days' notice did not substantially comply with the thirty-day notice requirement. Following Pendley, I find that the thirty-day notice given in this case did not substantially comply with the mandatory notice of *at least 35 days*. To rule otherwise renders the statutory requirement of *at least 35 days* meaningless.

In this case there were 919 votes cast for the creation of the hospital district and 880 against, which is a difference of 39 votes out of 1,789 total votes. The opponents to the proposition, Appellant herein, were not legally aware that Precinct 3 had been eliminated from the proposed district until the April 5, 1990, edition of the Hamilton Herald News, just 30 days prior to the election. The proponents of the district, Appellees herein, had known of the boundary change since May 1989. By limiting the Appellant to only 30 days' notice of a major change in the size of the proposed district which eliminated Appellant's strongest precinct, it is my opinion that the Appellant was placed at a significant disadvantage which materially interfered with the election. It is obvious that the Appellant was entitled to *at least 35 days* notice of this change. Under these circumstances and following the rationale in Pendley, it is my opinion that the 30 days' notice given was not substantial compliance with the notice provision and that the

failure to give 35 days' notice materially interfered with the election and the right of electors to freely participate therein. Accordingly, I respectfully dissent from the majority opinion and would reverse the judgment of the trial court.

805 S.W.2d 864

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Supreme Court of Ohio.

In re ELECTION CONTEST OF DEMOCRATIC
PRIMARY ELECTION HELD MAY 4, 1999 FOR
NOMINATION TO the OFFICE OF CLERK,
YOUNGSTOWN MUNICIPAL COURT.
No. 99-1941.

Submitted Feb. 8, 2000.
Decided March 29, 2000.

Second-place candidate in Democratic primary for municipal court clerk filed election contest based on county elections board's failure to remove a withdrawn candidate's name from ballot. The Court of Common Pleas dismissed action for failure to state a claim. Appeal was taken. The Court of Appeals, Mahoning County, reversed and remanded. Following trial, the Court of Common Pleas denied the election contest. Appeal was taken. The Supreme Court held that: (1) trial court was not required to rule on claimed irregularities that were not pled in petition, and (2) elections board did not abuse discretion in not removing withdrawn candidate's name from ballot.

Judgment affirmed.

West Headnotes

[1] Elections 269144k269 Most Cited Cases

Courts should be very reluctant to interfere with elections, except to enforce rights or mandatory or ministerial duties as required by law.

[2] Elections 291144k291 Most Cited Cases

Every reasonable presumption should be indulged in favor of upholding the validity of an election and against ruling it void.

[3] Elections 269144k269 Most Cited Cases

An election result will not be disturbed unless the evidence establishes that the result was contrary to the will of the electorate.

[4] Elections 295(1)144k295(1) Most Cited Cases

To prevail in an action contesting an election, contestor prove by clear and convincing evidence that

one or more election irregularities occurred and that the irregularity or irregularities affected enough votes to change or make uncertain the result of election. R.C. § 3515.08.

[5] Evidence 596(1)157k596(1) Most Cited Cases

"Clear and convincing evidence" is that measure or degree of proof which is more than a mere preponderance of evidence, but not to the extent of such certainty as is required beyond a reasonable doubt in criminal cases, and which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.

[6] Elections 269144k269 Most Cited Cases

Procedures prescribed for election contests are specific and exclusive, and must be strictly construed. R.C. § 3515.09.

[7] Elections 154(9.5)144k154(9.5) Most Cited Cases

Trial court was not required, in election contest arising from county elections board's failure to remove withdrawn candidate's name from primary ballot, to rule on claimed irregularities that were not pled in petition, where contestor did not request leave to amend petition to include the additional claims and contestee did not expressly or impliedly consent to trial of those claims. R.C. § 3513.30(E), 3515.09, 3515.11; Rules Civ.Proc., Rule 15(B).

[8] Elections 126(5)144k126(5) Most Cited Cases

County board of elections did not abuse its discretion in failing to remove from primary election ballot the name of withdrawn Democratic candidate for municipal court clerk; there was insufficient time to reprint ballots at time of candidate's withdrawal, placing stickers on or marking over candidate's name could have resulted in problems with optical scan ballot-counting machines, and board diligently proceeded to notify electors that candidate had withdrawn and that votes for him would not be counted. R.C. § 3513.30(E).

[9] Statutes 181(1)361k181(1) Most Cited Cases

When construing a statute, Supreme Court's paramount concern is the legislative intent in enacting

the statute.

[10] Statutes  **184**
[361k184 Most Cited Cases](#)

[10] Statutes  **188**
[361k188 Most Cited Cases](#)

In determining the legislative intent, Supreme Court first reviews the statutory language and the purpose to be accomplished.

[11] Elections  **174**
[144k174 Most Cited Cases](#)

Whether it is practicable to remove a withdrawn candidate's name from ballots in the time remaining before the election is an issue vested within the discretion of boards of elections. R.C. § 3513.30(E).

[12] Courts  **26**
[106k26 Most Cited Cases](#)

Term "abuse of discretion" connotes an unreasonable, arbitrary, or unconscionable decision.

[13] Elections  **174**
[144k174 Most Cited Cases](#)

Advisory from Secretary of State interpreting election statute, though stating that board of elections "must" reprint all ballots if certified candidate withdraws in writing 35 days before a primary or general election, merely provides guidance and is not mandatory. R.C. § 3513.30(E).

[14] Elections  **154(1)**
[144k154\(1\) Most Cited Cases](#)

New election was not available as relief in election contest arising from county elections board's failure to remove withdrawn candidate's name from primary election ballot. R.C. § 3515.08.

****272 *258** The names of the following candidates appeared on the ballot for the May 4, 1999 Democratic Primary for the Clerk of the Youngstown Municipal Court: appellant, Rick Durkin; appellee, Sarah Brown-Clark; Charles P. Sammarone; Austin D. Kennedy; and Michelle A. Sexton. On Friday, March 26, 1999, thirty-nine days before the election, Sammarone delivered a written statement to the Mahoning County Board of Elections notifying the board of his withdrawal as a candidate and requesting the removal of his name from the May 4 primary election ballot. Under R.C. 3509.01, absentee ballots

for the May 4 primary election had to be printed and ready for use on the thirty-fifth day before the primary election, *i.e.*, Tuesday, March 30, 1999.

On March 26, when the board's then Deputy Director, Michael Sciortino, received Sammarone's withdrawal, he conferred with the printer about the feasibility of removing Sammarone's name from the ballot. The printer informed Sciortino that as of that date, the absentee ballots for the election had already been printed and delivered to the board and that the regular ballots had practically all been printed but had not yet been delivered. The printer further advised Sciortino that on that late date, the ballots could not be reprinted to remove Sciortino's name in time for the absentee ballots to be ready for use at the primary election.

Alternative methods of removing Sammarone's name from the ballot were also impracticable. For example, because Mahoning County uses an optical-scan ballot-counting system, placing stickers over Sammarone's name on the ballots was not a viable option because the stickers did not always remain on the ballots ***259** and had a ****273** tendency either to jam the ballot-counting machines and stop the counting process or cause the ballots to bend so they could not be fed through the machines. Marking over Sammarone's name on the ballots would not have necessarily completely concealed his name, could have led to an "overvote" when scanned by the ballot-counting machines, and would have been contrary to normal board instructions that poll workers never mark the ballots. The board also could not have used a different printer because there still would not have been enough time to reprint the ballots, and the board probably would have had to rebid the printing job. R.C. 3505.13.

Sciortino then conferred with the board's director and some of the board members, all of whom concurred with his conclusion that the ballots could not be reprinted with Sammarone's name removed in time for the May 4 primary election. Instead of removing Sammarone's name from the ballots, the board placed in each absentee ballot envelope a yellow notice, which informed absentee voters that Sammarone had withdrawn from the municipal court clerk's race and that votes for him would not be counted. The board also placed at eye level in each individual voting booth a eleven-by-fourteen-inch sign, which specified the following in large, bold print:

**"IMPORTANT NOTICE
VOTES WILL NOT BE COUNTED
FOR
THE FOLLOWING CANDIDATE WHO
HAS WITHDRAWN FROM THE
MAY 4, 1999
PRIMARY ELECTION
CHARLES P. SAMMARONE,
YOUNGSTOWN CLERK OF
THE MUNICIPAL COURT."**

In addition, the board instructed poll workers to advise voters of Sammarone's withdrawal from the primary election and that votes for him would not be counted, and precinct advisors reiterated these instructions to poll workers on the May 4 primary election date. Sciortino notified a local newspaper, which published a story about Sammarone's withdrawal.

*260 Brown-Clark won the May 4 primary election with 4,849 votes, and Durkin received 4,533 votes. Sammarone received 830 votes, *i.e.*, more than the 316 votes that separated Brown-Clark from Durkin.

On June 9, 1999, Durkin filed an election contest under R.C. 3515.08 in the Mahoning County Court of Common Pleas to challenge Brown-Clark's nomination. In his petition, as subsequently amended, Durkin alleged that the board's failure to remove Sammarone's name from the May 4 ballot pursuant to R.C. 3503.30(E) and Ohio Secretary of State Advisory No. 96-02 (entitled "Removal of Names of Withdrawn Candidates from the Ballot"), and its concomitant failure to adequately inform voters that Sammarone had withdrawn and that votes cast for him would not be counted, constituted an election irregularity and that this irregularity either affected the election outcome or rendered the result unreliable and uncertain. Durkin further alleged that the election irregularity was "caused by the officers, agents, or employees of the Mahoning County Board of Elections." Durkin requested that the May 4, 1999 primary election be ruled void and that a special election be ordered. Brown-Clark and the board filed motions to dismiss. On July 27, after conducting a portion of the evidentiary hearing on Durkin's election contest, the common pleas court granted the motions and dismissed the election contest for failure to state a claim upon which relief can be granted.

On appeal to this court under R.C. 3515.15, we reversed the judgment of the common pleas court and

remanded the **274 cause to that court for further proceedings. In re Election Contest of Democratic Primary Election Held May 4, 1999 for Clerk, Youngstown Mun. Court (1999), 87 Ohio St.3d 118, 717 N.E.2d 701. We held that Durkin's amended petition alleged the elements of an election contest with sufficient particularity to withstand dismissal under Civ.R. 12(B)(6).

On remand, the common pleas court conducted a trial on Durkin's election contest. At the trial, Brown-Clark specifically objected to Durkin's attempts to introduce evidence and argument on unpled election irregularities, *e.g.*, the board's alleged failure to meet and make decisions regarding the withdrawal. At one point in the trial, Brown-Clark's attorney stated:

"Your Honor, I'm going to interpose an objection here similar to the one I made yesterday. Where [Durkin's counsel] is going with these questions, I think he wants to establish there is an irregularity * * * in the board as opposed to the board's staff doing or not doing certain things. That is not in the petition. The petitioner's name was not removed from the ballot. That's the only irregularity. We stipulate [that] the name wasn't removed from the ballot in terms of stickers or being blacked out. But he's trying to add, I think, additional irregularities here by saying that the board didn't vote on certain things."

*261 Further, during the trial, John F. Bender, the Chief Elections Council for the Secretary of State when R.C. 3501.30(E) was enacted and Secretary of State Advisory No. 96-02 was promulgated, testified that the advisory was drafted in order to give some guidance to boards of elections after our holding in State ex rel. White v. Franklin Cty. Bd. of Elections (1992), 65 Ohio St.3d 45, 50, 600 N.E.2d 656, 660, where we held that a statement of withdrawal of candidacy filed after absentee ballots had been mailed was sufficient to terminate the personal candidacy of the withdrawn candidate. Bender helped draft a recommendation regarding the withdrawal of candidates that was subsequently codified by the General Assembly in R.C. 3513.30(E), and he supervised the drafting of Secretary of State Advisory No. 96-02.

According to Bender, despite the use of generally mandatory language like "shall" and "must" in the advisory, the Secretary of State's Office decided to

draft Secretary of State Advisory No. 96-02 as an advisory rather than as a directive because these matters were intended to be committed to the broad discretion of boards of elections, and the Secretary of State was unable to predict each and every situation that might occur concerning a candidate's withdrawal from an election. Bender opined that if at the time of a candidate's withdrawal, the election was only thirty-nine days away, ballots could not be reprinted in that period of time, and stickers were not a viable option because of the problems they caused for the optical-scan ballot-counting system, removal of the withdrawn candidate's name was not required by statute or order of the Secretary of State and notification of electors of the withdrawal under the advisory would be sufficient to comply with the applicable election laws.

On October 27, 1999, after the trial had been concluded, the common pleas court denied Durkin's election contest. The common pleas court reasoned that Durkin had failed to meet his burden of proving his contest by clear and convincing evidence:

"The members of the Board of Elections either as individuals or jointly took no action to remove the withdrawn candidate's name from the ballot, nor was the Secretary of State consulted. Apparently, one or more Board of Election[s] employees made the decision that time constraints and count-machine limitations made removal of the name impracticable. This court does not opine on the validity of such action or non-action.

"The court holds that the mandatory language of R.C. 3513.30(E) is made less ****275** so by the words '... to the extent practicable...'. The provisions of 'C' and 'D' of the Secretary of State Advisory 96-2 were followed by the Mahoning [County] Board of Elections. Voters were warned and notified of the candidate's withdrawal and that votes for him would not be counted.

***262** "There must be clear and convincing evidence that the election result is contrary to the will of the electorate. This race was not a two candidate race where the 'illegal,' the 'bad,' [or] the 'lost' vote was double the differential. The fact that 830 citizens of Mahoning County * * * either intentionally or negligently chose to waste their vote did not make the contestee's nomination uncertain or invalid."

We subsequently denied Durkin's various motions pending his appeal from the common pleas court's judgment, including his motions to impound the ballots for the November 2, 1999 general election and to prohibit certification of the general election result. See 87 Ohio St.3d 1434, 718 N.E.2d 930, and 87 Ohio St.3d 1456, 720 N.E.2d 539. Brown-Clark ultimately won the general election for the office of Clerk of the Youngstown Municipal Court.

This cause is now before the court upon a consideration of the merits of Durkin's appeal.

Don L. Hanni and J. Gerald Ingram, Youngstown, for appellant.

Donald J. McTigue, Columbus, for appellee.

Patrick J. Williams; Carr Goodson Warner, A Professional Corporation, M. Miller Baker, William J. Carter and Richard B. Rogers, urging reversal for amici curiae, The Voting Integrity Project and Common Cause.

PER CURIAM.

Election Contest: Applicable Standards
Durkin challenges the May 4, 1999 primary election for the office of Clerk of the Youngstown Municipal Court. In evaluating Durkin's election contest, we are guided by several, well-established precepts.

[1] Initially, "courts should be very reluctant to interfere with elections, except to enforce rights or mandatory or ministerial duties as required by law." State ex rel. Taft v. Franklin Cty. Court of Common Pleas (1998), 81 Ohio St.3d 480, 481, 692 N.E.2d 560, 562; MacDonald v. Bernard (1982), 1 Ohio St.3d 85, 86, 1 OBR 122, 123, 438 N.E.2d 410, 411-412.

[2] Additionally, every reasonable presumption should be indulged in favor of upholding the validity of an election and against ruling it void. Copeland v. Tracy (1996), 111 Ohio App.3d 648, 655, 676 N.E.2d 1214, 1218; Beck v. Cincinnati (1955), 162 Ohio St. 473, 475, 55 O.O. 373, 374, 124 N.E.2d 120, 122.

[3] Moreover, an election result will not be disturbed unless the evidence establishes that the result was contrary to the will of the electorate. Portis v. Summit Cty. Bd. of Elections (1993), 67 Ohio St.3d 590, 592, 621 N.E.2d 1202, 1203; Mehling v. Moorehead

(1938), 133 Ohio St. 395, 408, 11 O.O. 55, 60, 14 N.E.2d 15, 21.

*263 In sum, "[t]he message of the established law of Ohio is clear: our citizens must be confident that *their vote*, cast for a candidate or an issue, *will not be disturbed except under extreme circumstances that clearly affect the integrity of the election.*" (Emphasis added.) *In re Election of November 6, 1990 for the Office of Atty. Gen. of Ohio* (1991), 58 Ohio St.3d 103, 105, 569 N.E.2d 447, 450; *State ex rel. Billis v. Summers* (1992), 76 Ohio App.3d 848, 850, 603 N.E.2d 410, 411.

[4][5] More specifically, in order to prevail in his contest of the May 4, 1999 primary election, Durkin had to prove by clear and convincing evidence that one or more election irregularities occurred and that the irregularity or irregularities affected enough votes to change or make uncertain the result of the primary election. **276 *In re Election Contest of Democratic Primary Held May 4, 1999*, 87 Ohio St.3d at 119, 717 N.E.2d at 702, citing *In re Election of Nov. 6, 1990*, 58 Ohio St.3d 103, 569 N.E.2d 447, at syllabus. "Clear and convincing evidence" is "[t]hat measure or degree of proof which is more than a mere 'preponderance of evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.'" *Cincinnati Bar Assn. v. Massengale* (1991), 58 Ohio St.3d 121, 122, 568 N.E.2d 1222, 1223, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, 53 O.O. 361, 120 N.E.2d 118, paragraph three of the syllabus.

With the foregoing standards in mind, we next consider Durkin's claimed election irregularities.

Unpled Irregularities

On appeal, Durkin contends that an election irregularity occurred when the board failed to meet and act by majority vote on Sammarone's withdrawal, instead permitting its employees, e.g., then Deputy Director Sciortino, to make decisions regarding the withdrawal. Durkin further claims that the board's failure to consult the Secretary of State concerning Sammarone's withdrawal constituted a separate election irregularity. In his amended election-contest petition, however, Durkin never alleged these election irregularities. Instead, Durkin alleged that the board's failure to remove Sammarone's name from the May 4

ballot pursuant to R.C. 3501.30(E) and Secretary of State Advisory No. 96-02 and the board's additional failure to adequately notify voters of the withdrawal were the sole election irregularities. [FN1]

[FN1. Durkin does not claim on appeal that the board committed an election irregularity by not adequately notifying voters of Sammarone's withdrawal.

[6] *264 Insofar as Durkin's amended petition did not set forth the election irregularities that he now claims on appeal, it did not comport with the requirements of R.C. 3515.09, which requires election-contest petitions to "set forth the grounds for such [election] contest." The procedures prescribed for election contests are specific and exclusive, and must be strictly construed. *In re Contested Election of November 2, 1993* (1995), 72 Ohio St.3d 411, 414, 650 N.E.2d 859, 862.

[7] Durkin nevertheless relies on R.C. 3515.11 to assert that "it is judicially feasible to conform the pleadings to evidence" of additional election irregularities elicited during trial. R.C. 3515.11 provides that "[t]he proceedings at the trial of the contest of an election shall be similar to those in judicial proceedings, in so far as practicable, and shall be under the control and direction of the court * * * with power to order or permit amendments to the petition or proceedings as to form or substance." Civ.R. 15(B), which is generally applicable to civil judicial proceedings, governs amendments of pleadings to conform to the evidence tried by the parties, and provides:

"When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or

defense upon the merits. * * * " (Emphasis added.)

****277** We need not consider the merits of these additional claims. Durkin never sought to amend his petition to include these claims, Brown-Clark did not expressly or impliedly consent to trial of these claims, and the trial court never considered whether these claims constituted election irregularities. See *State ex rel. Taxpayers Coalition v. Lakewood* (1999), 86 Ohio St.3d 385, 391, 715 N.E.2d 179, 184; *State ex rel. BSW Dev. Group v. Dayton* (1998), 83 Ohio St.3d 338, 344, 699 N.E.2d 1271, 1276-1277. And despite Durkin's claims to the contrary, at the time he filed his amended petition he could have obtained the meeting minutes of the board that he eventually introduced as evidence at trial, which would have disclosed his claimed irregularities. Nor would any purported lack of access to supporting evidence until trial have precluded him from requesting the trial court to amend his petition to include these claims. In fact, when Brown-Clark objected to Durkin's attempts to litigate these unpled issues, Durkin failed to ***265** request leave from the trial court to amend his petition to include these additional claimed irregularities. Therefore, the common pleas court did not err by failing to determine these unpled claims.

Failure to Remove Withdrawn Candidate's Name from Ballot

[8] Durkin's remaining claim, which he properly raised in his amended election-contest petition, is that the board's failure to remove Sammarone's name from the ballot constituted an election irregularity because it contravened R.C. 3513.30(E) and Secretary of State Advisory No. 96-02.

After Sammarone withdrew from the primary election in accordance with R.C. 3513.30(B) and (D), [FN2] the board's duty was that set forth in R.C. 3513.30(E), which provides:

FN2. R.C. 3513.30 provides:

"(B) Any person filing a declaration of candidacy may withdraw as such candidate at any time prior to the primary election, or, if the primary election is a presidential primary election, at any time prior to the fiftieth day before the presidential primary election. The withdrawal shall be effected and the statement of withdrawal shall be filed in accordance with the procedures prescribed in division (D) of this section for the

withdrawal of persons nominated in a primary election or by nominating petition.

" * * *

"(D) * * * Such withdrawal may be effected by the filing of a written statement by such candidate announcing the candidate's withdrawal and requesting that the candidate's name not be printed on the ballots. * * * If such candidate's declaration of candidacy * * * was filed with a board of elections, the candidate's statement shall be addressed to, and filed with such board."

"When a person withdraws under division (B) or (D) of this section, the board of elections shall remove the name of the withdrawn candidate from the ballots to the extent practicable in the time remaining before the election and according to the directions of the secretary of state. If the name is not removed from all ballots before the day of the election, the votes for the withdrawn candidate are void and shall not be counted." (Emphasis added.)

[9][10] When construing a statute, our paramount concern is the legislative intent in enacting the statute. *Yonkings v. Wilkinson* (1999), 86 Ohio St.3d 225, 227, 714 N.E.2d 394, 396. In determining the legislative intent, we first review the statutory language and the purpose to be accomplished. *Rice v. CertainTeed Corp.* (1999), 84 Ohio St.3d 417, 419, 704 N.E.2d 1217, 1218.

[11] Under the plain language of the statute, R.C. 3513.30(E) expressly limits the board's duty to remove the name of a withdrawn candidate from ballots "to the extent practicable in the time remaining before the election." Whether it is practicable to remove a withdrawn candidate's name from ballots in the time remaining before the election is an issue vested within ****278** the discretion of boards of elections. See *State ex rel. Ohio Assn. of Pub. School Emp. v. Girard Civ. Serv. Comm.* (1976), 45 Ohio St.2d 295, 297, 74 O.O.2d 463, 464-465, 345 N.E.2d 58, 60, ***266** where we held that comparable language in R.C. 124.31 requiring promotions in the classified service to be based upon merit, "to be ascertained as far as practicable by promotional examinations," vested the question of whether promotional examinations were practicable initially in the civil service commission.

This interpretation furthers the purpose of R.C.

3513.30(E), which the then Secretary of State's Chief Elections Counsel, who helped draft the provision, testified was to confer broad discretion on boards of elections to handle ballot-removal issues in candidate-withdrawal cases.

[12] The evidence establishes that the board did not abuse its discretion under R.C. 3513.30(E) by determining that it was not practicable to remove Sammarone's name from the ballots. The term "abuse of discretion" connotes an unreasonable, arbitrary, or unconscionable decision. State ex rel. Duncan v. Chippewa Twp. Trustees (1995), 73 Ohio St.3d 728, 730, 654 N.E.2d 1254, 1256. At the time that Sammarone withdrew from the primary election, there was insufficient time to reprint the ballots to remove his name. In addition, because Mahoning County uses optical-scan ballot-counting machines, neither placing stickers on nor marking over his name on the ballots was feasible. Given these circumstances, the board's decision was neither unreasonable, arbitrary, nor unconscionable.

[13] Secretary of State Advisory No. 96-02 does not require a contrary result. The advisory states that "[i]f a certified candidate withdraws in writing prior to thirty-five (35) days before a primary or general election * * *, a board of elections must reprint all ballots without the name of the withdrawn candidate, or otherwise remove the name of the withdrawn candidate from existing ballots by use of stickers or another method adopted by the board." But the opinion was drafted as an *advisory* rather than as a *directive*. In addition, as specified by the official under whose direction the advisory was issued, despite the use of language normally considered mandatory, the advisory merely provided guidance and was not mandatory. Finally, a contrary conclusion would nullify the "to the extent practicable" clause in R.C. 3513.30(E). See State ex rel. Sinay v. Soddors (1997), 80 Ohio St.3d 224, 232, 685 N.E.2d 754, 760 ("We must construe statutes to avoid unreasonable or absurd results."); In re Election of Member of Rock Hill Bd. of Edn. (1996), 76 Ohio St.3d 601, 609-610, 669 N.E.2d 1116, 1123 (board of elections could not rely on Secretary of State advisory that erroneously interpreted election statute).

Moreover, after the board determined that it was impracticable to remove Sammarone's name from the ballots given the proximity of the election, it diligently proceeded to notify electors that Sammarone had

withdrawn as a candidate and that votes for him would not be counted. Notices were placed in each absentee-ballot envelope and individual voting booth, a local newspaper *267 reported the withdrawal, and poll workers were instructed to verbally inform voters of the withdrawal.

Based on the foregoing, the board did not abuse its broad discretion in not removing Sammarone's name from the ballots, and it did not violate R.C. 3513.30(E). Durkin failed to establish by the requisite clear and convincing evidence that one or more election irregularities occurred. Therefore, we need not determine the second prong of the election-contest test, *i.e.*, whether the claimed irregularity or irregularities affected enough votes to change or make uncertain the result of the primary election.

[14] We note, however, that to the extent Durkin and *amici curiae* claim entitlement to a new election, that relief is not available in an election contest. **279Hitt v. Tressler (1983), 7 Ohio St.3d 11, 12, 7 OBR 404, 405, 455 N.E.2d 667, 667-668, quoting Hitt v. Tressler (1983), 4 Ohio St.3d 174, 178, 4 OBR 453, 457, 447 N.E.2d 1299, 1304, *fn.* 10 ("[A] court is without jurisdiction to order an election in [an election-contest] case in the absence of legislative authority.").

Conclusion

Because Durkin did not establish any election irregularity by the board's actions on the Sammarone withdrawal, the common pleas court properly denied the writ. This is not a case in which "extreme circumstances" manifestly affected the "integrity of the election." In re Election of November 6, 1990, 58 Ohio St.3d at 105, 569 N.E.2d at 450. Instead, the board acted diligently and properly exercised its statutory discretion by keeping Sammarone's name on the ballot and notifying the electors of his withdrawal. Accordingly, we affirm the judgment of the court of common pleas. [FN3]

FN3. Given this disposition, we also need not consider the merits of Brown-Clark's alternate assertion that Durkin's claims are barred by estoppel, a ground not relied upon by the trial court in denying the contest. See In re Contested Election of Nov. 2, 1993, 72 Ohio St.3d at 414, 650 N.E.2d at 862.

Judgment affirmed.

MOYER, C.J., RESNICK, FRANCIS E. SWEENEY, SR., PFEIFER, COOK and LUNDBERG STRATTON, JJ., concur.

DOUGLAS, J., not participating.

88 Ohio St.3d 258, 725 N.E.2d 271, 2000-Ohio-325

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C

Court of Appeals of Texas,
Beaumont.
B.E. "Slim" SPEIGHTS, Appellant,
v.
Bob WILLIS, Appellee.
No. 09-02-192 CV.

Submitted Sept. 19, 2002.
Decided Oct. 24, 2002.

Unsuccessful candidate for county commissioner brought action contesting the result. The 258th District Court, Polk County, Sam Bournias, J., upheld the result. Candidate appealed. The Court of Appeals, David B. Gaultney, J., held that: (1) candidate failed to meet his burden of proving violations of election code that materially affected election, and (2) address descriptions used on registration applications by 5,000 challenged voters permitted election officials to locate the voters in the proper voting precincts, and thus, voters were validly registered.

Affirmed.

Don Burgess, J., filed concurring and dissenting opinion.

West Headnotes

[1] Elections 295(1) 144k295(1) Most Cited Cases

Unsuccessful candidate for county commissioner, contesting election on claim that over 5000 voters were not residents, failed to meet his burden of proving violations of election code that materially affected election, where opponent won election by a margin of 2,757 votes, yet only eight voters testified at trial, and there was no evidence of the individual circumstances, volition, intention, and actions of the more than 5000 voters attacked by unsuccessful candidate. V.T.C.A., Election Code § 1.015.

[2] Elections 71.1 144k71.1 Most Cited Cases

Whether a person is a resident within the meaning of the election code depends on the circumstances surrounding the person involved and largely depends upon the present intention of the individual. V.T.C.A., Election Code § 1.015.

[3] Elections 71.1

144k71.1 Most Cited Cases

Volition, intention, and action are all factors to be considered in determining "residence," within meaning of election code.

[4] Elections 295(1)

144k295(1) Most Cited Cases

Declared election results are to be upheld unless there is clear and convincing evidence of an erroneous result.

[5] Elections 71.1

144k71.1 Most Cited Cases

Address descriptions used on registration applications by 5,000 challenged voters, who were all largely full-time travelers in recreational vehicles (RVs), permitted election officials to locate the voters in the proper voting precincts, and thus, voters were validly registered and did not cast illegal votes based on the method of registration, whereby voters, who all received mail at one building on one 140-acre tract of land owned by the RV club to which they belonged, each used an assigned personal mail box (PMB) number as their voting and mailing address, and county divided voters between two precincts based on whether they had odd or even PMB numbers. V.T.C.A., Election Code § 13.002(c)(7).

[6] Elections 10

144k10 Most Cited Cases

The election code is to be interpreted to achieve a just and reasonable result, and a court may consider the statute's purpose in construing its provisions.

*818 Doug W. Ray, Randall B. Wood, Ray, Wood & Bonilla, LLP, Austin, for appellant.

Larry F. York, Scott K. Field, Keller & Field, LLP, Austin, for appellee.

Before WALKER, C.J., BURGESS and GAULTNEY, JJ.

OPINION

DAVID B. GAULTNEY, Justice.

B.E. "Slim" Speights contests the result of the 2000 election for Polk County Commissioner, Precinct 1. Speights claims over 5000 voters were not residents

and were not properly registered. See Tex. Elec.Code Ann. § 11.002(5), (6) (Vernon Supp.2002). After a bench trial on the merits conducted on April 29 and 30, 2002, the trial court declared Bob Willis the winner of the election.

THE RESIDENCY REQUIREMENT

[1][2][3] We consider the residency issue first. "Residence" is defined in the Texas Election Code, in part as follows:

(a) In this code, "residence" means domicile, that is, one's home and fixed place of habitation to which one intends to return after any temporary absence.

*819 (b) Residence shall be determined in accordance with the common-law rules, as enunciated by the courts of this state, except as otherwise provided by this code.

(c) A person does not lose the person's residence by leaving the person's home to go to another place for temporary purposes only.

(d) A person does not acquire a residence in a place to which the person has come for temporary purposes only and without the intention of making that place the person's home.

....

Tex. Elec.Code Ann. § 1.015 (Vernon Supp.2002). Whether a person is a resident depends on the "circumstances surrounding the person involved and largely depends upon the present intention of the individual." Mills v. Bartlett, 377 S.W.2d 636, 637 (Tex.1964). Volition, intention and action are all factors to be considered in determining residence. See *id.*; see also Slusher v. Streater, 896 S.W.2d 239, 243-44 (Tex.App.-Houston [1st Dist.] 1995, no writ).

The challenged voters are all members of a club referred to as the Escapees, and are largely full-time travelers; typically, the members own their own recreational vehicles (RVs) and travel around the country extensively. The club owns a 140-acre tract of land in Polk County, Texas called Rainbow's End. Rainbow's End includes 220 lots owned by members, and also has space for RV parking with or without electricity and water. The club provides services to its members, and has an adult day care center on the premises, a library, an activity center, a swimming pool, a club house and a mail-forwarding service.

On the grounds is a building identified as 101 Rainbow Drive, to which mail is delivered for members of the club. Several years ago, the United States Post Office, together with the club's owners,

implemented a numbering system to facilitate mail delivery to the members. Mail is addressed to Rainbow Drive with a number assigned for each individual member. Members use these addresses on Texas driver's licenses and on voter registrations.

In his findings of fact, the trial judge found in part as follows:

19. Rainbow's End is a large community of over 140 acres with deeded lots, lease sites, RV parking sites, an activity center, a club house, a library, a pool, and an Adult Day Care Center.

20. Contestant Speights ran for and was elected County Commissioner of Polk County Precinct 1 in 1992 and 1996. Escapees members voted in those elections, as well, and Contestant Speights made no complaint about Escapees members' residency or their respective methods of registration. Contestant Speights actively campaigned for Escapees members' votes in the 2000 election, as well, and, indeed, received over 1,000 votes from voters voting in precincts 19 and 20.

21. Contestant Speights was County Commissioner in 1999, when Polk County submitted a preclearance package to the U.S. Department of Justice pursuant to the Voting Rights Act. At that time, there were too many Escapees registered to vote in one voting precinct. The County decided to split these voters, which the County recognized as legal residents, into two voting precincts by their assigned PMB numbers, with voters whose addresses contained odd-numbered PMBs placed in voting precinct 19 and those with even-numbered PMBs placed in voting precinct 20. Contestant Speights, as County Commissioner, signed off on and approved this preclearance package.

*820 At the time of the 2000 election, 6,000 members were registered to vote in Polk County, and the county divided the voters between two precincts by whether they had odd or even PMB numbers.

Only eight voters testified at trial; each described his or her individual circumstances. Some described little contact with Polk County. Daniel Topping testified to being registered to vote in Polk County. He and his wife own an RV lot in Arizona, and he testified to receiving mail at Mesa, Arizona. He has never been to Polk County. Muriel Ripley first registered as a Polk County voter and obtained her Texas driver's license in 1999. She was last in Polk County in April, 2000. Joseph Beador and Judith Beador own a summer home and an RV lot in

California. The Beadors are registered voters in Polk County. He testified that neither of them have ever been to Rainbow's End.

Other voters testified to considerable contacts with Polk County and Rainbow's End, and to their actions and intentions to make their residence there. Janet Hildebrandt has been a full-time RV'er since 1991, and an Escapees member since 1994. She and her husband moved their residence to Rainbow's End in 1995, and in Polk County they registered their vehicle, registered to vote, joined a church and participated in community activities. She stopped traveling and settled permanently at Rainbow's End in June, 2000, after her husband had a stroke. She obtained a five-year lease at Rainbow's End with an option to extend.

Wayne and Audrey Quigle became full-time RV'ers upon Wayne's retirement in 1994. Wayne's driver's license address is 137 Rainbow Drive, No. 3722. The Quigles engage in volunteer mission work while traveling about the country. They moved to Texas to get away from the cold. One of their daughters lives in Texas. They were aware of the adult care center at Rainbow's End and considered it the best option if they needed to stop traveling and obtain care. When in town, they attend First Methodist Church. A local attorney drafted their will designating an administrator in Texas. Mr. Quigle testified they have a bank account in Polk County and they pay taxes in Polk County. On the day Mr. Quigle testified before the trial judge in this case, Mrs. Quigle was serving jury duty in Polk County.

Wendy Melinger has been an Escapees member since 1994, and a full-time RV'er since 1998. She maintains her bank and investment accounts in Texas, and pays many of her bills through the Escapees Club in Polk County. She comes to Polk County at least once, twice some years, in the spring and the fall. She considers Texas her home. Her Texas driver's license shows her address as 101 Rainbow Drive. Her vehicles are registered in Polk County. She votes in local elections in Polk County. She testified that she loves the area and "would like to have a place at Rainbow's End" when she stops being a full-time RV'er, although she "can't know for sure."

Jacqueline Morris, a retired nurse, moved to Polk County in 1999. Her address is 235 Rainbow Drive, No. 13536. She has served jury duty in Polk County.

She has a Texas driver's license, is a member of a local church and has four bank accounts in Polk County. Her lawyer, accountant, veterinarian and doctors are all in Polk County. She insists that all medical tests be done at the Livingston Hospital in Polk County. She intends to live in Polk County when she is required to "hang up the keys."

Residency depends on the circumstances surrounding the individual voter. See Slusher, 896 S.W.2d at 243-44. While the Rainbow's End members have a common *821 means of having their mail delivered, this by itself is not determinative of residency. The evidence at trial established that some of the voters who testified have significant ties to Polk County, and by their actions, decisions and intentions have established residency in Polk County at Rainbow's End. In contrast, some voters testified they had never been to Rainbow's End in Polk County. Other than the eight who testified at trial, however, the trial court was presented with no evidence of the individual circumstances, volition, intention and actions of the more than 5000 voters attacked by contestant.

[4] The trial court properly found that "[c]ontestant has not offered proof of a sufficient number of individual voter's volition, intention, or actions with regard to his or her residence for voting purposes." The trial court found that Willis won the election "by a margin of 5,822 votes to 3,065 votes, a difference of 2,757 votes." Declared election results are to be upheld unless there is clear and convincing evidence of an erroneous result. See Price v. Lewis, 45 S.W.3d 215, 218 (Tex.App.-Houston [1st Dist.] 2001, no pet.). The trial court correctly concluded that Speights did not meet his burden of proving violations of the Election Code that materially affected the election. See generally Price, 45 S.W.3d at 218.

REGISTRATION

[5] We next consider the registration challenge. Speights challenged the address descriptions on voter registration applications filed by over 5,000 voters. The trial court concluded that the voters at issue met the requirements of Section 13.002(c)(7), which provides that a registration application must include "the applicant's residence address or, if the residence has no address, the address at which applicant receives mail and a concise description of the location of the applicant's residence[.]" See Tex. Elec.Code Ann. § 13.002(c)(7) (Vernon Supp.2002). The trial court also concluded that "The fewer than 200 votes cast by

voters in Polk County voting precincts 19 and 20, who registered to vote by either leaving the residence address box on their voter registration application blank or by indicating that they 'Live in an RV' or something similar, or by using only a rural route were not in sufficient number to affect the outcome of the election."

The trial court heard testimony that the election officials were aware of the physical location of Rainbow Drive described in the applications, and that Polk County was able to place the voters into precincts based on the voter registration application descriptions. The trial court found that in prior years Polk County had confirmed repeatedly the validity of the method of registration challenged here, namely the use of a Rainbow Drive description with a PMB number, and had accepted and used this method of registration.

[6] The Texas Election Code is to be interpreted to achieve a just and reasonable result, and a court may consider the statute's purpose in construing its provisions. *In Re Bell*, 45 Tex. Sup.Ct. J. 336, 91 S.W.3d 784, 785 (2002) (failure of petitioning voter to include city and zip code as required by statute did not render the signatures invalid). The address descriptions used by the voters on the registration applications permitted election officials to locate the voters in the proper voting precincts. *See generally Slusher*, 896 S.W.2d at 247. Election officials could assign and verify voting precincts based upon the descriptions furnished in the applications, pursuant to a process established by Polk County and in place for many years. Based on the evidence in this case, the *822 trial court properly concluded these challenged voters validly registered and "did not cast illegal votes on the basis of this method of registration." The trial court's judgment is affirmed.

AFFIRMED.

DON BURGESS, J., concurs and dissents with written opinion.

DON BURGESS, Justice, concurring and dissenting.

I concur with the majority's holding on the residency issue. Mr. Speights simply did not meet his burden of showing a sufficient number of non-residents voted. However, I respectfully dissent to the registration issue.

This issue involves three pertinent sections of the Election Code. Tex. Elec.Code Ann. § 13.002(c)(7) (Vernon Supp.2002) requires a voter registration application to include "the applicant's residence address or, if the residence has no address, the address at which the applicant receives mail and a concise description of the location of the applicant's residence." Tex. Elec.Code Ann. § 1.005(17) (Vernon Supp.2002) says " 'Residence address' means the street address and any apartment number, or the address at which mail is received if the residence has no address, and the city, state, and zip code that correspond to a person's residence." Tex. Elec.Code Ann. § 1.015(a) (Vernon Supp.2002) states: "In this code, 'residence' means domicile, that is, one's home and fixed place of habitation to which one intends to return after any temporary absence."

While the determination that a person is in fact a resident is a separate inquiry, the statutory definition of residence must be included in the determination of whether a voter properly registered by including a residence address or a description of the applicant's residence. The definition of residence is clear and has two components: a home or fixed place of habitation and the requisite intent.

The majority's description of the scheme established for the members of the Escapees' RV club to establish a mailing address on Rainbow Drive is correct, insofar as it does. The chief operating officer of the club testified that the mail forwarding service, one building, started with a rural route number and box and then selected a street address of 101 Rainbow Drive. She went on to explain that all the addresses on Rainbow Drive, whether they be 101, 201, etc., are in the same location, the mail forwarding service. She further explained that each member is assigned a personal mail box (PMB). She acknowledged that an address such as 101 Rainbow Drive or 124 Rainbow Drive, with a PMB number after it, would not have a lot or house associated with that address.

Speights introduced, as exhibit two, a collection of eighty-nine voter registration applications. These applications, under residence address, reflect thirty-five addresses as 201 Rainbow Drive, eighteen addresses as 200 Rainbow Drive, eighteen addresses as 202 Rainbow Drive, fifteen addresses as 101 Rainbow Drive, two addresses as 217 Rainbow Drive and one address as 124 Rainbow Drive. Speights received certified copies of the voter registration

applications for persons who voted [FN1] in precincts 19 and 20 in the election. [FN2] He produced evidence that 5,187 voter registration applications had a residence address of either Route 5, Box 3xx or # Rainbow #. There was also evidence *823 that of those, less than 100 would have the Route designation. The Escapees' CEO testified Rainbow Drive was approximately a quarter of a mile long. The CEO also testified from a map or plat of the RV park that there were certain deed lots and those numbered approximately 220. According to the plat and the testimony, there are 29 deeded lots that could have a Rainbow Drive Address. The election results show that Mr. Willis received 4,142 votes from precincts 19 and 20 while Mr. Speights received 1,050, or a total of 5,192 votes were cast from those two boxes.

FN1. The number of applications was slightly less than the total voters.

FN2. Voters using a PMB were placed in either 19 or 20 based upon the PMB.

The simple question is whether the address of a mail forwarding service can be a "residence address." [FN3] I would hold, as a matter of law, it cannot. [FN4] However, even if factual determinations are necessary, there is overwhelming evidence that: (1) there are, at most, only 29 deed lots on Rainbow Drive (2) Rainbow Drive is about a quarter of a mile long and (3) some 5,000 voters listed their residence address as Rainbow Drive. Disregarding the uncontroverted evidence that these 5,000 persons were only utilizing the mail forwarding building as their residence address and assuming 29 Rainbow Drive addresses, this translates to 172 persons per address. There is no evidence that each of these lots contained an apartment building capable of being a home or fixed place of habitation for 172 persons. [FN5] Either way, in my view, the 5,000 or so voters in precincts 19 and 20 were not properly registered, therefore they were ineligible voters. If that is the case, then the true outcome of the election can not be ascertained and the election should be declared void. Thompson v. Willis, 881 S.W.2d 221, 225 (Tex.App.-Beaumont 1994, no writ).

FN3. See Alvarez v. Espinoza, 844 S.W.2d 238, 248 (Tex.App.-San Antonio 1992, writ dism'd w.o.j.) (where the court held that a person with an alleged permanent address that was essentially a place to receive mail

was an illegal voter).

FN4. See Fischer v. Stout, 741 P.2d 217, 221 (Alaska 1987).

FN5. This is noted very "tongue in cheek".

The legislature may very well change the definition of "residence" to accommodate persons such as members of the Escapees, [FN6] but it is not for this court or the trial court to do. Therefore, I respectfully dissent.

FN6. For example, "residence" means either domicile, that is, one's home and fixed place of habitation to which one intends to return after any temporary absence or legal domicile, that is, that place which one intends to be their legal residence, without any necessity of a fixed place of habitation or without any intent to maintain an actual residence.

88 S.W.3d 817

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Dennis C. Vacco, Individually and as a Candidate for the Office of Attorney-
General of the State of New York, Plaintiff,

v.

Eliot Spitzer et al., Defendants.

Supreme Court, Albany County,

December 14, 1998

HEADNOTES

Elections--Fraud and Irregularities--Number of Irregularities Insufficient to Affect Election Outcome

(1) A postelection declaratory judgment action brought by plaintiff, a candidate for the Office of Attorney-General who lost by 25,186 votes, in which he seeks a judgment declaring that he was rightfully and duly elected or, alternatively, that it is impossible to declare a winner because of massive irregularities in the conduct of the election, is dismissed for plaintiff's failure to show that the irregularities were of such a number as to establish the probability that the outcome of the election would have differed if the irregular votes had not been cast.

Elections--Fraud and Irregularities--Procedure for Challenging Voters' Registration

(2) While Election Law § 5-702, which establishes a procedure for investigating the qualifications of a voter to register and vote, does not explicitly foreclose a postelection day challenge, it does not envision a challenge by plaintiff candidate to the qualifications of more than 100,000 voters in a declaratory judgment action commenced five weeks after the election.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Elections, § § 374, 375, 412, 417, 419, 438, 441.

McKinney's, Election Law § 5-702.

NY Jur 2d, Elections, § § 184, 186, 190.

ANNOTATION REFERENCES

See ALR Index under Elections and Voting.

APPEARANCES OF COUNSEL

Fisher, Fisher & Berger, New York City (*Stanley Kalmon Schlein* of counsel), and *Martin E. Connor*, Brooklyn, for Eliot Spitzer, defendant. *Thomas J. Spargo*, East Berne, for plaintiff.

OPINION OF THE COURT

Thomas W. Keegan, J.

This is a motion by the defendant Eliot Spitzer which seeks *585 to dismiss the complaint in this declaratory judgment action for failure to state a cause of action.

This court, in an exercise of its discretion, and mindful of the need to expedite this matter, has given notice of its intention to treat Mr. Spitzer's motion as one for summary judgment.

As the parties are aware, summary judgment is a drastic remedy. However, after reviewing the evidence if the court concludes that there are no issues of fact, and, therefore, nothing to try, summary judgment is appropriate.

If ever there was a case before this court calling out for a swift resolution, this is it. Indeed, election disputes have been

described as "the most preferred action[s] of all". (Siegel, NY Prac § 373, at 552 [2d ed].)

On December 7th, five weeks after the election, Mr. Vacco commenced an action seeking a judgment declaring that he was rightfully and duly elected to the Office of Attorney-General or, alternatively, that it is impossible to declare a winner because of massive irregularities in the conduct of the election.

In the usual election dispute, courts are asked to examine the validity of a handful of votes, cast on paper ballots which were impounded by court order and/or challenged at the polls.

This is hardly the usual election case.

Here the court is asked to examine the qualifications of more than 100,000 voters.

Here the court is asked to invalidate *presumptively valid* votes cast on machines.

Here the court is asked to invalidate votes *unchallenged* at the polling place on election day.

Here the court is asked to take the extraordinary step of declaring the apparent winner, the loser--or, to declare a 25,186-vote margin inconclusive.

Here the court is asked to take the " 'drastic, if not staggering' remedy of voiding a state election". (*Saxon v Fielding*, 614 F2d 78, 79, citing *Bell v Southwell*, 376 F2d 659, 662.)

The election is indeed close, the closest in the State's history. "Close elections usually leave in their wake nagging suspicions that perhaps the true choice of the electorate was not declared the winner. But all elections do not result in thumping pluralities that give reassuring evidence of the clear-cut mandate of the People; and there is no law in this State providing that elections of a specified closeness must be rerun. The margin of *586 victory, no matter how narrow, in and of itself cannot justify upsetting an election". (*Matter of DeSapio v Koch*, 21 AD2d 20, 22, citing *Matter of McGuinness v DeSapio*, 9 AD2d 65.)

To justify such drastic action, plaintiff must bring to this court clear and convincing evidence (*see, Matter of Kelly v Villa*, 176 AD2d 992).

He must show: first, that there is a reasonable basis for the inquiry as to each vote challenged; second, that the alleged irregularities are not susceptible of inferences other than fraud; third, that specific acts of fraud, misconduct and/or irregularity occurred; and finally, that the fraud or other unlawful behavior changed the outcome of the election. (*Cf., Donohue v Board of Elections*, 435 F Supp 957, 968.)

Plaintiff alleges that he has evidence of both noncitizen and nonexistent voters casting ballots in the November 3rd election. Relying on the matching of a computerized list of New York City voters and the records of a credit reporting service on which these voters did not appear, plaintiff states that he believes that a sufficient number of persons voted who were not eligible or were not legally qualified to vote.

Plaintiff next alleges that substantial numbers of voters were ineligible because they registered to vote from private post-office boxes and office buildings in which there is no residential space. In this instance, plaintiff relies on a comparison of the list of voters of the City of New York, the National Change of Address File, and the listings in the Yellow Pages for offices of Mailboxes Plus throughout New York City.

Plaintiff also claims that there are duplicate registrations for hundreds of voters who by identical names and dates of birth and/or similar names and dates of birth appear to have voted more than once in *past* elections and in some cases *may* have voted in the 1998 general election.

Plaintiff further claims that there are an excessive number of individuals registered to vote from a single apartment or building, and substantial numbers who are registered to vote in New York City as well as other States.

Plaintiff contends that in some instances there is a greater number of votes having been cast on voting machines than there are corresponding voters who signed to vote.

Finally, plaintiff alleges that a number of deceased voters voted in the general election held on November 3rd.

"A fair election is the cornerstone of democracy". (*Matter of Lowenstein v Larkin*, 40 AD2d 604, 605, *aff'd* 31 NY2d 654.) *587 "Protecting the integrity of elections ... is essential to a free and democratic society [citation omitted]. It is difficult to imagine a more damaging blow to public confidence in the electoral process than [an] election ... whose margin of victory was provided by fraudulent registration or voting, ballot-stuffing or other illegal means." (*Donohue v Board of Elections*, 435 F Supp, *supra*, at 967.)

Yet elections, like lawsuits, are adversary actions, to be fought hard and cleanly, but within a dominant self-help philosophy. (*Matter of DeSapio v Koch*, 21 AD2d 20, 23, *supra*, citing *Matter of McGuinness v DeSapio*, 9 AD2d 65, *supra*.)

(1) Over the past six weeks, Mr. Vacco has been afforded the opportunity to investigate his claims. Obviously, a great deal of time, effort and creativity has been spent in an exhaustive search for possible voter fraud. However, to date that investigation has failed to yield sufficient proof to invalidate enough votes to change the outcome of the election. "An election will not be overturned upon a mere mathematical possibility that the results could have been changed, when the *probabilities* all combine to repel any such conclusion". (*Matter of Ippolito v Power*, 22 NY2d 594, 598 [emphasis added].) Here the plaintiff has not shown that the irregularities were of such a number "as to establish the probability that the outcome of the election would have differed if the irregular votes had not been cast". (*Lehner v O'Rourke*, 339 F Supp 309, 314, quoting *Powell v Power*, 320 F Supp 618, *aff'd* 436 F2d 84.)

Because even plaintiff concedes he has not made a sufficient showing of irregularity in the conduct of this election, the court need not decide the other issues raised in the pleadings.

However, the court would be remiss if it did not take this opportunity to reflect on the important issues this extraordinary election dispute has brought to the surface.

(2) This court is of the opinion that section 5-702 of the Election Law should not be used to invalidate votes *which were not challenged on or before election day*. The law expressly provides a mechanism to challenge a voter's registration at the time of that registration or at the polls and to cancel the registrations of ineligible voters and/or registrants *after* notice and an opportunity to be heard. (Election Law § § 5-218, 5-220, 5-402.) While the law does not explicitly foreclose a postelection day challenge, it clearly does not envision a challenge on this scale at this late date.

This is not the first time these allegations have been made. In the 1976 presidential race, the 1992 United States Senate *588 race, and the 1993 mayoral election, similar claims of voter fraud in New York City were raised. This begs the question as to why the remedies available in the Election Law have not been used before now to challenge individual registrations and questionable practices at the local Boards of Election.

The propriety of such challenges and the practices of local boards are issues that should be resolved by the Legislature and election officials between now and next November; not after Election Day, and not by this court.

This court has sought to be fair and just to Mr. Vacco, Mr. Spitzer and the 4.2 million New Yorkers who cast their votes for Attorney-General on November 3rd. All are entitled to assurances that the election was fair.

In acting today, the court is conscious of the need to restore voter confidence in the process and to prevent the uncertainty that would result in future elections if the courts were to sanction such protracted postelection tactics.

The time has come to bring finality to this election.

It is hereby declared that the election for Attorney-General on November 3, 1998 was duly and properly conducted.

Defendant Eliot Spitzer's motion is granted and the verified complaint dated December 6, 1998 is hereby dismissed.*589

Copr. (c) 2005, Randy A. Daniels, Secretary of State, State of New York.

N.Y.Sup. 1998.

VACCO v SPITZER

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Office of the Attorney General
 State of Washington

*1 AGO 65-66 No. 66
 January 10, 1966

OFFICES AND OFFICERS -- STATE -- COUNTY
 -- ELIGIBILITY OF CANDIDATE --
 CONVICTION OF FELONY OR GROSS
 MISDEMEANOR -- DISMISSAL OF
 PROCEEDINGS UNDER RCW 9.95.240.

Assuming a person is otherwise qualified for a particular public office, he may file for and hold, if elected, a state or county office even though he had previously entered a plea or was found guilty of a felony (an infamous crime in this state resulting in a loss of the elective franchise) where his sentence was deferred; he was placed on probation and at the expiration thereof the superior court dismissed the proceedings under RCW 9.95.240, releasing him "from all penalties and disabilities resulting from the offense or crime of which he was convicted."

Honorable Alfred E. Leland
 State Representative
 48th District
 P.O. Box 175
 Redmond, Washington

Dear Sir:

By letter previously acknowledged you have asked this office for an opinion on the following question:

Is a person eligible to file for and hold, if elected, a county or state office who has entered a plea of guilty or was convicted of a felony; was placed on probation and at the expiration of such probationary period, had such proceedings dismissed pursuant to RCW 9.95.240?

We answer your question in the affirmative.

ANALYSIS

In general no person may qualify for or hold any elective public office in this state unless he be "... a citizen of the United States and the state of

Washington, and an elector of such county, district, precinct, school district, municipality or other district or political subdivision." (Emphasis supplied) RCW 42.04.020. [FN1] See, also, Article III, § 25 of the state constitution governing elective executive offices of the state government.

The qualifications of electors are set forth in Article VI, § 1, Amendment 5 of the state constitution which reads as follows:

"All persons of the age of twenty-one years or over, possessing the following qualifications, shall be entitled to vote at all elections: They shall be citizens of the United States; they shall have lived in the state one year, and in the county ninety days, and in the city, town, ward or precinct thirty days immediately preceding the election at which they offer to vote; they shall be able to read and speak the English language: Provided, That Indians not taxed shall never be allowed the elective franchise: And further provided, That this amendment shall not affect the rights of franchise of any person who is now a qualified elector of this state. The legislative authority shall enact laws defining the manner of ascertaining the qualifications of voters as to their ability to read and speak the English language, and providing for punishment of persons voting or registering in violation of the provision of this section. There shall be no denial of the elective franchise at any election on account of sex."

*2 By Article VI, § 3, of our constitution, certain persons are excluded from exercising their elective franchise. The section reads as follows:

"All idiots, insane persons, and persons convicted of infamous crime unless restored to their civil rights are excluded from the elective franchise."

An "infamous crime" is one "punishable by death or imprisonment in the penitentiary." Section 3057, Code of 1881, cf. RCW 29.01.080. Therefore, only a "felony" which provides such punishment (RCW 9.01.020)

(Cite as: 805 S.W.2d 864)

is an infamous crime in this state. [FN2] See our informal opinion to the Secretary of State dated November 8, 1962, and cases cited therein.

It follows that the crucial question to be determined in regard to a person such as you have described is whether he stands convicted of a felony (within the meaning of Article VI, § 3, supra) where his sentence was deferred and after successful completion of probation the court has dismissed the information or indictment pursuant to RCW 9.95.240.

RCW 9.95.240, supra, reads as follows:

"Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, may at any time prior to the expiration of the maximum period of punishment for the offense for which he has been convicted be permitted in the discretion of the court to withdraw his plea of guilty and enter a plea of not guilty, or if he has been convicted after a plea of not guilty, the court may in its discretion set aside the verdict of guilty; and in either case, the court may thereupon dismiss the information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted. The probationer shall be informed of this right in his probation papers: Provided, That in any subsequent prosecution, for any other offense, such prior conviction may be pleaded and proved, and shall have the same effect as if probation had not been granted, or the information or indictment dismissed." (Emphasis supplied)

The language of this statute is quite clear. **Once the criminal proceedings have been dismissed** pursuant thereto, the defendant is thereafter "released from all penalties and disabilities resulting from the offense or crime of which he has been convicted." This, in our judgment, includes the constitutional exclusion from the elective franchise. Accord, Truchon v. Toomey, 116 Cal.App. 2d 736, 254 P.2d 638, 36 A.L.R. 2d 1230 (1953); cf., Tembruell v. Seattle, 64 Wn.2d 503, 392

P.2d 453 (1964).

We therefore conclude that a person whose felony information or indictment is dismissed pursuant to RCW 9.95.240, supra, is "released from all penalties and disabilities resulting from the offense or crime of which he has been convicted" and may qualify for or hold any elective state or county office for which he is otherwise qualified as an elector.

*3 We trust the foregoing will be of assistance to you.

Very truly yours,

John J. O'Connell

Attorney General

Burton R. Johnson

Assistant Attorney General

[FN1]. Reference of course would have to be had to the specific office in question to determine if there are any additional qualifications. For example, legislators must be qualified "voters." Article II, § 7, Washington state constitution. Defilipis v. Russell, 52 Wn.2d 745, 328 P.2d 904 (1958); judges and the attorney general must be licensed to practice law in this state; see, In re Bartz, 47 Wn.2d 161, 287 P.2d 119 (1955); and RCW 43.10.010.

[FN2]. Accordingly, taking note that your letter of inquiry also made reference to the significance of conviction of a gross misdemeanor, it is clear that such a conviction would in no event disqualify a person from exercising his elective franchise.

Wash. AGO 1965-66 NO. 66, 1966 WL 86482 (Wash.A.G.)

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- 1. Letter to Judge Bridges Regarding Motion in Limine to Exclude Evidence of Petitioners' Erroneously Listed "Illegal Convicted Felon Voters;
- 2. Note for Motion;
- 3. Motion in Limine to Exclude Evidence of Petitioners' Erroneously Listed "Illegal Convicted Felon Voters;
- 4. Declaration of Beth Colgan in Support of Motion in Limine to Exclude Evidence of Petitioners' Erroneously Listed "Illegal Convicted Felon Voters;"
- 5. (Proposed) Order Granting Motion in Limine to Exclude Evidence of Petitioners' Erroneously Listed "Illegal Convicted Felon Voters;" and
- 3. Certificate of Service.

These documents were served in the manner described below.

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Harry J.F. Korrell
Robert Maguire
Davis Wright Tremaine LLP
2600 Century Square, 1501 Fourth Avenue
Seattle, WA 98101
Email: robmaguire@dwt.com;
harrykorrell@dwt.com
Attorneys for Petitioners

- E-Service Via E-Filing.com
- Via Electronic Mail
- Via Overnight Mail
- Via U.S. Mail, 1st Class, Postage Prepaid
- Via Facsimile

Richard Shepard
John S. Mills
818 S. Yakima Avenue, Suite 200
Tacoma, WA 98405
Email: richard@shepardlawoffice.com
Attorneys for the Libertarian Party

- E-Service Via E-Filing.com
- Via Electronic Mail
- Via Overnight Mail
- Via U.S. Mail, 1st Class, Postage Prepaid
- Via Facsimile

Gary A. Reisen
Chelan County Prosecutor's Office
P.O. Box 2596
Wenatchee, WA 98807-2596
Email: Gary.Riesen@co.chelan.wa.us
*Attorneys for Respondent Chelan County
and Chelan County Auditor*

- E-Service Via E-Filing.com
- Via Electronic Mail
- Via Overnight Mail
- Via U.S. Mail, 1st Class, Postage Prepaid
- Via Facsimile

Timothy S. O'Neill, Klickitat County
Prosecuting Attorney
Shawn N. Anderson, Klickitat County
Prosecuting Attorney
205 S. Columbus Avenue, MS-CH-18
Goldendale, WA 98620
Email: timo@co.klickitat.wa.us
Attorneys for Respondent Klickitat County

- E-Service Via E-Filing.com
- Via Electronic Mail
- Via Overnight Mail
- Via U.S. Mail, 1st Class, Postage Prepaid
- Via Facsimile

Barnett N. Kalikow
Kalikow & Gusa, PLLC
1405 Harrison Ave NW, Suite 207
Olympia, WA 98502
Email: barnett.kalikow@gte.net
*Attorneys for Respondent Klickitat County
Auditor*

- E-Service Via E-Filing.com
- Via Electronic Mail
- Via Overnight Mail
- Via U.S. Mail, 1st Class, Postage Prepaid
- Via Facsimile

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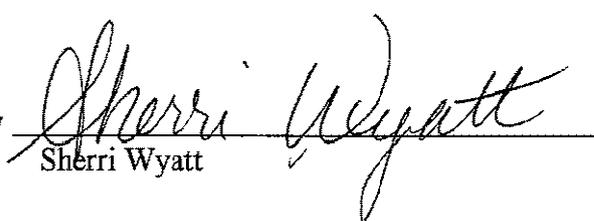
L. Michael Golden, Senior Dep. Pros. Atty.
Office of the Lewis County Prosecuting
Attorney
360 NW North Street
Chehalis, WA 98532-1900
Email: imgolden@co.lewis.wa.us
*Attorneys for Respondent Lewis County
Auditor*

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Gordon Sivley
Michael C. Held
Snohomish County Prosecutors Office
2918 Colby, MS 504
Everett, WA 98201
Email: (gsivley@co.snohomish.wa.us;
mheld@co.snohomish.wa.us)
*Attorneys for Respondents Snohomish
County and Snohomish County Auditors*

- E-Service Via E-Filing.com
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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 April 13, 2005.

By 
Sherri Wyatt