

The Honorable John E. Bridges

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CHELAN COUNTY

TIMOTHY BORDERS, et al.,

Petitioners,

v.

KING COUNTY AND DEAN LOGAN, et al.,

Respondents.

v.

WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE,

Intervenor-Respondent,

v.

LIBERTARIAN PARTY OF WASHINGTON
STATE, et al.,

Intervenor-Respondents.

No. 05-2-00027-3

PETITIONERS' OPPOSITION TO
WSDCC MOTION TO STRIKE
TESTIMONY OF CLARK
BENSEN

I. INTRODUCTION

The WSDCC's motion to strike Mr. Bensen's testimony:

1. Errs when it implies that the WSDCC did not have notice of his testimony and argues that the testimony is not appropriate under ER 701;
2. Concedes that King County counted at least 583 absentee ballots in excess of the number of absentee ballots it credited; and

1 Bensen Dep. at 70:10-71:6.

2 Q. So basically, as I understand this, what you were
3 looking for was discrepancies between the total votes
4 credited in a precinct and the total turn out reported for the
5 precinct.

6 A. Correct.

7 *Id.* at 75:1-5.

8 Q. And what did you need this for? What's the purpose
9 of this?

10 A. Well, it was just to look for anomalies, see if there's
11 any kind of pattern to the places that had more ballots than
12 voters versus the places that had more voters than ballots.

13 *Id.* at 76:3-8.

14 Q. Could you briefly outline the anomalies that you
15 were referring to?

16 A. Well, I'm not sure brief is going to be easy to do, but
17 there were differences between the number of credits
18 summarized by precinct and the number of ballots cast at the
19 precinct overall by ballot type and by degree. Some were
20 small and sort of randomly situated and others were quite
21 huge and not so randomly situated.

22 *Id.* at 94:5-13.

23 Counsel for Petitioners specifically advised that Mr. Bensen might testify regarding
24 his calculations. *Id.* at 46:19-21.

25 Mr. Bensen's testimony is that he took numbers provided by King County as to
26 absentee ballots credited and counted, which numbers have been admitted in evidence in
27 the form of Exhibits 276 and 299, added them, and noted where the number of ballots
credited did not match the numbers of ballots counted. He also noted which precincts
reflected the largest differences between the number of ballots credited and the number of
ballots counted. Testimony such as this, which simply involves making arithmetic
calculations and describing the results, is not expert testimony. Lay witnesses are perfectly
competent to perform arithmetic and discuss the results of their calculations. *See, e.g.,*

1 *Radio Parts Co. v. Lowry*, 125 B.R. 932, 944-45 (D. Md. 1991) (lay witness was
2 competent to testify “based on his review of the record and simple arithmetic”); *see*
3 *generally State v. Hardy*, 76 Wn. App. 188, 190 (1994) (“ER 701 is identical to Federal
4 Rule of Evidence 701, so federal cases are instructive”); *State v. Kinard*, 39 Wn. App. 871,
5 874 (1985) (“A lay witness may give an opinion, so long as it is rationally based on her
6 perceptions and helpful to the jury”).

7 **B. The WSDCC Concedes That the Discrepancy Between Absentee Ballots**
8 **Counted and Credited in King County Is at Least 583.**

9 The WSDCC does not dispute the following points:

10 1. When King County’s records of the number of absentee ballots that
11 it counted and the number of absentee ballots that it credited are compared, there is a
12 discrepancy of 808 votes. That is, King County’s records indicate that it counted 808 more
13 absentee votes than there were absentee voters.

14 2. Three specific items help explain the discrepancy. When 251
15 federal write-in ballots, 69 ballots cast by confidential voters, and 95 absentee ballots
16 misplaced and not found until March 2005 are taken into account, the discrepancy narrows
17 to 583 votes.

18 The WSDCC’s brief thus concedes that, at the least, King County did count 583
19 absentee ballots more than the number of credited absentee voters. WSDCC Motion at 5.
20 While the WSDCC attempts to minimize the discrepancy, noting that Clark County also
21 had a discrepancy, *id.*, it does not dispute that King County counted at least 583 more
22 absentee ballots than it had absentee voters.

23 **C. The WSDCC’s Arguments With Regard to the 292 Late-Rejected**
24 **Ballots Go to the Weight of the Evidence, and Are Incorrect in Any**
25 **Event.**

26 Thus, the parties are in agreement regarding all but one of Mr. Bensen’s
27 calculations, the adjustment for 292 late-rejected ballots. That adjustment increases the

1 discrepancy of absentee ballots counted in excess of absentee voters credited, from 583 to
2 875.

3 Chapter 7 of the DIMS Manual (Exhibit 8 to the Deposition of Garth Fell),
4 describes the process for crediting absentee ballots. It instructs elections personnel to
5 decline to credit a vote if the worker encounters one of the reasons set forth in Step 7
6 (Bates Nos. B/KING 003627-3634). If none of these problems are encountered, "the
7 **Congratulations!** window will appear," and the vote is credited. B/KING 003634. Logic
8 indicates that the 292 ballots listed in the Mail Ballot Report, Exhibit 1, as rejected *after*
9 validation, would have been cleared by the elections personnel and included in the credited
10 number. The testimony of Ms. Way quoted by the WSDCC does not support WSDCC's
11 argument to the contrary. In fact, Ms. Way's testimony supports the view that these ballots
12 were credited. She testified that neither DIMS nor Wanda would have automatically
13 rejected these ballots. Way Dep. at 51:15-18.

14 In any event, the parties' arguments about whether or not these ballots are included
15 in the tally of credited absentee votes go to the weight to be given to Mr. Bensen's
16 testimony, not to whether it should be admitted. The WSDCC has not demonstrated that
17 the testimony should be stricken.

18 III. CONCLUSION

19 For the reasons stated above, the WSDCC's Motion to Strike should be denied.

20 DATED this 2nd day of June, 2005.

21 Davis Wright Tremaine LLP
22 Attorneys for Petitioners

23
24 By David M. Pomeroy, for
25 Harry J. F. Korrell
26 WSBA #23173
27 Robert J. Maguire
WSBA #29909

The Honorable John E. Bridges
Siri A Woods
Chelan County Clerk

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

Timothy Borders, et al.,
Petitioners,
v.
King County and Dean Logan, its Director of
Records, Elections and Licensing Services, et al.,
Respondents,
v.
Washington State Democratic Central
Committee,
Intervenor-Respondent,
v.
Libertarian Party of Washington State et al.,
Intervenor-Respondents.

No. 05-00027-3

**DECLARATION OF
DAVID BOWMAN**

DAVID BOWMAN declares as follows:

I am an attorney at Davis Wright Tremaine LLP, attorneys of record for Timothy Borders, et al. ("Petitioners"). I make the statements in this Declaration based on personal knowledge, and if called and sworn as a witness in any proceeding, could and would testify competently thereto.

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1. Attached as Exhibit 1 to this Declaration is a true and correct copy of pages 1, 4-8, 41-47, 70-76, 93-94, and 103-107 of the Deposition of Clark Bensen dated May 13, 2005.

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

Executed at Seattle, Washington, this 2nd day of June, 2005.

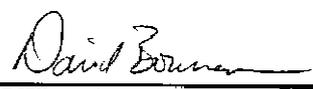

DAVID BOWMAN, WSBA No. 28523

Exhibit 1

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CHELAN COUNTY

TIMOTHY BORDERS, et al.,

Petitioners,

v. No. 05-2-00027-3

KING COUNTY, et al.,

Respondents,

and

WASHINGTON STATE DEMOCRATIC

CENTRAL COMMITTEE,

Intervenor-Respondent.

DEPOSITION OF CLARK BENSEN

Friday, May 13, 2005

Washington, D.C.

- - -

Deposition of CLARK BENSEN, commencing at
10:02 a.m., held at the offices of Perkins Coie,
607 Fourteenth Street, N.W., Washington, D.C.,
before Keith Wilkerson, a notary public in and for
the District of Columbia.

1 P R O C E E D I N G S

2 (Bensen Exhibits-1thru 20
3 marked
4 for identification.)

5 Whereupon,

6 CLARK BENSEN

7 was called for examination by counsel for
8 Intervenor-Respondent and, after having been duly
9 sworn by the notary public, was examined and
10 testified as follows:

11 EXAMINATION BY COUNSEL FOR INTERVENOR-RESPONDENT

12 BY-MR.BURMAN:

13 Q. Mr. Bensen, I'm sorry I can't be you with
14 this morning. I hear it's a pretty nice day. This
15 is Dave Burman. As you know, I'm one of the
16 lawyers for the respondent, Washington State
17 Democratic Central Committee.

18 A. Yes.

19 Q. Could you state your name for the record,
20 please?

21 A. Clark Bensen, 3112 Cave Court, Lake
22 Ridge, Virginia.

23 Q. Thank you. Could you describe generally
24 what your role has been in the litigation?

25 A. My role in the litigation is basically to

1 develop the political datasets and provide the
2 experts with the information that they need to do
3 their analyses, their reports.

4 Q. And how did you determine what
5 information they needed?

6 A. Well, basically at the early onset, we
7 were looking at several different things, but they
8 all related to precinct level election results.
9 And as that devolved into their reports, the basic
10 theory was they would do a proportional deduction
11 of votes that were determined to be invalid, so
12 therefore the precinct level results for the
13 governor's race were the main element of the
14 datasets.

15 Q. And other than supporting their precinct
16 level proportional reduction or deduction, is there
17 any other data or other tasks that you took related
18 to the litigation?

19 A. Related to the litigation, I was
20 responsible basically more making sure we had
21 political datasets for whatever purpose.

22 Q. And when you say political datasets, what
23 do you mean by that?

24 A. Precinct level election data for the 2004
25 general election initially for all races, because

1 we started actually during the recount, and then
2 those datasets were used as the contest commenced.
3 And so basically, I was making sure that we had a
4 precinct level dataset that reflected the results
5 precinct by precinct, candidate by candidate.

6 And that was the basic core dataset, as
7 it were, for the state that we used to do any other
8 kind of analysis which would -- I guess the only
9 other aspect would be matching up in King County
10 some of the crediting data.

11 Q. Okay. Let me put that to the side, and
12 we'll come back to that to make sure I understand
13 what that is. You referred to data for other
14 candidates. Did you use data for other candidates
15 for any purpose in the litigation?

16 A. No, I did not. I'm saying we had a
17 statewide dataset that included all statewide races
18 in it. Almost everything the experts used was just
19 the gubernatorial race.

20 Q. And when you say everything the experts
21 used, I just want to make sure if there's some
22 other purpose to which your data is being put for
23 the litigation. I want to make sure we cover that
24 in this same deposition rather than having to take
25 two bites at it.

1 So are you aware of anything that's being
2 used for any purpose other than the two experts,
3 Professors Gill and Katz?

4 A. Aside from the crediting I mentioned, my
5 understanding is that's it.

6 Q. If someone could show Mr. Bensen Exhibit
7 12 that's been premarked. Just to make sure that
8 it matches up with what I'm looking at on this end,
9 can you describe what this is?

10 A. It's a partial spreadsheet printout of an
11 Excel version of a dataset that I most likely
12 provided to the experts, and it's entitled -- the
13 dataset name is wa04sp_ex_ee031, and it's actually
14 this one, .xls.

15 Q. And can you explain to us -- I assume
16 that's your name for the dataset.

17 A. Yes.

18 Q. What's the convention that you used for
19 creating that name?

20 A. Well, it would depend. Basically, the
21 decode here would basically just be Washington 2004
22 general election, a single record. That's what the
23 SP is for. And it's an extract, and the rest is
24 just a code so I can identify it.

25 Q. What does single record mean?

1 A. As opposed to having a separate record
2 for each precinct by absentee vote and by poll
3 vote.

4 Q. So in the database, there is a separate
5 listing of both absentee and poll votes for each
6 precinct?

7 A. Well, it would depend entirely on the
8 county. For instance, in King County there clearly
9 was. In other counties, it really depended on the
10 county. It also depended on whether it was the
11 machine recount or the manual recount.

12 Q. And I don't think I've seen a dataset
13 that has those broken out. Was that break out
14 important for any reason in the litigation?

15 A. Not really. It was just a question of
16 what level of data was easiest to capture the data
17 and process it, and actually there is a King County
18 dataset that does have it broken down.

19 Q. And I think Professor Gill -- I saw that
20 in Professor Gill's materials. Is that correct?

21 A. They were both provided with one King
22 County, at least one, that had the break out by
23 ballot type. But the other counties basically were
24 just -- that's the whole concept of the SP. It's
25 one record for each precinct.

1 absentees that weren't assigned precincts?

2 A. Well, it would depend on what you're
3 looking for in an election analysis. If you're
4 trying to differentiate between absentee and poll
5 votes, it would be pretty difficult to do it in
6 Kittitas County.

7 Q. If you go down to the paragraph 1.6 on
8 King County, you reference a list of precinct codes
9 generated by the voter list vendor for the
10 Washington State Republican Party, ACS. Do you see
11 that?

12 A. Yes.

13 Q. Did ACS provide any other data or
14 information for this process that you're aware of?

15 A. I think aside from crediting data, I'd
16 say no. I think the only thing they did in this
17 case was help us figure out which precinct codes
18 were there. I believe that's the only thing I
19 actually asked them for.

20 I may have asked them for precinct codes
21 for another county or two when I was doing the
22 felons, I'm not sure, but other than that, the only
23 thing they provided was crediting data, which was
24 the voter history files from King County.

25 MR. BURMAN: Mark, I had sent an e-mail.

1 I assume this is the same company that's listed as
2 a potential witness on the witness list. Do you
3 know?

4 MR. BRADEN: I don't know, but that would
5 be my assumption, yes. I just don't remember that
6 they were on the witness list, but probably they're
7 on the witness list on data verification issues
8 would be my guess.

9 MR. BURMAN: If possible, we need to
10 decide if it's necessary to take a deposition of
11 them. I think I'd asked you in an e-mail a while
12 back just to confirm that they didn't really do
13 anything other than forward on this type of data to
14 Mr. Bensen.

15 MR. BRADEN: And I have to admit, I don't
16 remember the e-mail, but I'm sure you sent it
17 because there's a thousand e-mails in my box.
18 We'll answer that question for you.

19 MR. BURMAN: Okay.

20 MR. BRADEN: Maybe Clark can answer now.

21 THE WITNESS: Mark can correct me if I'm
22 wrong, but my recollection on this, the only reason
23 they were there was in fact to provide provenance,
24 chain of custody, for the voter history files that
25 they picked up at King County, and then converted

1 to an Access database and then sent to me.

2 Subsequently, I'd gotten those datasets
3 myself anyway, but my understanding is that's the
4 only reason they were in there at all, because if
5 we were going to do any crediting analysis, they
6 were the chain of custody.

7 MR. BRADEN: And if that is incorrect, I
8 will get back to you.

9 MR. BURMAN: I appreciate that.

10 MR. BRADEN: Sure.

11 BY MR. BURMAN:

12 Q. Let's turn to the second page of Exhibit
13 1. At the end of paragraph 1.7, there's a
14 reference to problems in Pierce County and Pacific
15 County, but they appear to be in races -- did any
16 of those problems affect the data that you
17 collected on the governor's race?

18 A. Well, Pacific County, they both had
19 different problems. Pierce County had reported the
20 results by absentee and then by poll, but unlike
21 most counties that did that -- let me rephrase
22 that.

23 Most counties would say precinct one,
24 here are the results for the absentee votes,
25 precinct one, here are the results for the poll

1 votes. Pierce County reported here's precinct one,
2 here's precinct 1001, and there was no indication
3 that one was absentee and one was poll vote.

4 And we didn't discover this for a long
5 time, but it was difficult to match it up. And I
6 remember there was some volunteer work, several
7 days, on trying to make it match. So that impacted
8 to some degree, because it was a sloppy set of
9 data.

10 Pacific County had a similar problem
11 although slightly different, but it was basically
12 again redounding to the breakout of the absentee
13 and the poll votes.

14 Q. And why would those questions be specific
15 to either the attorney general or the secretary of
16 state race?

17 A. Well, my recollection here is just that
18 the proofing process never figured out what the
19 problem was in the attorney general's race, but
20 they were able to figure out the problems in all
21 the other races.

22 Pacific County, though, apparently it
23 looks like there was still a problem with the
24 secretary of state's race. Obviously they were not
25 a high priority for us at that point.

1 Q. Then in paragraph 1.8 you say, "following
2 the manual recount (also called Count 3), this
3 dataset formed the basis for comparing other
4 aspects of the recount process." What other
5 aspects was it used for?

6 A. Let me read it over.

7 Q. Take your time.

8 A. This refers basically to the crediting
9 process or just looking at election results in
10 general. Again, for instance, in King County, you
11 could differentiate between absentee and poll votes
12 versus other counties, where it wasn't consistently
13 available.

14 Q. And then next you say, "for several
15 reasons, the focus was usually on King County."
16 What were the reasons that the focus was on King
17 County?

18 A. I suspect because it's the largest county
19 and has the largest chunk of the vote. That would
20 be the main reason. That seemed to be where
21 litigation counsel were focusing.

22 Q. Any other reason that you heard?

23 A. No.

24 Q. If you go down to 1.9, it talks about
25 using the King County dataset to review the

1 reconciliation process. Is that a report that you
2 created that reviews the reconciliation process?

3 A. That's the crediting process we were
4 talking about before. I didn't provide any
5 information to the experts aside from the dataset
6 that had some of this information in it.

7 Q. So the crediting process is not something
8 that's a topic for the experts.

9 A. No. It was in the possible topics at the
10 outset, which is why they got some of these
11 datasets, but as I say later in that paragraph, we
12 stopped it because it was a question about the move
13 outs and the reassignments.

14 MR. BURMAN: Mark, after the court's
15 ruling, I assume the crediting process really isn't
16 relevant anymore?

17 MR. BRADEN: I'm not sure the crediting
18 process isn't necessarily relevant, no.

19 MR. BURMAN: Mark, do you expect to have
20 Mr. Bensen testify on the crediting process?

21 MR. BRADEN: He may. I don't know
22 whether he's going to necessarily testify, period.
23 It depends on where we get on the data
24 stipulations.

25 MR. BURMAN: And I've been out of or at

1 least not directly in that loop. I'll still save
2 the crediting process and finish up with this
3 document to get through the rest of this.

4 BY MR. BURMAN:

5 Q. If you jump down to 1.11, where it refers
6 to the felon list, it says at the end of that first
7 paragraph, "and an additional factor was added."
8 What's the additional factor?

9 A. The end of the first sentence. That
10 would be the Republican and Democratic percentage
11 or maybe just the Republican percentage for the
12 precinct.

13 Q. And that's a percentage taken of the
14 Republican or Democratic percentages of the total
15 votes for those three candidates or of some other
16 denominator?

17 A. It would depend. If it was just the
18 percentage, it would be strictly the percentage of
19 those three candidates, the percentage of total
20 vote. It may have included, as I think it probably
21 did in some cases, just the actual vote totals for
22 each of the three candidates and such.

23 Q. So does that match up, if we turn to
24 Exhibit 2, with one of the fields in Exhibit 2,
25 that calculation?

1 Place Canvass Reports for King County received from
2 King County, I believe I saw that, but I'm not
3 really sure on that. It's a question of what a
4 canvass report is. I don't remember seeing any
5 canvass polling reports, but there may have been
6 something denominated as such.

7 Q. Anything else on that exhibit?

8 A. Well, nothing from Pierce, and I don't
9 know what the Chronicle is, so no, I guess not.

10 Q. Let me turn, then, to the crediting topic
11 that you mentioned a couple of times earlier. Why
12 don't you describe for me generally what you did
13 with respect to crediting? I think you indicated
14 that was only in King County. Is that correct?

15 A. I don't remember it coming up in any
16 other county. We took the voter files from the end
17 of the manual recount, and there were three of
18 them, and we tried to tabulate the credits by
19 precinct so that we could match them with the turn
20 out by precinct.

21 Q. And created a dataset that did that or
22 that tried to match those up?

23 A. Yes. In fact, one of the original
24 datasets that went out to the experts included
25 that. In other words, it would have been

1 information that was once again appended to the end
2 of the record for each precinct.

3 For instance, it would have said, you
4 know, a hundred votes were cast in this precinct,
5 absentee, but there were only 95 credits in the
6 dataset for absentee voters for this precinct.

7 Q. So if you look back at Exhibit 13, that
8 directory, the file directory, is that one of those
9 documents that included that information?

10 A. Well, it is. I'm not sure I can tell you
11 exactly which one it is.

12 Q. Do you remember what the name would be or
13 something close to the name of the file?

14 A. Not really. It may have been the
15 KINGPR.ZIP, because that was one of the first
16 datasets that went out, and it may have been one of
17 the other wa04SR's. It probably wouldn't have been
18 the wa04SR's because that would have been the
19 state, so it probably would have been the
20 KINGPR.ZIP.

21 And I'll tell you right away the
22 KINGPP.ZIP would have suffered from the polling
23 place problem, so that really wouldn't be relevant.
24 That's why I didn't use it. But I suspect it would
25 have been the KINGPR.ZIP. I'd have to look it up

1 otherwise.

2 Q. And what were the data sources that you
3 used for this comparison that you did?

4 A. There were three files that King County
5 produced, one on 12-29, one on 01-07, and one on
6 01-08. I think technically there were two produced
7 on 01-07, but we called the third one 01-08. And
8 these were a dump of the voter lists from King
9 County that -- well, basically they were a dump of
10 the record, so basically it was all the fields --
11 well, I'll rephrase that.

12 I do not know they were a dump of all
13 fields because each of the three files was in a
14 completely different format delivered in a
15 completely different mode, although they were all
16 on CD-ROM. They were originally given to ACS, the
17 voter list vendor for the state party, and they
18 loaded them up into an Access database and then
19 provided the Access databases to me.

20 I converted the Access databases to
21 FoxPro, which is what I used to work with the file,
22 and then I did counts based upon that.

23 Q. And what were the key fields from those
24 datasets that you were interested in?

25 A. Well, the key field really would just be

1 precinct and the voter history field, which was
2 generally -- well, I'm not sure if it was actually
3 on theirs or not, but G 2004 I believe would have
4 been the field.

5 Q. So you had these three different files
6 from King County. Did you use all three of them or
7 just the most current one?

8 A. You had to use all three.

9 Q. And then did you compare those to
10 anything else?

11 A. Well, I compared the total number of
12 credits by ballot type with the turnout by
13 precinct.

14 Q. And was the turn out in the same file or
15 did you get that somewhere else?

16 A. No. That was in the political election
17 files that we already talked about. So in other
18 words, that was appending the crediting sums to the
19 precinct file.

20 Q. And then what sort of calculations did
21 you do on that?

22 A. Just sums.

23 Q. So it just showed the difference where
24 there was a difference?

25 A. Well, no. First I had to calculate the

1 sum, and that went into two types of sum, sum by
2 ballot type and then a total for all ballot types,
3 and then that was compared with the total for the
4 precinct as well as with absentees versus polls and
5 add-ons and provisionals.

6 Q. And was there any other data from any
7 other source that you added to this?

8 A. No.

9 Q. There was a reference yesterday to PSI
10 data. Does that mean anything to you?

11 A. Only to the extent I know they're part of
12 the absentee mail processing. I think they're a
13 vendor that gets the absentee ballots from the post
14 office.

15 Q. Is it correct you didn't use -- as I
16 understand it, they created some sort of document
17 when they forwarded those ballots to King County.
18 Is that information that you used at all?

19 A. No. I saw some information relating to
20 that, but I haven't used those datasets. The
21 crediting process was strictly off of the voter
22 history to assess that, in fact, Joe Smith was
23 credited as voting absentee in X precinct, his
24 credit was applied to the precinct level dataset as
25 an absentee vote.

1 Q. So basically, as I understand this, what
2 you were looking for was discrepancies between the
3 total votes credited in a precinct and the total
4 turn out reported for the precinct.

5 A. Correct.

6 Q. And then where you found a discrepancy,
7 did you do anything further to explore what might
8 have caused it, for example?

9 A. No. There wasn't anything else I could
10 do.

11 Q. And who did you provide that report to?

12 A. Well, to counsel.

13 Q. But I take it the experts did not get
14 that report directly anyway.

15 A. Not through me.

16 Q. And when did you last update that report?

17 A. Well, I did two separate passes. I did
18 it way back in January, when I first started
19 looking at the datasets, and then, as I said
20 earlier, we stopped the experts from looking at it
21 because of the move-outs and reassignments. So we
22 put it on hold for a while, and then I reactivated
23 it again a couple of weeks ago.

24 Q. And is it complete at this point? Are
25 you done with that effort?

1 A. No, but I've reconstructed much of what I
2 needed to, yes.

3 Q. And what did you need this for? What's
4 the purpose of this?

5 A. Well, it was just to look for anomalies,
6 see if there's any kind of pattern to the places
7 that had more ballots than voters versus the places
8 that had more voters than ballots.

9 Q. Did you have the data that would have
10 allowed you to do this in other counties but you
11 didn't do it in those counties for some reason?

12 A. I remember at one point in time back in
13 January of getting something similar for, I've
14 forgotten which, one or two other counties. But we
15 just never got around to doing that because it was
16 determined we couldn't do it for any other
17 counties. I never opened them to find out what was
18 there.

19 Q. Any other projects that you've undertaken
20 for purposes of the litigation or related to the
21 litigation?

22 A. I'd have to confer with counsel to
23 refresh my recollection.

24 Q. That's fine.

25 A. I don't think so. Again, there may have

1 the results at each precinct for each office up for
2 election and basically check it over.

3 Q. When you're saying we, who is the we?

4 A. Well, much of this work was, as I said,
5 done earlier during the recount, initially during
6 November and December, so it was the campaign team
7 basically, and then to some degree the litigation
8 team as it turned into a contest.

9 Q. And when you say the campaign team, you
10 mean the candidate Rossi campaign team?

11 A. Well, yes. The campaign team would be
12 Rossi for governor.

13 Q. And the litigation team, that would be --
14 would that be the litigation team with
15 Mr. Schalestock that you referred to earlier?

16 A. I assume so. I'm sort of lost as to how
17 it transmogrified, but yes.

18 Q. And other than the campaign team and the
19 litigation team and you yourself, who else is part
20 of the we, if anybody?

21 A. That's it.

22 Q. Are you a one man shop?

23 A. Yes.

24 Q. A little later on, when Mr. Burman was
25 talking about crediting in general and there was a

1 discussion of King County, you said something along
2 the lines of how you were looking for anomalies.

3 And my question is, did you find any?

4 A. Well, of course.

5 Q. Could you briefly outline the anomalies
6 that you were referring to?

7 A. Well, I'm not sure brief is going to be
8 easy to do, but there were differences between the
9 number of credits summarized by precinct and the
10 number of ballots cast at the precinct overall by
11 ballot type and by degree. Some were small and
12 sort of randomly situated and others were quite
13 huge and not so randomly situated.

14 Q. What I'm really looking for is making
15 sure I know all the categories of anomalies you're
16 talking about. The categories you've identified is
17 the difference between the number of credited and
18 the number of ballots that were actually counted?

19 A. That's the basic analysis, yes.

20 Q. Any other general types of anomalies that
21 you found?

22 A. No. It was just breaking it out by
23 ballot type and by precinct.

24 Q. If I can ask you to look at Exhibit 1,
25 please.

1 There were no external datasets.

2 Q. And looking at the other kinds of
3 information or data is what you mean by external
4 datasets?

5 A. I don't understand your question. It was
6 just a question of looking at the precinct results
7 and making sure they matched up with the canvass
8 reports. I had earlier versions of the canvass
9 reports in electronic format that we'd been
10 developing over time.

11 So sometimes I looked back at those
12 because it may have been messed up in the
13 transition process. That's the kind of thing I was
14 looking at. In other words, it was not all hands
15 on. There was some programming involved.

16 MR. AHEARNE: That is all I have.

17 MR. BURMAN: I have a few, as you can
18 imagine. When I heard large and not random, I had
19 a couple of questions.

20 EXAMINATION BY COUNSEL FOR INTERVENOR-RESPONDENT

21 BY-MR.BURMAN:

22 Q. You were talking about the King County
23 crediting anomalies. When you say large, what
24 standard are you using for large?

25 A. Larger than others.

1 Q. But is that less than ten per precinct or
2 is it more than ten?

3 A. Well, it would depend on what we're
4 looking at. It's more a question of what would
5 normally be called an outlier. If you charted
6 things on a graph, there would be a cluster of many
7 precincts in one area and then there would be
8 outliers. It's the outliers that you'd look for to
9 see if there's an anomaly.

10 Q. And I take it you identified some
11 outliers.

12 A. Well, yes. Again, depending on the
13 break, if I was looking at absentees or I was
14 looking at provisionals or I was looking at
15 whatever, it would depend on that kind of analysis.

16 For instance, the typical outlier, as I
17 recall, and this is just only because it was
18 mentioned so often, was the King County
19 administration building precinct 1823, I think,
20 where there was a big discrepancy between the
21 number of provisional ballots counted versus the
22 number of credits in the dataset. That would be
23 large, because it was an outlier.

24 You expect some sort of random
25 distribution of small level anomalies just by

1 virtue of the processing, but there would be other
2 cases in which case it was higher.

3 Q. Do you remember any other particular
4 precincts where you noticed outliers?

5 A. Well, I remember the most recent thing I
6 did was on absentees, and there were a few
7 precincts that were definitely outliers from the
8 standpoint of having either more ballots than
9 voters or voters than ballots.

10 Q. A few, meaning less than ten precincts
11 like that?

12 A. Well, I'd say there were outliers and
13 then there were more far outliers. There were a
14 couple that were farther away from others, and then
15 there were others that were off the chart.

16 Q. How many were off the chart?

17 A. A handful.

18 Q. Do you remember which precincts those are
19 or do you have anything with you today that would
20 allow you to identify those?

21 A. Well, I don't think I have it with me
22 now. Actually, it's probably not even in there.
23 As I recall, and I suppose we could e-mail you this
24 when we figure it out, there were two precincts I
25 believe that from an absentee standpoint had far

1 more ballots than they had voter credit, and that
2 was 1770 and 1774, I believe.

3 And then there were two, I believe, that
4 had far fewer the other way, which I believe was
5 3166 and 3464. I think those were the biggest
6 outliers that I recall of that set of the last
7 analysis, and that's because that's the most recent
8 one done.

9 Q. But you've done a number of those types
10 of analyses?

11 A. Well, sort of. I mean, I've been looking
12 at them off and on. I'm not sure that I'd actually
13 classify them as analyses.

14 Q. And you said they weren't random. How
15 did you determine they weren't random?

16 A. Because I compared the Rossi percentage
17 with the difference in the crediting.

18 Q. And what does that tell you about whether
19 or not they're random?

20 A. Well, if it was truly random, I would
21 expect there to be some of them scattered all along
22 the Rossi percentage range of zero to a hundred,
23 but some of the outliers were clustered in certain
24 parts of the Rossi percentage range.

25 Q. And that's the Rossi percentage range,

1 meaning the precinct percentage support for Rossi?

2 A. Yes.

3 Q. And once you identified these outliers,
4 did you investigate possible explanations?

5 A. Well, to the extent I could, which was
6 pretty limited. I just made sure that from a
7 processing standpoint what I had processed seemed
8 to make sense. In other words, that's what the
9 dataset said.

10 Q. So you didn't have any ability to go see
11 whether it had been a mistake in crediting or what
12 the explanation was.

13 A. No, because I don't have access to any of
14 that information. All I had was just the datasets
15 which were just the voter history files.

16 Q. You mentioned e-mails between you and
17 Mr. Yetter, and I don't think we've seen those.
18 Mark, is that something that's been produced?

19 MR. BRADEN: I don't know the answer to
20 that question.

21 MR. BURMAN: I don't know the answer,
22 either. Let me check with some people here before
23 you do any work, and I'll find out whether or not
24 we've gotten that and I just haven't seen it.

25 THE WITNESS: I can summarize right away

1 3. On June 2, 2005, I caused the documents listed below:

2 **Petitioners' Opposition to WSDCC Motion to Strike Testimony of**
3 **Clark Bensen**

4 **Declaration of David Bowman; and**

5 **Certificate of Service**

6 to be filed with the Clerk of Chelan County Superior Court via Electronic Filing Legal
7 Services (E-Filing.com) which sent notification of such filing to the following persons,
8 with this Certificate to follow:

9 **Kevin Hamilton, Esq.**
10 Perkins Coie LLP
11 Attorneys for Washington State Democratic
12 Central Committee
13 1201 Third Avenue, Suite 4800
14 Seattle, WA 98101

Thomas Ahearne
 For: Secretary of State Sam Reed
 Foster Pepper & Shefelman
 1111 Third Avenue, Suite 3400
 Seattle WA 98101

13 **Russell J. Speidel**
14 Speidel Law Firm
15 7 North Wenatchee Avenue, Suite 600
16 Wenatchee, WA 98807

Richard Shepard
 John S. Mills
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17 **Dale M. Foreman**
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26 Kalikow & Gusa PLLC
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 Olympia WA 98504-0100

1 **Gorden Sivley**
2 **Michael C. Held**
3 Snohomish County Deputy Prosecuting
4 Attorneys
5 2918 Colby Avenue, Suite 203
6 Everett WA 98201-4011

7 I certify under penalty of perjury under the laws of the State of Washington that the
8 foregoing is true and correct.

9 DATED this 2nd day of June, 2005, at Seattle, Washington.

10 
11 _____
12 Margaret C. Sinnott