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April 25, 2005

Clerk of the Court
Chelan County Superior Court
350 Orondo, 5th Level
Wenatchee, WA 98801

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

Dear Court Clerk:

I am e-filing the following documents:

1. Letter to Clerk of Chelan County Superior Court;
2. Reply in Support of Washington State Democratic Central Committee's Motion in Limine to Exclude Evidence of "Voter Crediting" and to Require Petitioners to Introduce Best Evidence of Voting;
2. Supplemental Declaration of William C. Rava in Support of Washington State Democratic Central Committee's Motion in Limine to Exclude Evidence of "Voter Crediting" and to Require Petitioners to Introduce Best Evidence of Voting;
4. Letter to Judge Bridges regarding Washington State Democratic Central Committee's Motion in Limine to Exclude Evidence of "Voter Crediting" and to Require Petitioners to Introduce Best Evidence of Voting; and
5. Certificate of Service.

[15934-0006/SL051150.118]

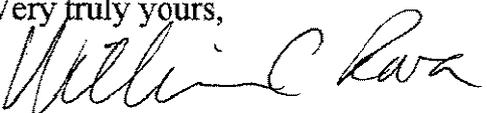
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Perkins Coie LLP and Affiliates

April 25, 2005
Page 2

Thank you for your assistance in this matter.

Very truly yours,



William C. Rava

WCR:sw

CONTENTS

1
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8
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16
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18
19
20
21
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I. INTRODUCTION1

II. SUPPLEMENTAL FACTS.....1

III. ARGUMENT AND AUTHORITY3

 A. The Poll Book Pages, Absentee Ballot Envelopes, and Provisional
 Ballot Envelopes are the Best Evidence of Voting.....3

 B. In the Alternative, the Court Could Exercise Its Discretion to Exclude
 the Voter Crediting Files Under ER 403.6

IV. CONCLUSION.....8

1
2
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I. INTRODUCTION

The Secretary of State supports WSDCC's Motion in Limine to Exclude Evidence of "Voter Crediting" and to Require Petitioners to Introduce the Best Evidence of Voting. The Secretary of State agrees that the "Court should insist upon the use of poll book pages or ballot envelopes to show that a voter cast a ballot in lieu of less reliable voter crediting data." Sec. State Resp. at 2. Similarly, Petitioners do not dispute the underlying basis of WSDCC's Motion – the errors in the "Voter Crediting Files" maintained by the counties make them inherently unreliable to show whether a particular individual voted in the 2004 General Election and whether that vote was counted. This fact has been well-established during pre-trial discovery in this case from the counties and the Secretary of State. Petitioners' Opposition ignores these facts (contending that "WSDCC is free to attack that evidence at trial," Opp. at 2) and attempts to shift their burden of proof to WSDCC to disprove that the voter voted based on the more reliable evidence.

The Court should exclude evidence of the Voter Crediting Files to show that a person in fact cast a ballot in the 2004 General Election, and require the parties to prove any illegal votes with the best evidence available: a signed receipt from the alleged voter (i.e., a poll book page that the voter signed to request a ballot, a provisional ballot envelope submitted for counting, or an absentee oath signed by the individual) or testimony from the voter him or herself.

II. SUPPLEMENTAL FACTS

As demonstrated by WSDCC's Motion, the counties' electronic registration files ("Voter Crediting Files") are often riddled with errors, which is why the Secretary of State and virtually every county agrees that they are meaningless with respect to the validity of an

1 election. *See, e.g.*, Declaration of William C. Rava in Support of WSDCC's Motion In
2
3 Limine to Exclude Evidence of "Voter Crediting" ("Rava Decl.") ¶ 2, Ex. B (Jan. 5, 2005
4
5 email from Nick Handy, Director of Elections, Office of Secretary of State, with attached
6
7 "Crediting Voters Issues: Talking Points" ("Secretary's Talking Points")). WSDCC provides
8
9 this supplemental factual section to incorporate information from the deposition of King
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11 County's chief elections official (Dean Logan), which did not take place until after the filing
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13 of WSDCC's Motion (as a result of the Court's ruling on Mr. Logan's motion for a protective
14
15 order). Supplemental Declaration of William C. Rava in Support of WSDCC's Motion in
16
17 Limine to Exclude Evidence of "Voter Crediting" ("Suppl. Rava Decl."), Ex. A (Deposition
18
19 of Dean Logan, April 19, 2005 ("Logan Dep.")).

20
21 The process for attributing votes to voters is inherently problematic and prone to
22
23 error. In King County alone, over 300,000 people voted at the polls. *Id.* (Logan Dep.),
24
25 at 251:20-22. It is a common mistake for a voter to fail to sign the poll book, or to sign in
26
27 the wrong place (leading to errors). *Id.* at 259:14-261:10. And each of these 300,000 entries
28
29 has to be scanned with a bar code reader – individually. *Id.* at 251:23-252:1. This is a new
30
31 system, and so it is the first General Election in which it has been implemented. *Id.*
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33 at 252:2-9. King County's chief elections official did not know the error rate on the bar code
34
35 reader itself or, more importantly, the error rate of the dozens of temporary employees who
36
37 were assigned this mind-numbing task. *Id.* at 253:3-10 (error rate in bar code scanner),
38
39 252:2-9 (error rate of "employee's process of going through and reading those bar codes").
40
41 Common sense, and discovery responses from the various counties, suggests that the error
42
43 rate is not insignificant. Rava Decl., Ex. G (Petitioners' First Interrogatories and Requests
44
45 for Production to Lewis County and Its Auditor).

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III. ARGUMENT AND AUTHORITY

A. The Poll Book Pages, Absentee Ballot Envelopes, and Provisional Ballot Envelopes are the Best Evidence of Voting.

Petitioners' Opposition fails to rebut the factual basis for WSDCC's Motion to exclude the Voter Crediting Files: these files are filled with errors. The Secretary of State agrees: "there are numerous reasons why the number of voters shown on county records as having been crediting with voting may not reconcile with the total number of ballots cast in an election." Sec. State Resp. at 2. And every county that has taken a position on this issue agrees that the voter crediting process contains numerous errors and is utterly meaningless to determine who voted in the last election. *See, e.g.*, Rava Decl., Ex. D (King County 2004 Elections Report) (crediting process used for tracking voter participation); Ex. E (Grays Harbor County's Responses to Petitioners' First Interrogatories and Requests for Production) (credit given to voters whose ballots not actually counted).

Petitioners do not dispute that the original sources of voter credit (the poll book pages and ballot envelopes) are inherently more reliable and constitute better evidence than the Voter Crediting Files. Nor do Petitioners dispute any of the examples in the Motion of the errors in Petitioners' claims that resulted from relying on the Voter Crediting Files. Motion at 6-8; Rava Decl. ¶ 12, Ex. K (Sarah Sakimae example); ¶ 13, Ex. L (Artrese Hartman example), ¶ 14, Ex. M (Frederick B. Ungrich II example). Rather, they dispute the applicability of ER 1002 ("Requirement of Original") and 1003 ("Admissibility of Duplicates"). WSDCC's Motion did not specifically rely on either ER 1002 or ER 1003 as a basis for excluding the Voter Crediting Files, but rather on the broader principle under

1 which courts have found that parties must produce the "best available evidence."¹ The
2 rationale underlying those decisions and the codified "best evidence rule"² supports the
3 exclusion of the Voter Crediting Files:
4
5

6
7 Underlying the rule are the presumptions that impugn the motive of a
8 party who withholds primary evidence and attempts to substitute
9 therefor evidence of an inferior grade, the innocent, sometimes
10 sinister, fallibility and inaccuracy of human understanding and
11 memory – particularly that of persons interested in the result – and the
12 possibility, often often strong probability, of error in copies of
13 documents which may be of the highest importance in the litigation.
14

15
16 *State v. Modesky*, 15 Wn. App. 198, 203-04 (1976). The Secretary of State agrees that the
17 Court should require Petitioners to introduce the "more reliable evidence of voting, in the
18 form of poll book and ballot envelope signatures." Sec. State Resp. at 2 (citing *Braut v.*
19 *Tarabochia*, 104 Wn. App. 728, 732 (2001)); *see also* Rava Decl., Ex. B (Secretary's
20 Talking Points). WSDCC established in its Motion (and Petitioners failed to dispute) that
21 the Voter Crediting Files are unreliable to show that a particular individual's vote was cast
22 and counted. They should be excluded.
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29 Moreover, the best evidence argument is particularly strong here given that
30 Petitioners must prove that the election was "clearly invalid." *Dumas v. Gagner*, 137 Wn.2d
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36
37 ¹ *See Seid Chee v. Sanitary Fish Co.*, 103 Wash. 345, 348 (1918) (holding secondary
38 evidence was properly excluded where defendant failed to offer the best evidence in its possession);
39 *Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 418 (2002) (holding that party must produce "best
40 available" evidence of lost profits and stating that the rule "pertains to the substance of the evidence,
41 not its source").
42

43 ² Although the "best evidence" rule articulated in ER 1002 does not require production of a
44 record of an act or event, 5C KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 1002.2
45 (2004), if a party chooses to rely on a written record of the event, the rule applies. *Id.*; *see also* Fed.
46 R. Evid. 1002, advisory committee's notes. Here, the "original record" that any particular individual
47 voted is the "original source" of the Voter Crediting File – the poll book page, absentee ballot
envelope, or provisional ballot envelope.

1 267, 283 (1999). To satisfy this burden, Petitioners should be required to produce the best
2 evidence available to them – the poll book pages, absentee ballot envelopes, and provisional
3 ballot envelopes. Indeed, courts have opined that poll books are the best evidence of who
4 voted in an election in other contexts. *See generally Bd. of Trs. for Sumner County High*
5 *Sch. v. Sumner County Comm'rs*, 60 P. 1057, 1058-59 (Kan. 1900) ("We know of no better
6 method of arriving at the number of votes cast at an election than by counting the names as
7 they appear upon the poll books."); *State v. Pressman*, 72 N.W. 660, 662 (Iowa 1897) ("The
8 registration lists and the poll books, prepared with such care, when duly authenticated, and
9 coming from the proper custodian, are the best evidence of who cast the ballots at the
10 election.").³
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20 For good reason, the Secretary of State agrees with WSDCC that the Court should
21 require Petitioners to produce original source documents:
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23

24 While it is likely that a voter credited with voting did in fact vote,
25 there are enough reasons why that data may be erroneous to justify
26 the Intervenor's request that the court and parties rely on the voter's
27 signature in the poll book or on an absentee ballot envelope. This is
28 particularly true given the availability of more reliable evidence of
29 voting, in the form of poll book and absentee ballot envelope
30 signatures.
31
32

33 Sec. State Resp. at 2. As King County's chief elections official agreed, the best evidence of
34 whether an allegedly "illegal voter" actually voted in King County is the poll book pages,
35 absentee ballot envelopes, and provisional ballot envelopes. Suppl. Rava Decl., Ex. A
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43 ³ In arguing that they can produce Voter Crediting Files to show that an "illegal voter" voted,
44 Petitioners attempt to shift the burden of proof to Respondents. Essentially, they argue that they can
45 introduce an often inaccurate database that purports to summarize data in poll book pages and ballot
46 envelopes (both of which are available to them) and then shift the burden to Respondents to disprove
47 that the voter voted. Competent, reliable evidence of voter crediting exists – and Petitioners should
be required to use it.

1 (Logan Dep.), at 322:11-25. The Court should exclude the Voter Crediting Files, and
2 require Petitioners to produce the most reliable evidence available.
3

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5 **B. In the Alternative, the Court Could Exercise Its Discretion to Exclude**
6 **the Voter Crediting Files Under ER 403.**
7

8 Given that the chief elections officer of the State (i.e., the Secretary of State) and
9 every county to have taken a position on the issue agree that using the Voter Crediting Files
10 as "evidence" to show whether an individual actually voted is inherently unreliable and
11 error-prone, the balancing inquiry of ER 403 weighs overwhelmingly in favor of WSDCC's
12 Motion. Instead of responding to WSDCC's argument that the Voter Crediting Files are
13 unreliable, however, Petitioners make various collateral arguments that lack merit.
14
15

16 First, Petitioners argue that Voter Crediting Files are admissible because they satisfy
17 exceptions to the hearsay rule, specifically the public records and business records
18 exceptions. *See Opp.* at 3-4. But WSDCC did not argue that the Voter Crediting Files were
19 inadmissible on the basis of their hearsay nature, so Petitioners' argument that these files fall
20 under the public records and business records exceptions is of no import to WSDCC's
21 Motion.
22

23 The threshold hurdle to admissibility is relevance. *See* ER 401 (defining "relevant
24 evidence"), 402 ("Evidence which is not relevant is not admissible."). And relevant
25 evidence is subject to ER 403's balancing test. *See* ER 403 ("Although relevant, evidence
26 may be excluded if its probative value is substantially outweighed by the danger of unfair
27 prejudice, confusion of the issues"). Merely because evidence satisfies an exception to
28 the hearsay rule does not affect the trial court's broad discretion to exclude the evidence
29 under ER 403. The Washington Supreme Court has found that a "statement admissible
30 under [an] exception [to the hearsay rule] is also subject to exclusion under ER 403 if
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1 unnecessarily cumulative or prejudicial." *In re Dependency of Penelope B.*, 104 Wn.2d 643,
2 656 (1985); *see also State v. Dunn*, __ Wn. App. __, 105 P.3d 1022, 1025-26 (2005)
3
4 (admitting child hearsay evidence in sex abuse case, but only after subjecting the evidence to
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6 ER 403 balancing analysis); *State v. Collins*, 45 Wn. App. 541, 547-48 (1986) (reviewing
7
8 trial court's application of ER 403 balancing test though testimony qualified under hearsay
9
10 exception). Therefore, Petitioners' evidence of Voter Crediting Files must satisfy both a
11
12 hearsay exception and the balancing test of ER 403.
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15 Petitioners also argue that ER 403 has no application to bench trials, yet they point to
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17 no Washington case or statute precluding this application, nor is WSDCC aware of any such
18
19 law.⁴ While ER 403's application to bench trials may be less robust than its application in
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21 jury trials, a more liberal stance toward the admission of evidence does not require the Court
22
23 to admit evidence where its relevance is outweighed by its shortcomings. Given the stakes
24
25 involved in this litigation and the great interest in the outcome from the citizens of this State
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27 and the media, the Court may consider that prejudicial and unreliable evidence will not only
28
29 affect these proceedings, but also affect the public confidence in the legitimacy of the
30
31 electoral process. "Elections cannot be subject to such uncertainties." *LaVergne v. Boysen*,
32
33 82 Wn.2d 718, 721 (1973). The public interest in the validity of elections militates against
34
35 admission of inherently unreliable Voter Crediting Files.
36

37 The argument for exclusion of the Voter Crediting Files under ER 403 is especially
38
39 strong where, as here, the more reliable evidence of poll book pages, absentee ballot
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44 _____
45 ⁴ In fact, a well-known federal treatise states: "Although some of the language in Rule 403
46 might suggest it is limited to jury trials, the better interpretation is that it applies in judge-tryed cases
47 as well." 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND
PROCEDURE § 5224, at 322 (1978 ed.); *see also Geisler v. Folsom*, 735 F.2d 991, 997 (6th Cir. 1984)
(affirming trial judge's decision to exclude cumulative and immaterial evidence in bench trial).

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envelopes, and provisional ballot envelopes is readily available to Petitioners. The Judicial Council Comment to ER 403 states in part:

In deciding whether to exclude evidence on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. *The availability of other means of proof may also be an appropriate factor.*

ER 403 cmt. (emphasis added). The Washington Supreme Court has explicitly found that the "availability of other means of proof is an appropriate factor for consideration in deciding whether to exclude evidence" under ER 403. *Kirk v. Wash. State Univ.*, 109 Wn.2d 448, 463 (1987); *see also State v. Johnson*, 90 Wn. App. 54, 62 (1998) (reversing trial court's decision to admit evidence when less prejudicial means of proof were available). The Court should exclude Voter Crediting Files, as more accurate, reliable, and relevant evidence is readily available to Petitioners.

IV. CONCLUSION

For the foregoing reasons and those stated in the Motion, the Court should grant WSDCC's Motion in Limine to Exclude Evidence of "Voter Crediting" and to Require Petitioners to Introduce Best Evidence of Voting.

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DATED: April 25, 2005.

PERKINS COIE LLP

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THE HONORABLE JOHN E. BRIDGES

SUPERIOR COURT OF 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

SUPPLEMENTAL DECLARATION OF
WILLIAM C. RAVA IN SUPPORT OF
WASHINGTON STATE DEMOCRATIC
CENTRAL COMMITTEE'S MOTION
IN LIMINE TO EXCLUDE EVIDENCE
OF "VOTER CREDITING" AND TO
REQUIRE PETITIONERS TO
INTRODUCE THE BEST EVIDENCE
OF VOTING

EXHIBIT A

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

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TIMOTHY BORDERS, et al,)
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 Petitioners,) No. 05-2-00027-3
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 v.)
)
 KING COUNTY, et al,)
)
 Respondents,)
 and)
 Washington State Democratic Central)
 Committee,)
)
 Intervenor Respondent,)
)
 and)
)
 Libertarian Party of Washington)
 State, et al,)
)
 Intervenor Respondents.)

DEPOSITION UPON ORAL EXAMINATION OF

DEAN LOGAN

(VOLUME II)

Tuesday, April 19, 2005
9:00 a.m.

Davis Wright Tremaine
1501 Fourth Avenue, Suite 2600
Seattle, Washington

24 Laurie E.Heckel, CSR, RPR
Court Reporter
25 CSR License No. HE-CK-EL-E386DM

Tuesday, April 19, 2005
Seattle, Washington

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Washington State Democratic Central
Committee Representative
BRAD HENRY
Libertarian Party Representative

1 book, and issues the ballot to the voter.

2 Q The voter then takes the ballot and votes the ballot, fills
3 in the oval?

4 A Correct. They go to a voting booth and fill out their
5 ballot.

6 Q What happens next?

7 A Then the voter is instructed to take their voted ballot to
8 the Accuvote and to insert it into the Accuvote.

9 Q And at what point is the ballot stub removed?

10 A The ballot stub is removed at the time that the ballot is
11 issued.

12 Q And that ballot stub number is written on the poll book page?

13 A Correct.

14 Q Now, after the day of the election during the crediting
15 process, the poll books are scanned. Each name in the poll
16 book is scanned individually, correct?

17 A The bar code, and there is a column in the poll book next to
18 the voter's signature that has the bar code associated with
19 their voter registration record, and the crediting is
20 accomplished by scanning those bar codes for those people --
21 for those voters who have signed the poll book. So the
22 entire poll book is not scanned. It's a manual process of
23 reading the bar code next to the signatures of those voters
24 who did sign the poll book.

5 Q How many names typically appear on a poll book page in King

1 County?

2 A I would need to look at a poll book page to tell you that.

3 Q Well, approximately, a dozen?

4 A I would say somewhere between a dozen and 20.

5 Q All right. And for each name, there is an individual bar
6 code on that page?

7 A That's correct.

8 Q And during the crediting process, the election worker is to
9 take a bar code reader and put it over the bar code that
10 it's -- that he or she is attempting to read and then scan
11 it, correct?

12 A Correct.

13 Q And then move to the next one?

14 A To the next one where there is a signature, yes.

15 Q An individual bar code scan is necessary to credit a poll
16 vote for each individual signature, correct?

17 A Correct. It would either need to -- it would either need to
18 be a bar code read, or somebody would have to manually key in
19 the voter registration number for that vote.

20 Q How many polling place voters appeared in the November 2004
21 general election?

22 A Roughly 300,000.

23 Q So after election day, individuals in your office operating
24 under your direction had to scan one by one 300,000 bar
25 codes?

1 A That's correct.

2 Q What's the error rate in scanning those bar codes?

3 A I'm not aware of an established error rate in that process.

4 This was part of the new voter registration system that we

5 installed in the past year, so we -- this is the second

6 election. The primary and general elections were the first

7 elections where we utilized that system. So I don't know of

8 an established error rate in the employee's process of going

9 through and reading those bar codes.

10 Q During the course of implementing this new voter registration

11 system, you didn't attempt to create a base line or test the

12 accuracy of bar code scanning or the implementation of bar

13 code scanning by the individuals who were doing it?

14 A Not to my knowledge we did not.

15 Q The individuals who were doing the bar code scanning, were

16 those regular King County employees or temporary employees?

17 A The majority of them were temporary employees.

18 Q How many temporary employees were assigned to this task?

19 A I would estimate between 30 and 40.

20 Q How much training were they given on doing the bar code

21 scanning?

22 A I don't know that I can speak specifically to the number of

23 hours or type of training, but there was training given prior

24 to the -- prior to any employee undertaking that process, it

25 would have been -- in this particular instance, would have

1 been mostly verbal training and assistance once people
2 started the process.

3 Q How about the bar code scanner itself, do you know the error
4 rate in reading bar codes?

5 A I don't. That issue came up post election. We were asked
6 that question, and I believe that was posed to the vendor
7 that we worked with on the installation of this system, and
8 to my knowledge we were not able to receive any information
9 to indicated an established error rate or accuracy rate with
10 regard to that.

11 Q So it could be zero errors. It could be 50 percent errors.
12 We don't know the answer to that question?

13 A Correct. If it was 50 percent errors, I think we would know
14 that, because we would have a variance much larger than the
15 variance that we're talking about.

16 Q All right. Could fall within the variance that we're talking
17 about or not. We didn't -- I mean, the point I'm trying to
18 make is you don't know the error rate of the accuracy of the
19 bar code readers?

20 A Correct.

21 Q Has anyone ever, the manufacturer, or the manufacturer's
22 representative, the distributor, the sales people, has anyone
23 ever claimed that the accuracy rate is 100 percent?

24 A Not to my knowledge.

25 Q Who is the vendor?

1 THE WITNESS: Can you read that back to me, please.

2 (Last question read.)

3 A The only thing that I can recall is that I do believe that
4 the Jefferson County auditor made some public statements to
5 the effect that she believes there was an issue of that,
6 yes.

7 Q Other than that, that's the only election official, county or
8 state election official, that you're aware of, Jefferson
9 County?

10 A That specifically addressed this issue, yes.

11 Q In fact, to determine whether a particular voter voted, the
12 best evidence of whether a specific voter voted would be his
13 or her signature in the poll book if he or she voted in
14 person, correct?

15 A Correct.

16 Q If they were an absentee voter, the best evidence of whether
17 an absentee voter cast a ballot would be the absentee ballot
18 envelope, correct?

19 A Correct.

20 Q And the best evidence of a provisional ballot voter would be
21 a copy of the provisional ballot envelope.

22 A Or the envelope itself, yes.

23 Q With that sort of evidence you have the actual voter's
24 signature on the poll book or on the envelope, correct?

5 A Correct.



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April 25, 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 referred to in the Reply in Support of Washington State Democratic Central Committee's Motion in Limine to Exclude Evidence of "Voter Crediting" and to Require Petitioners to Introduce Best Evidence of Voting, filed today.

Yours truly,

William C. Rava

cc: All parties and counsel of record

WCR:ccs

Enclosures

[15934-0006/SL051150.056]

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

C

Supreme Court of Kansas.
BOARD OF TRUSTEES FOR SUMNER COUNTY,
KAN., HIGH SCHOOL
v.
BOARD OF COM'RS OF SUMNER COUNTY et al.

May 5, 1900.

Syllabus by the Court.

1. An act of the legislature provided that the question of the continuance of the Sumner County High School should be submitted to the electors of that county at the general election in 1899. and, if a majority of the voters voting at said election should vote "No," the school should be disestablished. *Held*, that the meaning of the statute is plain, and that, a majority of all the voters voting at said election having failed to vote in the negative, the school was not discontinued.

2. The names of the voters appearing on the poll books furnish the best evidence of the total number of votes cast.

3. The board of county commissioners met as a board of canvassers on November 10th and 11th, after the general election, and made an abstract of the votes cast, which showed that the total number of voters voting at said election was 5,324, of which 2,648 voted "No," and 2,100 voted "Yes," on the high-school proposition; but said board of commissioners made no declaration of the result. Later, and in December following, a meeting of the board was called, and arguments heard regarding the construction of the statute authorizing the vote. A majority of the board then decided "that, according to the votes of the November election, the right to maintain the high school was lost." *Held*, that the action taken at the December meeting was a nullity; that a complete canvass of the votes was made on November 10th and 11th, and the work of the canvassing board completed, with the exception of declaring the result, which it was the duty of the board to do, and the performance of such duty may be enforced by mandamus.

Application by the board of trustees for the Sumner County High School for mandamus against the board of county commissioners of Sumner county and others. Writ awarded.

West Headnotes

Elections 237

[144k237 Most Cited Cases](#)

Laws Sp.Sess.1898, c. 32, § 1-3, provided that the question of the continuance of the Sumner County High School should be submitted to the electors of that county at the general election in 1899, and, if a majority of the voters voting at said election should vote "No," the school should be disestablished. *Held*, that the meaning of the statute is plain, and that a majority of all the voters voting at said election having failed to vote in the negative, the school was not discontinued.

Elections 237

[144k237 Most Cited Cases](#)

A county canvassing board properly assumed that all persons whose names appeared on the poll books voted at the election, since the names of the voters appearing on the poll books furnish the best evidence of the total number of votes cast.

Elections 259

[144k259 Most Cited Cases](#)

The board of county commissioners met as a board of canvassers on November 10th and 11th, after the general election, and made an abstract of the votes cast, which showed that the total number of voters voting at said election was 5,324, of which 2,648 voted "No," and 2,100 voted "Yes," on the question whether a high school should be continued; but said board of commissioners made no declaration of the result. Later, and in December following a meeting of the board was called, and arguments heard regarding the construction of the statute authorizing the vote. A majority of the board then decided "that, according to the votes of the November election, the right to maintain the high school was lost." *Held* that, a complete canvass of the votes having been made in November, the action at the December meeting was a nullity.

Mandamus 74(5)

[250k74\(5\) Most Cited Cases](#)

Where, after a county election, the board of county commissioners met as a board of canvassers and made an abstract of all votes cast, and the number cast in favor of and against a certain proposition that had been submitted, but announced no result as to the proposition, they could be compelled to declare the result by mandamus.

*1057 Herrick & Rogers, Cleo. D. Burnette, and J. M. Ready, for plaintiff.

C. E. Elliott and Jas. A. Ray, for defendants.

SMITH, J.

This is an action originally brought in this court by the board of trustees of the Sumner County High School against the board of county commissioners of the county of Sumner and the county clerk, for the purpose of requiring the latter to meet as a board of canvassers, and declare the proper result of a vote had at the general election in 1899 upon the proposition then submitted, "Shall the Sumner County High School be maintained?" Chapter 186 of the Laws of 1897 authorized the board of county commissioners of Sumner county to lease from the board of education of the city of Wellington a building or rooms for a county high school, and provided that upon the completion of the lease said building and rooms should become a county high school, and that a board of trustees should be appointed thereafter, whose duties should be in all respects the same as those of high school boards provided *1058 for in chapter 147 of the Laws of 1886. On the 23d day of July, 1897, the county board leased from the board of education of Wellington a building and rooms for high-school purposes, and appointed a board of trustees, as provided for in said act. The trustees organized and established a high school in said building, and it has been maintained therein since that time.

Chapter 32 of the Laws of the Special Session of 1898 provided for the submission to the voters of Sumner county of the question whether the high school should be disestablished. The act referred to reads:

"Section 1. That the board of county commissioners of Sumner county, Kansas, is hereby authorized, empowered and directed to submit to the voters of Sumner county, Kansas, at the general election of 1899, the proposition as to whether or not the Sumner County High School shall be maintained as is provided by chapter 186 of the Session Laws of 1897.

"Sec. 2. That those desiring to vote in the affirmative shall vote 'Yes' and those desiring to vote in the negative shall vote 'No.'

"Sec. 3. If a majority of the voters voting at such election shall vote 'No,' the right, power and authority of the board of trustees of the Sumner County High School or the board of county commissioners of said county to levy taxes for the support and maintenance

thereof shall cease to exist, and the said school shall be discontinued on and after the 1st day of July A. D. 1900, and the properties and effects of said school shall be sold, and the funds derived therefrom be turned into the general revenue fund of the county."

On September 6, 1899, the board of county commissioners made an order that the proposition as to whether or not the high school should be maintained be submitted to a vote of the people of the county at the next general election, as provided in the act above set out. The proposition was printed upon the ballots as follows: "Shall the Sumner County High School be maintained?" On the 10th day of November, 1899, the county commissioners met as a board of canvassers, and proceeded to canvass the returns of said election, as required by law, and completed the canvass on November 11, 1899. An abstract of the votes cast at said election was made out and signed by the members of the board of canvassers, which abstract showed that the total number of voters voting at the election was 5,324, that the total number of voters voting against said proposition was 2,648, and that the total number of voters voting in favor of said proposition was 2,100. Attached to the abstract of the votes cast was a certificate, made by the members of the board, stating that the same was true and correct. The board of canvassers then adjourned, without making any formal declaration of the result of the vote on the high school proposition, except as shown by said abstract. On the 28th day of November the commissioners, in response to a petition signed by numerous taxpayers, met in special session for the purpose of considering whether the high-school proposition had been carried or not. On December 2d, at an adjourned meeting of the board, a motion was made and carried "that, according to the votes of the November election, the right to maintain the high school is lost."

It will be noticed that section 3 of the act of 1898, providing for a submission to the voters of the county, provides that, "if a majority of the voters voting at said election shall vote 'No,' the right, power and authority of the board of trustees of the Sumner County High School or the board of county commissioners of said county to levy taxes for the support and maintenance thereof, shall cease to exist," etc. There is not much room for disagreement as to the meaning of this section of the law. It was within the power of the legislature to submit the proposition in any manner it saw fit. It might have made the continued existence of the high school depend upon an affirmative vote of one-third of the voters, or might have continued the high school indefinitely without any vote at all, or have abolished it without consulting the voters of the

county. State v. Board of Com'rs of Elk Co., 61 Kan. --, 58 Pac. 959. We know of no limitation upon the authority of the legislature which would prevent it from making the disestablishment of the high school depend upon the will of a majority of the voters voting at the election who should vote "No." We can come to no other conclusion than that the statute means what it says. See Prohibitory Amendment Cases, 24 Kan. 700-722. Mr. Justice Brewer, speaking for the court in those cases, said: "A distinction is also apparent between the number requisite for the adoption of an amendment, and that for calling a constitutional convention. In the latter it must be a majority of all the electors voting at that election, while in the former it is a majority of those voting on the amendment." The board of commissioners in fact made but one canvass of the votes, and that canvass was made on the 10th and 11th days of November, 1899. Whatever action was taken thereafter by the board was based on the canvass made on November 10th and 11th. All that was necessary to complete the canvass made on those dates was a declaration of the result. When the board sat in December, it was not a canvassing board. Its principal occupation was to hear a discussion of law questions, involving the construction of section 3 of the statute under which the proposition was submitted. The board was attempting at that time to ascertain the law covering the case. This distinctly appears from the proceedings had before it.

It is contended that the canvassing board wrongfully assumed that all the persons whose names appear upon the poll books voted at the election. We know of no better *1059 method of arriving at the number of votes cast at an election than by counting the names as they appear upon the poll books. It is not to be presumed that any person whose name appears thereon did not vote, but that all there named appeared personally and cast their ballots. We must assume that all persons' whose names appear on the poll books voted at the election. State v. Sillon, 24 Kan. 13. We cannot see that the 51 ballots which were returned to the county clerk, marked defective and mutilated, and not voted, can in any way affect the case. Their condition is not explained, and we take it they were not placed in the ballot box, and did not express the will of any voter named on the poll book. It clearly appears that a majority of the voters voting at said election did not vote "No." This was the test on which the legislature determined that the continuance of the high school should depend, and we think it was the duty of the board of canvassers, at its meeting on November 10th and 11th, to declare that the proposition to discontinue the school was lost. The declaration made by the board at their meeting in December was wrong,

according to its own record, of which the abstract of the vote cast at the election was a part.

Section 106 of chapter 52 of the General Statutes of 1897 provides that the commissioners shall meet as a board of canvassers at the office of the county clerk on Friday next following the election, "and shall proceed to open the several returns which shall have been made to that office; and said commissioners shall determine the persons who have received the greatest number of votes in the county for the several county, district, and state officers. *** And such determination shall be reduced to writing, and signed by said commissioners, and attested by the clerk, and shall be annexed to the abstract of votes given for such officers respectively provided for in section thirty-one of this act." It is the duty of the canvassing board to register its "determination," and sign the same, which is to be attested by the clerk and annexed to the abstract of votes. An abstract of votes was made in this case by the board, but their determination, which we understand to be nothing more than a declaration of the result, was omitted. This declaration would be of little importance in a case where certificates of election are required to be issued by the board. No fraud is claimed to have been committed in this election. The hesitation upon the part of the commissioners resulted from a doubt as to the proper construction of the statute which authorized an election to be had upon the question. In Shull v. Commissioners, 54 Kan. 101-106, 37 Pac. 995, it is said: "The duty of a canvassing board is almost wholly ministerial. They are to ascertain and declare the result of the voting as shown by the returns." When writs of mandamus issue to ministerial canvassers, and command acts which involve no exercise of discretion, the writ may control such officers, and not only command the performance of the act in question, but the manner of such performance, and the decision which they are to render. This rule has been applied to a judicial officer invested with discretion as to acts which it is sought to compel by mandamus. If such discretion is abused, the writ may issue, controlling the performance of the duty. 13 Enc. Pl. & Prac. 527, 528, and cases cited. We conclude, therefore, that it was the duty of the board of county commissioners, sitting as a canvassing board on November 10th and 11th, to declare the result as shown by the record then made; and a peremptory writ of mandamus will be awarded to compel the performance of such duty now, as of that time. Peremptory writ awarded.

All the justices concurring.

60 P. 1057
61 Kan. 796, 60 P. 1057
(Cite as: 60 P. 1057)

Page 4

61 Kan. 796, 60 P. 1057

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Supreme Court of Iowa.
STATE
v.
PRESSMAN ET AL. (THIRTY-TWO CASES).

Oct. 23, 1897.

Appeal from district court, Polk county; W. A. Spurrier, Judge.

Action to enjoin the maintenance of a nuisance in keeping and selling intoxicating liquors. The petition is in the usual form. The answer, in addition to a general denial, alleges compliance with all the conditions of chapter 62 of the Acts of the 25th General Assembly; and that, before engaging in the business of keeping or selling intoxicating liquors, the city council of Des Moines, acting as a license board, passed upon the statement of consent, and determined it to be sufficient, and adopted a resolution consenting that said business be conducted within the city; and that, owing to the action of the city council, the court is not authorized to investigate the facts concerning said statement. Decree being entered as prayed, defendants appeal. Affirmed.

Granger, J., dissenting.

West Headnotes

Intoxicating Liquors 27

223k27 Most Cited Cases

In an action involving the sufficiency of the statement of consent of legal voters of a city to the issue of a liquor licence, the best evidence of who were legal voters of the city at the last election is the poll books and registration lists of that election.

Intoxicating Liquors 27

223k27 Most Cited Cases

Section 17, c. 62, Acts 25th Gen. Assem., provides, among other things, that the payment of a specified tax, and filing with the county auditor of a written consent to the sale of liquor, signed by a majority of the voters of a city, shall, upon the "following conditions," be a bar to proceedings under the statute prohibiting such sale. One of the succeeding conditions is the filing with the auditor of a copy of a resolution of consent of the city council.

Held, that the action of a city council in passing such a resolution is not a determination of the sufficiency of the statement of consent signed by the voters, which will protect it from collateral attack in a suit to enjoin a liquor nuisance.

*661 C. H. Sweeney and E. T. Morris, for appellants.

J. J. Davis and Harvison & Mershon, for the State.

LADD, J.

It is conceded that this case cannot be tried de novo in this court, for the reason that all the evidence is not contained in the abstract. Several errors are assigned, only two of which are argued. The first is thus stated by the appellant: Did the city council determine the validity or sufficiency of the petition or statement of consent when it granted the resolutions of consent to the defendants? The determination of this question involves the construction of portions of section 17 of chapter 62 of the Acts of the 25th General Assembly, which are here set out: "Sec. 17. In any city of five thousand or more inhabitants, the tax hereinbefore specified may be paid quarterly in advance on the first days of January, April, July, October, of each year, and after a written statement of consent, signed by a majority of the voters residing in said city, who voted at the last general election, shall have been filed with the county auditor, such payments shall, upon the following conditions, be a bar to proceedings under the statute prohibiting such business: (1) The person appearing to pay the tax shall file with the county auditor, a certified copy of a resolution regularly adopted by the city council, consenting to such sales, and a written statement of consent from all the resident free-holders within fifty feet of the premises where said business is carried on. But in no case shall said business be conducted within three hundred feet of any church or school house." The second condition requires the filing of a bond, approved by the clerk of the district court, with the county auditor. Then follow eight other subdivisions relating to the place and manner of conducting the business, and another relating to the payment of the tax. The filing of the statement of consent and the payment of the tax are independent of the conditions operating as a bar,--the basis, as it were, without which these would be of no avail. Only after such statement has been filed and the tax paid will compliance with the conditions be considered. If this has been done, then, by observing every condition mentioned in the eleventh subdivision

of the section, including the filing of "a certified copy of the resolution regularly adopted by the city council, consenting to such sales," such payment becomes a bar, and not otherwise. The statement must be filed with the county auditor, and his action filing it is ministerial only. State v. Ashert (Iowa) 63 N. W. 557. The members of the city council have only such right to inspect it when so filed as is accorded to citizens generally. Acts 25th Gen. Assem. c. 62, § 21.

If it had been intended that the council pass upon the sufficiency of the statement of consent, why file it with the county auditor, instead of the city clerk? No more importance is attached to the filing of a copy of a resolution of consent as a condition than the written consent from resident freeholders owning property within 50 feet of the premises where the business is to be carried on, or the filing of the bond approved by the clerk, except that the council may withdraw its consent. Section 19 provides that "whenever any of the conditions of this act shall be violated, or whenever the city council or trustees of the incorporated town shall, by a majority vote, direct it, or whenever there shall be filed with the county auditor a verified petition signed by a majority of the voters of said city, town, or county as the case may be, as shown by the last general election, requesting it," then the bar shall cease. This would occur without any action on the part of the council if the verified petition referred to were filed with the county auditor. If the council is required to pass upon the sufficiency of the statement of consent, why not upon that of the petition withdrawing consent? Certainly, that of withdrawing consent is quite as important to the welfare of the city.

It is urged that somebody should determine whether the statement has a sufficient number of signatures, and has been properly prepared. There is no greater necessity for this than that compliance with other conditions named be adjudicated in advance. The party engaging in this business is required to know that all the conditions have been complied with, and must plead and prove compliance therewith in order to avail himself of the bar. State v. Van Vliet (Iowa) 61 N. W. 241; Ritchie v. Zalesky (Iowa) 67 N. W. 399. Section 18 of the act fixes the condition on which any city or town of less than 5,000 inhabitants may come within the provisions of section 17, heretofore referred to. Under the rule contended for, each council of such city or town, *662 in adopting a resolution of consent, must pass upon the sufficiency of the statement filed with the county auditor. Municipal councils are not free from the infirmities which beset the rest of mankind, and might well be expected to reach different conclusions upon a question so closely

touching the preference, sentiment, or prejudice of every citizen. An adjudication of an issue by one tribunal of original jurisdiction, not appealed from, has heretofore been deemed quite enough to end a controversy. Here it is insisted there shall be as many adjudications, all conclusive, upon the one identical issue,--that of the sufficiency of the statement of consent,--as there are cities and towns with less than 5,000 inhabitants in the county. Such an anomaly was never intended. Nor could it be expected that councilmen would make the needed investigation necessary for the ascertainment of the truth when the law does not expressly require it. The decision in State v. Forkner (Iowa) 62 N. W. 772, rests on the ground that the liquor traffic is placed under the control of the municipalities of the state, in the exercise of the police power. The council may prevent such traffic by withholding its consent thereto, or discontinue it by withdrawing such consent after given. It may levy and collect additional taxes, and adopt rules and ordinances for the regulation of the traffic not inconsistent with the act. The statement of consent is only a condition precedent to the exercise of such control. Cases are cited in which statutes are considered requiring an election to be ordered by the board of supervisors or township trustees when a petition is filed by a certain proportion of the electors. The ground on which it is held that such petition may not be investigated in a collateral attack in subsequent proceedings is well stated in Ryan v. Varga, 37 Iowa, 78: "The petition for the vote stands in substantially the same relation to the subsequent proceedings as an original notice or summons does to the proceedings which it inaugurates. If it is defective in fact, but is adjudged sufficient by the tribunal having jurisdiction to decide upon it, such adjudication becomes conclusive until reversed or set aside upon an appeal, writ of error, certiorari, or the like." The petitions in such cases are presented to the body which, in ordering an election, necessarily passes upon their sufficiency. The action of the city council is not in terms made dependent on the filing of the statement, while the order for an election can only be made upon the filing of a proper petition. The statement is filed with an officer not officially connected with the duties devolving upon the council, nor is it subject to its inspection except in the office of another municipality, often located at a considerable distance. Had the legislature intended to so place the burden of investigation, it certainly would have provided ready access to, and the use of, necessary papers, and a method of procedure. Clearly, such was not the intention, but, rather, that the person engaging in the liquor traffic know at his peril that all the prerequisites and conditions required by the law have been fully

complied with. By section 2450 of the Code, adopted since the submission of this case, the board of supervisors of the county is authorized to pass upon the statement of consent, thus confirming by legislative construction the conclusion we have reached.

2. The court held that the poll books and registration lists were the best evidence of who were at the election. The registration laws of this state are strict and explicit. No ballot can be received at a general election in a city of over 2,500 inhabitants unless the name of the person offering it be on the registry; and, if any is so received, it is void, and must be rejected when the result of the election is involved. Acts 21st Gen. Assem. c. 161, § 8. But, for certain reasons, an elector who has not previously registered may procure a certificate of registration on the day of election, and cannot vote without so doing. The lists and certificates are carefully preserved for 18 months. The name of each person, when his ballot is received, is entered on two poll books, one of which is filed with the county auditor, and becomes a part of the records of his office. The registration lists and the poll books, prepared with such care, when duly authenticated, and coming from the proper custodian, are the best evidence of who cast the ballots at the election. 6 Am. & Eng. Enc. Law, 427, and cases cited; Dixon v. Orr, (Ark.) 4 S. W. 774; Paine, Elect. 756. This, of course, does not mean that they are records in such a sense that they may not be attacked on the ground of fraud. We discover no error in the rulings of the district court, and its decree must be affirmed.

GRANGER, J., dissents.

103 Iowa 449, 72 N.W. 660

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United States Court of Appeals,
Sixth Circuit.
Anne GEISLER, Plaintiff-Appellant,
v.

Frank FOLSOM, JR., personally and in his official
capacity; Dwight Kessel,
William C. Tallent, in their official capacity; County
of Knox, Defendants-
Appellees.
No. 82-5785.

Argued Feb. 15, 1984.
Decided June 1, 1984.
Order on Grant of Rehearing
July 3, 1984.

Female employee brought sex discrimination in employment action. Following bench trial, the United States District Court for the Eastern District of Tennessee, Robert L. Taylor, Chief Judge, entered judgment in favor of defendant, and employee appealed. The Court of Appeals, Lively, Chief Judge, held that: (1) District Court's findings that employee was not paid less than less qualified male employee, that pregnancy policy of employer was in compliance with law, that no unequal treatment in office and furniture assignments occurred, over that employee was not constructively discharged, were not clearly erroneous; (2) employee established prima facie case of failure to promote on basis of sex; and (3) trial court did not abuse its discretion in limiting employee's proof on certain aspects of her claim.

Vacated and remanded.

West Headnotes

[1] Federal Courts 858

170Bk858 Most Cited Cases

Decision by district court on issue of discrimination under statute prohibiting employment discrimination is subject to review under clearly erroneous standard. Civil Rights Act of 1964, § § 703(a), 704(a), 42 U.S.C.A. § § 2000e-2(a), 2000e-3(a); Fed.Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

[2] Federal Courts 850.1

170Bk850.1 Most Cited Cases

(Formerly 170Bk850)

Reviewing court is bound by all findings of fact in case heard by district court without jury, or with advisory jury, unless they are clearly erroneous. Fed.Rules Civ.Proc.Rule 52(a), 28 U.S.C.A.

[3] Federal Courts 858

170Bk858 Most Cited Cases

In employment discrimination case, if findings of district court are supported by probative evidence they must be upheld and his judgment affirmed unless it committed error in application of controlling legal principles to facts. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000c et seq.

[4] Civil Rights 1549

78k1549 Most Cited Cases

(Formerly 78k387, 78k44(5))

In sex discrimination in employment action, district court's findings that female employee was paid more than less qualified male employee, that there was no unequal treatment in office and furniture assignments, that employer did not discriminate against her after she filed Equal Employment Opportunity Commission claim, that employee was not constructively discharged, and that pregnancy policy of employer was in compliance with requirements of law were not clearly erroneous.

[5] Civil Rights 1549

78k1549 Most Cited Cases

(Formerly 78k387, 78k44(5))

Where female employee applied for vacant position of Engineer II, received no response to application and was never interviewed, and one week later, job was advertised with requirement that applicant have degree in engineering, whereas formerly requirement was only that applicant have equivalent to degree of engineering, female employee established prima facie case of failure to promote her to Engineer II on basis of her sex. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000c et seq.

[6] Federal Civil Procedure 1952

170Ak1952 Most Cited Cases

[6] Federal Courts 823

170Bk823 Most Cited Cases

Trial judge has, and must have, broad discretion in conduct of trial; thus, rulings on relevancy and materiality of evidence may not be disturbed on appeal in absence of showing of clear abuse of discretion.

[7] Federal Civil Procedure  **2011****170Ak2011 Most Cited Cases**

Where female employee bringing sex discrimination in employment action was permitted to introduce some evidence on each of her claims, trial judge's restriction of cumulative evidence on certain aspects of claim did not constitute abuse of discretion.

***992** Geoffrey P. Emery, Assistant Law Director, Knox County (argued), Knoxville, Tenn., for defendants-appellees.

Dorothy B. Stulberg (argued), Oak Ridge, Tenn., for plaintiff-appellant.

Before LIVELY, Chief Judge, WELLFORD, Circuit Judge, and BROWN, Senior Circuit Judge.

LIVELY, Chief Judge.

This is an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000c, et seq. (1976), in which the plaintiff charged that she was subjected to discrimination in employment solely because she is a woman. Following a two day bench trial the district court filed a memorandum opinion finding that plaintiff failed to prove unlawful discrimination in wages and working conditions or in promotions and work assignments. The court also found that the defendants had not retaliated against the plaintiff for filing a complaint with the Equal Employment Opportunity Commission (EEOC), that the pregnancy leave policy of the defendants complied with federal and state requirements and that plaintiff was not constructively discharged. Judgment was entered for all defendants and this appeal followed.

I.

A.

The plaintiff was employed as an "Engineer I" in the Knox County, Tennessee Department of Air Pollution Control (the Department) from January, 1976 until she resigned in May, 1981. During most of the time of plaintiff's employment there were three positions in the Department designated "Engineer." Mark Mitckes, who had bachelor's and master's degrees in chemical engineering, had the title of Engineer II. The plaintiff had the title Engineer I and Richard West was designated "Engineering Aide." Ms. Geisler has a bachelor's degree in environmental health and had taken graduate courses in environmental engineering. She did not have an engineering degree. West had no collegiate degree, but had long experience in the Department as a pollution inspector. During the time of plaintiff's employment Mitckes was the highest

paid person with an "Engineer" title, the plaintiff was next highest paid and West was the lowest paid. For a six-month period West had additional earnings from a contract with the Environmental Protection Agency (EPA) which put his total income above that of the plaintiff. Mitckes and Ms. Geisler dealt with "major sources" of pollution in the county while West was involved primarily in field monitoring. The duties of Mitckes and Ms. Geisler required frequent contact with industry personnel and higher technical qualifications than the work which West performed.

The organization chart of the Department called for a Director and an Assistant Director. The Department was without a permanent Director during much of Ms. Geisler's tenure as an employee. From August, 1979 until October, 1980 Frank Folsom was Acting Director. Dwight Kessel served as Acting Director from December, 1980 until April, 1981. James Lovett ***993** was chosen as Director to succeed Kessel. Under the controlling regulations he was required to serve as Acting Director for a period before formally assuming the position of Director. He was Acting Director when the plaintiff resigned by a letter dated May 15, 1981, effective May 29th.

B.

It is clear from the record that Frank Folsom dealt poorly with professionally trained women employees. Ms. Geisler testified that Folsom refused to deal directly with the women on the professional staff, made demeaning remarks to them and generally made their life at work uncomfortable. She was supported by the testimony of two female environmentalists who worked for the Department. Both testified that the atmosphere changed dramatically for the worse when Folsom succeeded the previous Director, John McDowell. In addition Mark Mitckes testified that in his opinion women were not given equal opportunities with men under Folsom. While admitting that he and Ms. Geisler did not get along well, Folsom denied that he ever discriminated against women.

On July 10, 1980 the plaintiff filed a charge of discrimination with the EEOC. In the charge she alleged that Richard West had received a salary increase which raised his earnings above hers, that an office assigned to her in August, 1979 was reassigned to West in January, 1980, that new furniture which had been assigned to her office was reassigned to Mark Mitckes, that the "line of communication" between her and Folsom had been broken, that rules and procedures relating to vacation time for male and female employees were not always the same and that major responsibilities had been taken away from the

(Cite as: 735 F.2d 991)

plaintiff and assigned to West.

C.

Following her resignation and receipt of a right to sue letter from the EEOC the plaintiff filed this action. In addition to the matters recited in her charge she alleged in the complaint that the defendants had retaliated against her for filing the charge and that the maternity leave policy of the Department was illegal. At trial she claimed she had been constructively discharged.

To support the claim of retaliation the plaintiff testified that conditions were worse for her and other women in the office after she filed the charge. Further, the day the Department received notice of the charge the three professional women were called to a meeting by Mitckes and told that they were to deal with him rather than Folsom. Mitckes said that Folsom did not know how to deal with these employees.

In support of her claim of constructive discharge the plaintiff testified that the new Director, Lovett, told her, "There is no opportunity for advancement for you here." She said she resigned at that point, because she had been told to get out and had no option. Lovett testified that he never told Ms. Geisler that she had no future in the Department. He said he had not had an opportunity to evaluate the people in the Department when the plaintiff resigned. He told a number of employees, including the plaintiff, that the County was feeling budgetary pressures and that there might be reductions. In fact, the County was not required to operate an air pollution monitoring and control entity and there was a possibility that the Department could be abolished. Lovett also testified that some time after Ms. Geisler resigned he reorganized the Department, changed titles and eliminated the position of Assistant Director.

Contrary to the plaintiff's testimony, Lovett said he did not give West either a promotion or a salary increase after Ms. Geisler resigned; he merely changed West's title and put him in charge of the section he had previously headed. Before resigning the plaintiff had applied for the positions of Director, Assistant Director and Engineer II. The positions of Assistant Director and Engineer II were vacant when Ms. Geisler resigned. After the position of Assistant Director was abolished, *994 Lovett appointed a Quality Assurance Coordinator who also functioned as Assistant Director. The man appointed had no engineering degree, but possessed extensive administrative experience.

II.

A.

The district court made specific findings with respect to plaintiff's claims as follows:

(1) The payroll records showed that the plaintiff was paid more than West during the entire period of her employment. The extra pay which West received for six months under the EPA contract was for work outside his regular employment.

(2) The three offices assigned to the engineering personnel were substantially the same and the plaintiff took Mitckes' office when he left. The plaintiff had access to a conference room along with other employees and was never denied access to individuals or meetings.

(3) Uniform office hours and time card requirements were instituted by Kessel and were applied uniformly and were non-discriminatory in nature.

(4) The maternity leave policy of Knox County complied with all state and federal regulations. The plaintiff used sick and annual leave for her pregnancy-related absence in September, 1980 and was compensated for her time off except for 4 1/2 days of claimed compensatory time which was denied pursuant to a neutral policy that was uniformly applied.

(5) When the plaintiff voluntarily resigned she indicated to Lovett that she had at least one other job offer in her field. After evaluating the remaining staff Lovett assigned West the title of Enforcement Coordinator without an increase in salary.

(6) The unfavorable conditions which existed during Frank Folsom's tenure did not exist after his departure. The evidence indicated that conditions improved and that plaintiff had her own office and substantial responsibilities when she resigned. Conditions were not so intolerable that plaintiff's resignation amounted to a constructive discharge.

(7) Plaintiff did not make out a prima facie case of disparate treatment in failure to promote her to Director, Assistant Director or Engineer II. Both the Director and Engineer II positions required engineering degrees at the time plaintiff applied, and she did not have the qualifications for either. "Even if she was qualified, we find that plaintiff failed to show that the County's decision to hire an engineer as Director was pretext for discrimination."

(Cite as: 735 F.2d 991)

The Engineer II position was eliminated in the restructuring and plaintiff submitted her resignation before the Assistant Director position was filled and the staff restructured. Thus, plaintiff withdrew her name from consideration before she was denied promotion to Assistant Director or Engineer II.

(8) Plaintiff did not prove that the decision to hire a man as Quality Assurance Coordinator was a pretextual move to cover a discriminatory act against women.

(9) Plaintiff failed to show any adverse employment action in response to her EEOC charge or any other protected activity. While additional tension arose after others became aware of Ms. Geisler's charge, such "predictable tension" is not "the type of adverse employment action prohibited by Title VII's retaliation clause."

B.

Section 703(a) of the Act, 42 U.S.C. § 2000c-2(a) makes it unlawful for an employer to discriminate against an employee because of the employee's sex, and section 704(a), 42 U.S.C. § 2000c-3(a) makes it an unlawful employment practice to discriminate against an employee for filing a charge under Title VII.

[1][2] A decision by a district court on the issue of discrimination under Title VII is subject to review under the clearly erroneous standard of Rule 52(a), Fed.R.Civ.P. *995 Pullman-Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982); Jacobs v. Martin Sweets Co., Inc., 550 F.2d 364, 369 (6th Cir.), cert. denied, 431 U.S. 917, 97 S.Ct. 2180, 53 L.Ed.2d 227 (1977); Heard v. Mueller Co., 464 F.2d 190, 193 (6th Cir.1972). In Pullman-Standard v. Swint the Supreme Court made it clear that Rule 52(a) makes no distinction between so-called "ultimate" and "subsidiary" facts. A reviewing court is bound by all findings of fact in a case heard by a district court without a jury, or with an advisory jury, unless they are clearly erroneous. 456 U.S. at 287, 102 S.Ct. at 1789.

[3] The plaintiff recognizes this standard of review and argues that each of the district court's findings is clearly erroneous. She then seeks to buttress this argument with references to her own proof, as if it were uncontradicted. In fact, plaintiff's proof was contradicted in every material respect. If the findings of the district court are supported by probative evidence they must be upheld and its judgment affirmed unless it committed error in the application

of controlling legal principles to the facts.

[4] (1) It is clear that every complaint but that of constructive discharge relates to the period when Frank Folsom was Acting Director. The evidence reveals a deplorable attitude by Folsom toward women. However plaintiff failed to establish any adverse impact on her employment other than bad relations between her and Folsom. The finding that plaintiff was paid more than West is not clearly erroneous. She does not claim that she was constructively discharged during Folsom's tenure. The district court found no unequal treatment in office and furniture assignments, and there was evidence to support that finding, including Lovett's testimony that Ms. Geisler agreed to the exchange of desks. These findings are not clearly erroneous.

(2) We reach the same conclusion with respect to the claims that Ms. Geisler was deprived of the opportunity to work on two projects because Folsom did not follow through with applications for outside grants. Explanations were given by the defendants for their decision not to proceed with the projects. These explanations were related to budgetary considerations and the plaintiff did not show that they were pretextual.

(3) Though we do not discuss them in detail we have considered each of plaintiff's other claims related to conditions of employment. We conclude that the findings of the district court are supported by probative evidence and are not clearly erroneous.

(4) Though plaintiff charged that the pregnancy policy of her employer violated the requirements of law, her proof appears to concern the failure to receive 4 1/2 days' pay for compensatory time. There was positive testimony that she was paid during her maternity leave from accumulated sick leave and annual leave. The district court found that "comp time" had been eliminated in the Department pursuant to a policy change that did not discriminate against women. The evidence on this issue is not clear. Nevertheless, the finding that the pregnancy policy was in compliance with requirements of the law when plaintiff took maternity leave is not clearly erroneous. If the district court was in error, as plaintiff claims, in its treatment of the compensatory time policy of the County, such error was harmless as not affecting substantial rights of the parties. See 28 U.S.C. § 2111 (1982); Rule 61, Fed.R.Civ.P.

(5) The evidence upon which the plaintiff based her claim of retaliation was minimal. The fact that

(Cite as: 735 F.2d 991)

Folsom recognized his inability to deal with three women employees and directed them to go through Mitckes is not such evidence of retaliation as to make the district court's finding clearly erroneous. On the organization chart Mitckes was shown as manager of engineering and enforcement and listed above the plaintiff. Since Mitckes was the only professional engineer on the staff it was not illogical to require other persons performing engineering-related functions to report through him.

***996** The very general claim that conditions became worse in the Department after the charge was filed was not supported by any specific testimony. We agree with the district judge that a general increase of tension in the workplace would be expected to follow revelation that a claim of discrimination in employment had been filed. However, evidence of such an increase should be considered, and any discrete act or course of conduct which could be construed as retaliation must be examined carefully. After such examination we conclude that the finding that no "adverse employment action" resulted from the filing of the EEOC charge is not clearly erroneous, particularly in view of the contrary evidence of a secretary, Amy Benson, and of Folsom.

(6) The finding that Ms. Geisler was not constructively discharged is not clearly erroneous. If she had resigned during Folsom's tenure a different answer might be required. However, she admitted on cross-examination that most of the alleged discriminatory practices took place under Folsom. Both of her supporting witnesses who were co-workers testified that conditions improved dramatically after Folsom left. Yet, plaintiff did not submit her resignation until several months after Folsom's departure. And it was submitted to a Director whom one of her co-worker witnesses described as "super" compared to Folsom and against whom the other such witness testified she had no complaint. It is obvious that conditions had improved substantially with Lovett's arrival.

The only reason given by plaintiff for her resignation was the claim that Lovett told her she had no future in the Department. Lovett flatly denied telling her that and testified that he had not had an opportunity to evaluate plaintiff at the time of her resignation which came one month after he took over as Director. A claim of constructive discharge must be decided on the facts of the particular case. This court has adopted the rule enunciated in Bourque v. Powell Electric Mfg., 617 F.2d 61, 65 (5th Cir.1980), that "a finding of constructive discharge requires the determination that

'working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.'" Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir.1982); accord, Johnson v. Bunny Bread Co., 646 F.2d 1250, 1256 (8th Cir.1981). Proof of discrimination alone is not a sufficient predicate for a finding of constructive discharge; there must be other "aggravating factors." Clark v. Marsh, 665 F.2d 1168, 1173- 74 (D.C.Cir.1981).

Applying these principles to the facts found by the district court, we conclude that the court did not err in holding that Ms. Geisler was not constructively discharged when she resigned on May 15, 1981.

[5] (7) On December 12, 1980 the plaintiff applied for the vacant position of Engineer II. Ms. Geisler received no response to her application and was never interviewed. On December 19, 1980 Knox County published a notice of job openings and advertised a vacancy in the position of Air Pollution Control Engineer II. The educational requirement in the notice of job opening and in the advertisements was a degree in engineering. The district court found that this requirement existed when plaintiff applied for the job. This finding is clearly erroneous. The job specifications for Engineer II as of January 1, 1974 prescribed the qualifications for the position as follows:

QUALIFICATIONS

Any combination of training and experience equivalent to:

Graduation from an accredited 4 year college or university with a degree in engineering.

Three years of progressively responsible experience in an air pollution control program or related field.

(Emphasis added). There is no evidence that the educational requirement was changed between January 1, 1974 and December 19, 1980. John McDowell who was Director from April, 1975 through August, 1979 testified that there was no requirement ***997** that the Engineer II position be held by a person with an engineering degree during his time as Director. It is uncontradicted that Ms. Geisler had performed the duties of Engineer II after Mitckes left the Department and this at least creates the inference that she had training and experience "equivalent to" an engineering degree. Grano v. Department of Development of Columbus, 637 F.2d 1073, 1081 n. 7 (6th Cir.1980).

Ms. Geisler also applied for the positions of Director and Assistant Director. She admitted on

(Cite as: 735 F.2d 991)

cross-examination that she was not a serious applicant for the Director position since she did not have an engineering degree. She also admitted that Kessel told her the position of Assistant Director would not be filled until the new Director was chosen. She resigned before the new Director completed his reorganization.

We agree with the district court that the plaintiff did not make a prima facie case of discrimination in the failure to promote her to Director or Assistant Director. However, we disagree with respect to Engineer II. Ms. Geisler applied for a vacant position for which she was qualified. One week later the qualifications for the position were changed, she says, for the purpose of excluding her. She was never contacted or interviewed for the position and she was not advised that it was being kept open until a Director was appointed. She was effectively rejected for the position and it remained open until her resignation. The titles of Engineer I and II were abolished in the reorganization, but there was no proof that the duties formerly carried out by Mitckes as Engineer II were eliminated. We believe the plaintiff established a prima facie case of failure to promote to Engineer II and that a remand for further proceedings on this issue is required. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

The plaintiff did not seek reinstatement in her complaint. Thus, if it is determined that the defendants did discriminate in failing to promote her to Engineer II her remedy is limited to back pay representing the difference between the salaries of Engineer I and Engineer II from December 12, 1980 through May 19, 1981.

C.

Plaintiff also complains about evidentiary rulings which she claims unduly restricted the proof she was permitted to offer. After hearing some evidence about the assignment of office space the district judge told plaintiff's counsel to move on to something more important. Nevertheless, the judge covered this matter in his memorandum and clearly considered the testimony which he heard. He had the right to refuse cumulative evidence, and that appears to be what he did. The district judge also stated that testimony about externally funded programs where plaintiff worked on proposals and then Folsom failed to follow through with submissions was "irrelevant to the case." Though he received some testimony on these matters, the judge stated, "these little disagreements in the

office are not controlling."

[6][7] The trial judge has, and must have, broad discretion in the conduct of a trial. Rulings on the relevancy and materiality of evidence may not be disturbed on appeal in the absence of a showing of clear abuse of discretion. *Page v. Barko Hydraulics*, 673 F.2d 134, 140 (5th Cir.1982). We find no such abuse here. The plaintiff was permitted to introduce some evidence on each of her claims. Though the comments of Judge Taylor exhibited some impatience with the pace of the trial, it is clear that plaintiff was permitted to develop her case. The thoroughness of its memorandum opinion belies any claim that the district court failed to consider all of plaintiff's claims.

CONCLUSION

The findings of the district court are not clearly erroneous except with respect to the qualifications for the position of Engineer II. The judgment of the district court *998 is vacated and the cause is remanded for further proceedings, consistent with this opinion, on the claim of plaintiff that she was denied an opportunity for promotion to Engineer II because she is a woman.

The parties will pay their own costs on this appeal. However, this order on costs will not prevent recovery of attorney fees by plaintiff if she prevails on the remanded issue.

ORDER

The plaintiff has filed a petition for rehearing taking issue with the statement on page 997 of the opinion heretofore circulated, "The plaintiff did not seek reinstatement in her complaint." In the petition the plaintiff points out that a Pretrial Order was entered in this case by the district court which states that plaintiff claims she is entitled to "employment in a position commensurate with her training and abilities" Plaintiff asks us to change the opinion to read "The plaintiff sought reinstatement."

The petition for rehearing is granted. Though the plaintiff did not seek reinstatement in her complaint, it appears that she did seek reinstatement at some point during the district court proceedings and that this was memorialized in the Pretrial Order.

The statement referred to on page 997 of the opinion will read as follows: "The plaintiff sought reinstatement. If it is determined on remand that the defendants did discriminate in failing to promote her to Engineer II her remedy will include reinstatement to a position commensurate with her training and

735 F.2d 991

Page 7

735 F.2d 991, 34 Fair Empl.Prac.Cas. (BNA) 1581, 34 Empl. Prac. Dec. P 34,421

(Cite as: 735 F.2d 991)

abilities plus back pay representing the difference between the salaries of Engineer I and Engineer II."

735 F.2d 991, 34 Fair Empl.Prac.Cas. (BNA) 1581, 34 Empl. Prac. Dec. P 34,421

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Washington Practice Series TM
Evidence Law and Practice
Current Through The 2004 Pocket Part
Karl B. Tegland FNa

Chapter 10. Contents Of Writings, Recordings, And Photographs
Rule 1002. Requirement Of Original
Author's Commentary

§ 1002.2 Distinguishing Between an Event and a Record of the Event

The key to understanding Rule 1002 is to understand that the rule requires production of the original writing, recording, or photograph *only* when seeking to prove *its contents*.

Various acts, events, and circumstances are memorialized in writing or in some other form of a record, and yet they also have an existence of their own. The best evidence rule applies only when it is the content of the record--*not the actual event*--that is sought to be proved.

In other words, when a party is seeking to prove an act or event, the best evidence rule does not require production of a record of the act or event. Under most circumstances, other evidence, including the testimony of witnesses, is equally acceptable. FN1 But if a party does choose to prove the act or event by producing a record of it, then the best evidence rule requires production of the original record. FN2

A clear-cut example of a situation in which the best evidence rule applies would be a dispute over the terms of a written lease. Both parties are seeking to prove the content of the lease (or at least their respective interpretations of it), and the best evidence rule would require production of the original lease. FN3

But suppose in another case, the issue was whether X paid money to Y. Suppose further that X had what purported to be a written receipt from Y, showing the money had been paid. The best evidence rule would not require X to produce the receipt as proof. The issue is whether the money was paid (i.e., whether an act or event occurred), and X would be free to testify about paying the money or to offer other proof of payment. However, if X did choose to introduce the receipt as evidence, then X *would* be seeking to prove the content of a document, and the best evidence rule would require production of the original receipt. FN4

The same distinction applies to acts or events that have been recorded electronically or on film. An event that has been recorded on tape or film need not be proved by introducing the tape or film, but if a party does seek to introduce the tape or film as evidence, the best evidence rule applies. FN5

When as a matter of substantive law a document or other record *is* the event or transaction that has legal significance, then the foregoing distinction is disregarded, and the proponent *is* required to produce the record itself. Oral testimony cannot be offered in lieu of producing the record itself. For example, the written memorialization of an agreement has special significance under the statute of frauds and the parol evidence rule, and when one of these rules controls the outcome, the best evidence rule applies and requires production of the written contract. Likewise, other documents with special legal significance, such as deeds and judgments, must be proved by producing the document itself. FN6

The foregoing rules are easily stated in the abstract, but their application to specific factual situations can often be difficult. Specific applications of the rules are discussed in subsequent sections. FN7

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FN1 Other evidence equally acceptable

D'Angelo v. United States, 456 F.Supp. 127, (D.C.Del.1978), affirmed 605 F.2d 1194 and 605 F.2d 1197 (3d Cir.1979) (the best evidence rule comes into play only when terms of a writing are being established and an attempt is made to offer secondary evidence; the rule is not applicable when a witness testifies from personal knowledge of the matter, even though the same information is contained in a writing).

FN2 By producing a record

Seattle v. Parker, 13 Wash. 450, 43 P. 369 (1896), may be an illustration.

FN3 The original lease

See Cowie v. Ahrenstedt, 1 Wash. 416, 25 P. 458 (1890).

FN4 The original receipt

Advisory Committee Note, Fed.R.Evid. 1002.

Delaware Coca-Cola Bottling Co., Inc. v. General Teamsters Local Union 326, 474 F.Supp. 777 (D.Del.1979), judgment reversed 624 F.2d 1182 (3rd Cir.1980).

FN5 Tape or film

United States v. Rose, 590 F.2d 232 (7th Cir.1978), cert. denied 442 U.S. 929, 99 S.Ct. 2859, 61 L.Ed.2d 297 (1979) (government need not prove contents of taped conversation by producing the tape; participant to the conversation may testify).

United States v. Gonzales-Benitez, 537 F.2d 1051 (9th Cir.1976), cert. denied 429 U.S. 923, 97 S.Ct. 323, 50 L.Ed.2d 291 (1976) (same; but "if the ultimate inquiry had been to discover what sounds were embodied on the tapes in question, the tapes themselves would have been the 'best evidence' but here the issue was not the content of the tapes but the content of the conversation").

FN6 The document itself

Strong et al., 2 McCormick on Evidence § 233 (two-volume 4th ed.).

FN7 Specific applications

See § § 1002.4 ct scq.

Federal Practice & Procedure**Federal Rules Of Evidence****Updated By The 2005 Supplement**

Charles Alan Wright [FN](#)_a, Kenneth W. Graham, Jr. [FN](#)_b; Supplement By The
Late Charles Alan Wright, Kenneth W. Graham, Jr.

Chapter 5. Relevancy And Its Limits**Rule 403. Exclusion Of Relevant Evidence On Grounds Of Prejudice, Confusion,
Or Waste Of Time**

§ 5224. Procedure For Discretionary Exclusion

[Link to Pocket Part](#)

Procedure is important in the use of discretionary powers. [FN](#)₁ Because there are no rules to guide the judge's decision, it can easily be seen to be arbitrary unless the method by which it is reached is visibly fair to both sides. Use of proper procedure can also help to insure that the decision is not arbitrary in fact as well as appearance. It facilitates appellate review as well. The essence of a fair procedure in the exercise of discretionary power is the opportunity to be heard before the decision and to know the basis of the decision when it has been made.

Although the judge can exclude evidence under Rule 403 without a request, [FN](#)₂ he is under no obligation to do so. [FN](#)₃ The request for discretionary exclusion should be distinguished from an objection to the admission of evidence; the objection asserts a right of the party whereas the request invokes a power of the judge. [FN](#)₄ This invocation of discretion may not technically be governed by Rule 103, [FN](#)₅ but that rule provides a useful guide for proper procedure. In order to preserve the point for appeal, counsel must invoke the court's discretion under Rule 403 [FN](#)₆ in some timely [FN](#)₇ and specific fashion. [FN](#)₈ Although some courts may treat an "objection" as sufficient to invoke Rule 403, it would be prudent for counsel to make clear whether he is objecting, asking for discretionary exclusion, or both. [FN](#)₉ Any form of words that makes it clear that relief is being sought under Rule 403 should suffice.

Once the judge's discretion is properly invoked, he cannot refuse to exercise it. [FN](#)₁₀ This does not mean that he must exclude the evidence, [FN](#)₁₁ only that he must balance the probative worth against the countervailing factors. [FN](#)₁₂ The existence of the countervailing factors is a preliminary fact under Rule 104(a). [FN](#)₁₃ This means that the judge determines the degree of prejudice, confusion, waste of time and the like; in making this determination he is not bound by the rules of evidence. [FN](#)₁₄ Some of the countervailing factors require only an inspection of the proffered evidence, but in other cases the judge will need to know the extent of available rebuttal evidence or the nature of any alternative methods of proof. [FN](#)₁₅ The parties should have an opportunity to show the existence of such factors by affidavit, avowal, or otherwise. [FN](#)₁₆

Courts and commentators generally agree that any inquiry into preliminary facts in an invocation of discretionary exclusion should be heard out of the earshot of the jury. [FN](#)₁₇ This suggests the desirability of a pretrial hearing where the issue is important and complex. [FN](#)₁₈ The use of the motion in limine for this purpose should be encouraged. [FN](#)₁₉

Unlike its predecessor provisions in the Model Code and Uniform Rules, [FN](#)₂₀ Rule 403 does not explicitly require a finding by the trial judge that probative worth is outweighed by countervailing factors. Nonetheless, most of the writers have urged the trial judge to state for the record his reasons for excluding evidence under the rule. [FN](#)₂₁ Recently, in an opinion holding that exclusion of a defense expert was an abuse of discretion, the trial judge was berated for his refusal to give reasons for his decision even though requested to do so by defense counsel. [FN](#)₂₂ This

may seem like a burdensome requirement, [FN23](#) but it will not be if trial judges are properly applying Rule 403. When the judge balances the factors as the rule requires, [FN24](#) stating that balance for the record should be a simple chore. Only shoot-from-the-hip rulings will be deterred by a requirement that reasons be given. [FN25](#)

The suggestion that the judge should give reasons for his decision does not mean that the digests are to replace discretion. As the Comment to the Model Code says:

The application of this Rule should depend so completely upon the circumstances of the particular case and be so entirely in the discretion of the trial judge that a decision in one case should not be used as a precedent in another. [FN26](#)

The fact that an appellate court has affirmed the exclusion of evidence under Rule 403 does not mean that it would have been error to admit it, and vice versa. [FN27](#) Of course, the trial judge is not bound to follow state decisions on discretionary exclusion in diversity cases. [FN28](#)

Although some of the language in Rule 403 might suggest that it is limited to jury trials, [FN29](#) the better interpretation is that it applies in judge-trying cases as well. [FN30](#) This is not to say that the rule will have identical impact in both kinds of cases. The judge cannot be totally isolated from prejudicial evidence since he has to at least peek at it in order to rule. [FN31](#) In addition, there may not be that many judges who will admit to being confused by the evidence. But the judge may be more concerned about the sheer bulk of the evidence when she is the one who has to wade through it. [FN32](#) Moreover, when the judge opines that evidence is not worth much, counsel would be foolish in insisting that it come in even where the probative worth is not substantially outweighed by countervailing factors. [FN33](#) The judge is likely to be pushed to the balancing test only where counsel believes the evidence is crucial to her case.

Some writers have claimed that the exercise of discretion under Rule 403 is virtually unreviewable. [FN34](#) This seems something of an overstatement. [FN35](#) It is true that the rule implies a healthy dose of secondary discretion [FN36](#) and appellate courts do express great deference to the trial judge's application of the balancing test. [FN37](#) Moreover, unless the judge is way off the mark in his assessment of probative value, exclusion of evidence under the rule will not often be reversible error. [FN38](#) But appellate courts have already found cases where discretion was abused; [FN39](#) such cases are likely to recur so long as trial judges take seriously some extravagant statements about the extent of their powers under the rule. In addition, there will be cases in which trial courts have refused to exercise discretion [FN40](#) or ignored the balancing test. [FN41](#) In short, while the claims of error in applying Rule 403 will not often be found meritorious, at least for a while appellate courts cannot ignore such claims. [FN42](#)

In order to preserve the point for appellate review, the proponent must make an offer of proof when the judge excludes evidence under Rule 403. [FN43](#) Since the ruling is "one excluding evidence," the provisions of Rule 103(a) (2) are applicable in determining the adequacy of the offer. [FN44](#)

Research References

[Fed. R. Evid. 403](#)

§ § 5225-5230 are reserved for supplementary material.

Pocket Part

The Third Circuit has apparently held that in a diversity case the trial court must apply state law in exercising power of discretionary exclusion, a questionable result if [Rule 403](#) is properly understood. [FN45](#)

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FN1 Procedure and discretion

Davis, *Discretionary Justice*, 1969, pp. 116-120.

Pocket Part FN: FN1 Procedure and discretion

A party calling for discretionary exclusion has the burden of showing the factors that would justify exclusion. State v. Medina, 1985, 493 A.2d 623, 630, 201 N.J.Super. 565.

FN2 Exclusion without request

This follows from both the language and the policy of the rule. On language, compare Rules 614 and 615. On policy, consult § 5219 for discussion of the judge's unique interest in efficiency.

Pocket Part FN: FN2 Exclusion without request

Indeed, one case holds that the judge can use Rule 403 to exclude evidence even though the parties had stipulated it was admissible. Noel Shows, Inc. v. U.S., C.A.11th, 1983, 721 F.2d 327, 329.

FN3 No obligation

Most of the prior caselaw holds there is no obligation to exclude sua sponte. Dolan, Rule 403: The Prejudice Rule in Evidence, 1976, 49 So.Calif.L.Rev. 220, 260.

Defendant could not complain on appeal of failure of trial judge to exclude testimony of victim's widow who lost composure while testifying because his failure to object below deprived the judge of the opportunity to balance probative worth against the countervailing factors under Rule 403. U. S. v. Segna, C.A.9th, 1977, 555 F.2d 226, 229 n. 1.

Where defendant made no objection at trial, he cannot argue on appeal that the trial judge should have exercised discretion to exclude under Cal.Evid.Code § 352. People v. Maxey, 1972, 104 Cal.Rptr. 466, 28 Cal.App.3d 190.

In the absence of a proper attempt to invoke Cal.Evid.Code § 352, it was not an abuse of discretion for trial judge not to balance probative worth against countervailing factors. Helfend v. Southern California Rapid Transit District, 1970, 465 P.2d 61, 2 Cal.3d 1, 84 Cal.Rptr. 173.

Pocket Part FN: FN3 No obligation

But see, People v. Roscoe, 1985, 215 Cal.Rptr. 45, 50, 168 Cal.App.3d 1093 (trial court should have used Cal.Evid.Code § 352 to exclude evidence even though not invoked).

FN4 Objection distinguished

The distinction is lucidly drawn in Heafey, *California Trial Objections*, 1967, p. 219, which also contains a suggested form for invocation.

Pocket Part FN: FN4 Objection distinguished

It was not error to admit evidence of defendant's connection with organized crime family where no objection was made under Rule 403. U.S. v. Scarpa, C.A.2d, 1990, 913 F.2d 993, 1013.

FN5 Not under Rule 103

See vol. 21, § 5036, p. 176.

Pocket Part FN: FN5 Not under Rule 103

Rule 403 objections must comply with the requirements of Rule 103. Wilson v. Attaway, C.A.11th, 1985, 757 F.2d 1227, 1242.

Civil Rule 46 precludes assertion of error in failure to exclude evidence as prejudicial when no objection on that ground was made at trial. Brookhaven Landscape v. J. F. Barton Contracting, C.A.11th, 1982, 676 F.2d 516, 523.

One court has assumed, without discussion, that Rule 103(a)(1) is applicable to an invocation of the trial court's discretion under Rule 403. U.S. v. Vitale, C.A.5th, 1979, 596 F.2d 688, 689.

One court has held that the application of Rule 403 to the admissibility of evidence of other crimes is subject to Rule 103 and that if the objector does not phrase his objection in the language of Rule 403, the appellate court will assume that the requisite balancing took place. U.S. v. Long, C.A.3d, 1978, 574 F.2d 761, 766.

A claim of error in admission of allegedly prejudicial evidence would not be reviewed on appeal where the defendant did not make valid objection under Kan.Stats.Ann. § 60-404, State v. Antwine, 1980, 607 P.2d 519, 4 Kan.App.2d 389.

Where no objection was made at trial to admission of bloody tennis shoes, N.M.R.Ev. 103(a)(1) did not permit issue of error under Rule 403 to be raised on appeal. State v. Mills, App.1980, 606 P.2d 1111, 94 N.M. 17.

FN6 Must invoke

It is possible that in some cases the failure to exclude could be "plain error." See vol. 21, § 5043. For a discussion of other doctrines that were used at common law to surmount the failure to object, see Dolan, Rule 403: The Prejudice Rule in Evidence, 1976, 49 So.Calif.L.Rev. 220, 258-261.

Pocket Part FN: FN6 Must invoke

Claim of prejudice under Rule 403 was not preserved for appeal when no objection on this ground was made in trial court. U.S. v. Meeks, C.A.8th, 1988, 857 F.2d 1201, 1203.

Evidence that victim believed that defendant was connected to organized crime is admissible in a loansharking prosecution to show belief that he would use extortionate means of collecting. U.S. v. Gigante, C.A.2d 1984, 729 F.2d 78, 83.

Where defendant did not object that evidence was prejudicial, trial court did not err in not excluding it under Rule 403. U.S. v. Roper, C.A.4th, 1983, 716 F.2d 611, 615 n. 5.

Objection that evidence is irrelevant is not sufficient to preserve for appeal claim that evidence should have been excluded under Rule 403. Jay Edwards, Inc. v. New England Toyota Distributor, C.A.1st, 1983, 708 F.2d 814, 823.

Claim that evidence of threats should have been excluded under Rule 403 was waived when it was not raised at trial. U.S. v. Rosa, C.A.1st, 1983, 705 F.2d 1375, 1377.

Trial court could not exercise discretion under Rule 403 unless the rule was invoked by party relying on it. Collins v. Seaboard Coast Line Railroad Co., C.A.11th, 1982, 675 F.2d 1185, 1189 (doubtful if the court really means it, but this is what is said).

Defendant could not claim error on appeal in failure to exclude under Rule 403 where this ground was not asserted below. State v. Sweet, App.1984, 693 P.2d 944, 949, 143 Ariz. 289, affirmed and modified in part on other grounds, judgment remanded 1985, 693 P.2d 921, 143 Ariz. 266.

Where trial court was not requested to exercise discretion under Cal.Evid.Code § 352 by objection or otherwise, appellate court would only review issue of whether evidence was relevant. People v. Deletto, 1983, 195 Cal.Rptr. 233, 246 n. 17, 147 Cal.App.3d 458.

Where no objection on this ground was made, the issue of propriety of trial court's exercise of discretion on the admission of evidence of gang membership was totally moot. People v. Frausto, 1982, 185 Cal.Rptr. 314, 135 Cal.App.3d 129.

Failure to object that probative value of testimony was outweighed by its prejudicial effect is a waiver of objection under Cal.Evid.Code § 352. People v. Navarro, 1981, 179 Cal.Rptr. 118, 126 Cal.App.3d 785.

It is axiomatic that before a trial court can be found to have abused its discretion in failing to exclude otherwise admissible evidence under Cal.Evid.Code § 352, the record must affirmatively show that court was requested to exercise its discretion. People v. Quaintance, 1978, 150 Cal.Rptr. 281, 86 Cal.App.3d 594.

Where defendant objected to evidence at trial on hearsay grounds, he could not raise on appeal the claim that it should have been excluded as prejudicial. People v. Watson, Colo.App.1983, 668 P.2d 965.

Whether evidence of prior convictions should have been excluded under Rule 403 will not be considered on appeal when it was not raised in the trial court. State v. Keener, App.1982, 639 P.2d 582, 97 N.M. 295.

Claim that proof of subsequent possession of drug paraphernalia and money to impeach defendant should have been excluded under N.M.R.Ev. 403 was not properly before court for review where no request for exclusion on this ground was made in the trial court. State v. Cervantes, App.1979, 593 P.2d 478, 92 N.M. 643.

FN7 Timely

In order to be timely, the invocation must take place before the jury has heard the evidence that is prejudicial or before time has been unduly consumed. See generally vol. 21, § 5037.

See People v. Delgado, 1973, 108 Cal.Rptr. 399, 32 Cal.App.3d 242.

Pocket Part FN: FN7 Timely

Motion in limine was not enough to preserve objection under Rule 403 where trial court ruled that it might exclude the evidence if objector could show specific prejudice at trial and this was not done. Soden v. Freightliner Corp., C.A.5th, 1983, 714 F.2d 498, 509 n. 16.

Continuing objection is not proper method of obtaining trial judge evaluation of probative worth and prejudice; if the court does proper weighing on record when evidence is first offered it has no duty to reweigh sua sponte when other like evidence is offered. People v. Smith, 1984, 203 Cal.Rptr. 196, 231, 155 Cal.App.3d 1103.

Proper time to invoke Cal.Evid.Code § 352 with respect to gory photos was when they were first used during cross-examination of expert, even though not shown to jury at the time, rather than at the end of the trial when they were formally offered in evidence. People v. Gardner, 1979, 151 Cal.Rptr. 123, 87 Cal.App.3d 476.

FN8 Specific

It has been suggested that counsel should not only invoke the rule by number but should also indicate which of the countervailing factors are relevant. Heafey, California Trial Objections, 1967, § 33.4.

Pocket Part FN: FN8 Specific

Given the complexity of a decision to admit or exclude evidence under Rule 403, neither court nor counsel should rely on a continuing objection to preserve issue for appeal. U.S. v. Mangiameli, C.A.10th, 1982, 668 F.2d 1172, 1177.

It was not error to admit evidence of threats to informer by unidentified third persons where the defendant did not object on the ground of prejudice. U.S. v. Smith, C.A.10th, 1980, 629 F.2d 650, 652.

Objection to evidence on grounds of relevancy was not sufficient to preserve claim that the trial judge should have excluded it as prejudicial under Cal.Evid.Code § 352. People v. Reid, 1982, 184 Cal.Rptr. 186, 133 Cal.App.3d 354.

Where no objection was made at trial on the ground that photos of co-conspirators bruised hands were prejudicial as being inflammatory, the issue could not be raised on appeal. People v. Paul, 1978, 144 Cal.Rptr. 431, 436, 78 Cal.App.3d 32.

A mere claim of "prejudice" is not sufficient to invoke N.M.R.Ev. 403. State v. Hogervorst, App.1977, 566 P.2d 828, 90 N.M. 580.

FN9 Make clear

Jefferson, California Evidence Benchbook, 1972, p. 290.

Pocket Part FN: FN9 Make clear

Court assumes invocation of Rule 403 requires an "objection" even under Rule 404(b) where such balancing is a prerequisite to admissibility. U.S. v. Jenkins, C.A.10th, 1990, 904 F.2d 549, 555.

In civil rights action, objection to relevance of evidence of racial riots in another state did not suffice to invoke Rule 403. Wilson v. Attaway, C.A.11th, 1985, 757 F.2d 1227, 1242.

Even though trial judge did not clearly state grounds of decision or invoke Rule 403, the record reveals that blood alcohol test was excluded because court believed prejudice substantially outweighed probative worth. Ballou v. Henri Studios, Inc., C.A.5th, 1981, 656 F.2d 1147, 1153.

An objection on grounds of relevance is not sufficient to raise issue of prejudice under Rule 403; a party must specifically request that the trial court determine if probative worth is outweighed by prejudice before court is required to invoke the rule. Carter v. Hewitt, C.A.3d, 1980, 617 F.2d 961, 966 n. 4.

Objection to evidence of street value of marijuana found in defendant's possession on ground of relevance was not sufficient to put the trial judge to the duty of balancing probative worth against prejudice under Rule 403. U.S. v. Miller, C.A.1st, 1978, 589 F.2d 1117, 1136.

Where judge made reference to Cal.Evid.Code § 352, it was reasonable interpretation of objection that it was based on that section and was so understood by trial judge when he overruled it; hence issue could be raised on appeal. People v. Gibson, 1976, 128 Cal.Rptr. 302, 56 Cal.App.3d 119.

Objection to mugshots on grounds of relevance and cumulativeness was sufficient to preserve objection on ground of prejudice. State v. Gutierrez, App.1979, 599 P.2d 385, 93 N.M. 232.

Walinsky, Applying Military Rule of Evidence 403: A Defense Counsel's Guide, 1982, 14 The Advocate 2.

FN10 Cannot refuse to exercise

Bowers, Judicial Discretion of Trial Courts, 1931, § § 20-23; Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 1971, 22 Syracuse L.Rev. 635, 666.

Pocket Part FN: FN10 Cannot refuse to exercise

When evidence is challenged under Cal.Evid.Code § 352, failure to weight the probative value of the evidence against its prejudicial effect constitutes a prima facie abuse of discretion. People v. Martinez, 1980, 165 Cal.Rptr. 160, 106 Cal.App.3d 524.

FN11 Need not exclude

See § 5214.

FN12 Must balance

Jefferson, California Evidence Benchbook, 1972, p. 294.

Trial court does not have duty under Cal.Evid.Code § 352 to exclude prejudicial evidence sua sponte; but where objection is made the record must reflect that the trial court did in fact weigh the conflicting factors. People v. Holt, 1972, 104 Cal.Rptr. 572, 28 Cal.App.3d 343.

FN13 Preliminary facts

See People v. Hernandez, 1976, 133 Cal.Rptr. 745, 63 Cal.App.3d 393.

Pocket Part FN: FN13 Preliminary facts

The Comment to Prop.N.Y.Evid.Code § 403 states that preliminary determinations are for the judge under the New York provision adapted from F.R.Ev. 104(a).

FN14 Judge's determination

See vol. 21, § § 5053, 5055.

FN15 Need to see other evidence

Since it is in the interests of the opponent to exaggerate the amount of time and the degree of confusion that will be engendered by the admission of the evidence, see § 5216, the court should be wary of generalized assertions of an intent to mount a complicated rebuttal and insist on some concrete showing that such evidence is in fact available.

FN16 Opportunity to be heard

In some cases the court will actually wish to hear the evidence. See, e. g., People v. Hernandez, 1976, 133 Cal.Rptr. 745, 63 Cal.App.3d 393, where in ruling on whether or not defense counsel could inquire into an injection received by a rape victim prior to the crime, the trial court heard undisputed rebuttal evidence showing that the injection was not narcotic and could not have affected her perception and credibility as a witness.

FN17 Out of earshot

See Jefferson, California Evidence Benchbook, 1972, p. 291; Dolan, Rule 403: The Prejudice Rule in Evidence, 1976, 49 So.Calif.L.Rev. 220, 256.

"The trial judge ordered that * * * testimony on insurance be given out of the presence of the jury. We approve this procedure which provides an accurate record for review rather than speculation." Posttape Associates v. Eastman Kodak Co., C.A.3d, 1976, 537 F.2d 751, 758 n. 8.

Pocket Part FN: FN17 Out of earshot

In considering the introduction of "mug shots" the preferable approach is to require a proffer of the evidence and rule on its admissibility out of the hearing of the jury. U.S. v. Fosher, C.A.1st, 1978, 568 F.2d 207, 216.

FN18 Pretrial hearing desirable

See vol. 21, § 5056.

FN19 Motion in limine

See vol. 21, § 5037.

Pocket Part FN: FN19 Motion in limine

There is general agreement that pretrial hearings are extremely useful where important and complex admissibility issues are presented that must be heard out of the presence of the jury; according lesser deference to such rulings would discourage the use of the motion in limine. U.S. v. Layton, C.A.9th, 1985, 767 F.2d 549, 554.

In action against manufacturer of aerosol product for wrongful death of youth who inhaled the substance, trial court should have granted a motion in limine to exclude evidence that the youth had once smoked marijuana. Harless v. Boyle-Midway, C.A.5th, 1979, 594 F.2d 1051, 1058.

For an opinion that is less than enthusiastic about making Rule 403 rulings on a pretrial motion, see Hackett v. Alco Standard Corp., 1984, 691 P.2d 142, 71 Or.App. 24.

FN20 Predecessor provisions

See § 5211.

Pocket Part FN: FN20 Predecessor provisions

In excluding evidence under Cal.Evid.Code § 352 the court must make a record reflecting its exercise of discretion granted by that section; it is not enough to label the evidence as "prejudicial." Hilliard v. A.H. Robins Co., 1983, 196 Cal.Rptr. 117, 134 n. 23, 148 Cal.App.3d 374.

FN21 Writers urge reasons

Weinstein & Berger, Basic Rules of Relevancy in the Proposed Federal Rules of Evidence, 1969, 4 Ga.L.Rev. 43, 86; Note, Determining Relevancy: Article IV of the Federal Rules of Evidence, 1975, 36 La.L.Rev. 70, 76; Comment, Relevancy and Its Limits in the Proposed Federal Rules of Evidence, 1969, 16 Wayne L.Rev. 167, 171. A similar position has been taken by the leading California evidence manual. Jefferson, California Evidence Benchbook, 1972, p. 289. For a general statement of the desirability of giving reasons for exercise of discretionary power, see Rosenberg, Judicial Discretion of the Trial Court, Viewed From Above, 1971, 22 Syracuse L.Rev. 635, 665.

Pocket Part FN: FN21 Writers urge reasons

Where appellate court is satisfied that the trial court did not abuse discretion in admitting the evidence, failure to articulate the balancing test of Rule 403 is not grounds for reversal. U.S. v. Echeverry, C.A.9th, 1985, 759 F.2d 1451, 1457.

While written findings of required balancing under Rule 403 are the better course, no reversal for failure to do so is warranted in absence of a request for such findings or when it is clear from record the balancing was done properly. U.S. v. Lavelle, C.A.D.C.1985, 751 F.2d 1266, 1279.

Balancing required by Rule 403 should be performed in the first instance by the trial judge and the record should show the weight given the various relevant factors. U.S. v. Lebovitz, C.A.3d, 1982, 669 F.2d 894, 901.

While it would have been preferable for the trial judge to have set down in writing his reasons for concluding that probative value of other crimes evidence outweighed prejudice, where the balance so clearly favors admissibility, the appellate court would not presume that the evidence was admitted for the wrong reasons. U.S. v. DeJohn, C.A.7th, 1981, 638 F.2d 1048, 1053.

The trial judge has the responsibility for making sure that the record reflects the balancing of the considerations articulated in Rule 403. U.S. v. Foskey, C.A.1980, 636 F.2d 517, 525 n. 7, 204 U.S.App.D.C. 245.

In considering the probative worth of evidence of gory photos sought to be excluded under Rule 403, judge is not limited to the grounds of relevance advanced by the parties; hence, it was not error in explaining his ruling to rely on a ground not advanced by the prosecutor. U.S. v. Garcia, C.A.7th, 1980, 625 F.2d 162, 167.

Appellate review of judge's ruling would be facilitated by written findings on the balancing of prejudice and probative worth under Rule 403, but it was not an abuse of discretion to admit evidence without such findings. U.S. v. Watson, C.A.7th, 1980, 623 F.2d 1198, 1203.

Practice of district court of making an explicit finding that probative worth of prior crime outweighed prejudice to the accused is to be encouraged. U.S. v. Berkwitz, C.A.7th, 1980, 619 F.2d 649, 655.

Although trial court did not state his reasons in balancing probative worth against prejudice under Rule 403, the appellate court would not presume he relied on the wrong reasons when the correct ones were apparent. U.S. v. Price, C.A.7th, 1979, 617 F.2d 455, 460.

One court has said that the trial judge should be encouraged to enter written findings as to the balance between prejudice and probative worth. U.S. v. Dolliole, C.A.7th, 1979, 597 F.2d 102, 106.

Although a clear statement of the balancing of prejudice and probative worth is desirable, appellate court would not require a mechanical recitation on the record as a prerequisite to exercise of powers under Rule 403. U.S. v. Sangrey, C.A.9th, 1978, 586 F.2d 1312, 1315.

One court has held that the trial judge is not required to place on the record his analysis of the balancing required under Rule 403 unless the person who wishes to raise the point on appeal has specifically invoked Rule 403; in all other cases it will be assumed that the appropriate balancing took place. U.S. v. Long, C.A.3d, 1978, 574 F.2d 761, 766.

Decision requiring that balancing of Rule 403 factors be done on the record was not retroactive; hence, it was not error for court to fail to do so. State v. Kinard, 1985, 696 P.2d 603, 605, 39 Wash.App. 871.

Green, *The Military Rules of Evidence and The Military Judge*, May 1980, *The Military Lawyer* 47, 51-52.

A.B.A. Section of Litigation, *Emerging Problems Under The Federal Rules of Evidence*, Joseph ed. 1983, pp. 59-60.

FN22 Berated for refusing

U. S. v. Dwyer, C.A.2d, 1976, 539 F.2d 924, 928.

Pocket Part FN: FN22 Berated for refusing

While court would not require an on-the-record statement of reasons for evidentiary rulings, it notes that such statement is one indicator of thoughtful exercise of discretion. U.S. v. St. Michael's Credit Union, C.A.1st, 1989, 880 F.2d 579, 601.

In some circumstances, failure to exercise discretion is an abuse of discretion; hence, it would be a good idea for courts to make exercise of discretion apparent from the record. Hernandez v. Cepeda, C.A.7th, 1988, 860 F.2d 260, 265.

It has now been held that trial judge has a duty to make an on-the-record balancing of probative worth and prejudice upon request when evidence of other crimes is offered under Rule 404(b). U.S. v. Robinson, C.A.5th, 1983, 700 F.2d 205, 213.

It is important that the exercise of discretion be accompanied by the trial court's articulation of the factors considered and the weight accorded them. U.S. v. Criden, C.A.3d, 1981, 648 F.2d 814, 819.

It was error for trial judge to fail to discharge statutory duty under Cal.Evid.Code § 352 to weigh for the record the probative value of evidence against its probative worth. People v. Wright, 1985, 217 Cal.Rptr. 212, 216, 39 Cal.3d 576, 582, 703 P.2d 1106, 1109.

Where it was clear from record that trial court balanced probative worth and prejudice before exercising discretion, fact that it did not recite the magic words that its decision was based on Cal.Evid.Code § 352 nor intone the probative value of the evidence was of no import. People v. Boyd, 1985, 212 Cal.Rptr. 873, 878, 167 Cal.App.3d 36.

Decision holding that record must show that the trial court balanced factors under Cal.Evid.Code § 352 does not require that the balancing be done on the record; it is enough if the record shows trial judge heard and considered arguments on issue. People v. Stone, 1983, 188 Cal.Rptr. 493, 498 n. 2, 139 Cal.App.3d 216, 224 n. 2.

Trial court erred in using Utah R.Ev. 45 to exclude evidence of criminal record of a prosecution without a finding on the record on the existence of factors that would justify such exclusion. State v. Patterson, Utah 1982, 656 P.2d 438.

Where trial court fails to set forth its reasoning in exercising discretion in Rule 403, the appellate court should conduct an independent evaluation of record to determine whether it supports the decision rather than sending case back to trial court for a hearing on this issue. State v. Pharr, 1983, 340 N.W.2d 498, 115 Wis.2d 334.

FN23 Burdensome

Cf. People v. Holt, 1972, 104 Cal.Rptr. 572, 28 Cal.App.3d 343 (stating Cal.Evid.Code § 352 does not cast "onerous burden" of findings on trial court; sufficient if record shows judge did balance factors).

FN24 Required balancing

See § § 5214, 5221.

FN25 Hipshots deterred

This is probably the reason that the writers suggest the requirement; most of them usually state the proposal

adjacent to a plea for a sparing use of Rule 403. See, e. g., Weinstein & Berger, Basic Rules of Relevancy in the Proposed Federal Rules of Evidence, 1969, 4 Ga.L.Rev. 43, 86.

FN26 No use of precedents

A.L.I., Model Code of Evidence, Rule 303, Comment, 1942, p. 182.

Pocket Part FN: FN26 No use of precedents

For a case which overlooks this, see State v. Henry, 1984, 676 P.2d 521, 524, 36 Wash.App. 530 (criticizing argument that "cites no authority supporting contention" that evidence should have been excluded under Rule 403).

FN27 Meaning of affirmance

Field & Murray, Maine Evidence, 1976, p. 60.

Pocket Part FN: FN27 Meaning of affirmance

Appellate affirmance of exclusion of certain evidence under Rule 403 in one case does not require reversal in subsequent case where the trial court admits the same sort of evidence over objection under Rule 403. Harvey By Harvey v. General Motors Corp., C.A.10th, 1989, 873 F.2d 1343, 1356.

FN28 State rulings

Wellborn, The Federal Rules of Evidence and the Application of State Law in the Federal Courts, 1977, 55 Texas L.Rev. 371, 414.

But see Brown v. Royalty, C.A.8th, 1976, 535 F.2d 1024, 1028 (in exercising discretion under Rule 403 trial judge can consider fact that state law would exclude).

FN29 Jury language

Rule 403 refers to "misleading the jury."

Pocket Part FN: FN29 Jury language

The view that Rule 403 does not apply to non-jury trials is embraced in A.B.A. Section of Litigation, Emerging Problems Under The Federal Rules of Evidence, Joseph ed. 1983, pp. 61-63.

FN30 Judge-trying cases

Dolan, Rule 403: The Prejudice Rule in Evidence, 1976, 49 So.Calif.L.Rev. 280-283.

Pocket Part FN: FN30 Judge-trying cases

In trial of employment discrimination case without jury, judge had the right to refuse cumulative evidence. Geisler v. Folsom, C.A.6th, 1984, 735 F.2d 991, 997.

FN31 Cannot be isolated

Of course, in some courts it may be possible to have the issue decided on a motion in limine by a judge other than the trial judge. See vol. 21, § 5037.

FN32 Judge must wade

See, e. g., U. S. v. United Shoe Machinery Corp., D.C.Mass. 1950, 93 F.Supp. 190, 191-192.

FN33 Foolish to insist

There may be tactical reasons, however, for offering the evidence. The judge's remarks when ruling on an objection that the evidence is cumulative may provide some clue as to whether or not he is convinced by the evidence already admitted. Tactical manipulation of the rules is generally beyond the scope of this Treatise.

Pocket Part FN: FN33 Foolish to insist

For the problem that the impatient judge may pose for counsel, see Geisler v. Folsom, C.A.6th 1984, 735 F.2d 991, 997.

FN34 Unreviewable

E. g., Weinstein & Berger, Basic Rules of Relevancy in the Proposed Federal Rules of Evidence, 1969, 4 Ga.L.Rev. 43, 79.

Pocket Part FN: FN34 Unreviewable

It is perhaps simply coincidence that some of the most emphatic statements of the limits on the trial judge's discretion are found in cases in which Rule 403 has been used to exclude prosecution evidence in a criminal case. See, e.g., U.S. v. Jamil, C.A.2d, 1983, 707 F.2d 638, 642.

Although review of discretionary rulings is couched in terms of single standard of "abuse of discretion", in fact the scope of review varies with reasons for conferring discretion in the first place. U.S. v. Criden, C.A.3d, 1981, 648 F.2d 814, 817.

The proper and fair limitation on cumulative and prejudicial evidence is best evaluated by the trial court which has a first-hand opportunity to consider these matters. Rush v. State, Del.Supr. 1985, 491 A.2d 439, 445.

It will be interesting to see if Ohio R.Ev. 403, which makes exclusion of evidence mandatory when the first three factors in the rule outweigh probative worth, will have any impact on the deference appellate courts pay to the trial court's exercise of discretion. Giannelli, Ohio Evidence Manual, 1982, § 403.04.

FN35 Overstatement

Indeed, in one case there was interlocutory review. See U. S. v. Amrep Corp., C.A.2d, 1976, 545 F.2d 797.

Pocket Part FN: FN35 Overstatement

Trial judge's balancing under Rule 403 was entitled to less deference when it was made before trial began when nature of evidence and need for it were less clear. Estes v. Dick Smith Ford, Inc., C.A.8th, 1988, 856 F.2d 1097, 1103.

Because trial judge's discretion depends upon its superior ability to view the witnesses and assess the impact of the evidence, the appellate court is freer to reverse under Rule 403 when the issue arises on prosecutorial appeal from a ruling in limine. U.S. v. King, C.A.11th, 1983, 713 F.2d 627, 631.

While discretion of trial judge to exclude evidence under Cal.Evid.Code § 352 is broad, it is not unlimited. People v. Redmond, 1980, 169 Cal.Rptr. 253, 111 Cal.App.3d 742.

For a good brief discussion of appellate review, see Giannelli, Ohio Evidence Manual, 1982, § 403.07.

FN36 Secondary discretion

See § 5212.

Pocket Part FN: FN36 Secondary discretion

U.S. v. Barry, C.A.8th, 1998, 133 F.3d 580, 582; U.S. v. Call, C.A.10th, 1997, 129 F.3d 1402, 1405 (will affirm unless a "definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice").

Judicial self-restraint is desirable when reviewing balancing under Rule 403 because the trial judge is in a better position to do this than the appellate court. Lesko v. Owens, C.A.3d, 1989, 881 F.2d 44, 52.

In reviewing decision of trial court under Rule 403, judicial self-restraint is desirable. Estate of Larkins v. Farrell Lines, Inc., C.A.4th, 1986, 806 F.2d 510, 515 (admitting evidence that deceased sailor was alcoholic).

In order to be abuse of discretion under Rule 403, district court's exclusion of evidence offered by stock brokerage firm need not be outlandish or malicious; it is enough that the Court of Appeals be firmly convinced that a mistake has been made. Hill v. Bache Halsey Stuart Shields Inc., C.A.10th, 1986, 790 F.2d 817, 826.

Ability to assess impact of evidence is not the only reason for court discretion under Rule 403; hence, appellate court has no greater latitude to overturn discretion in cases of pretrial ruling on admissibility of tape recording. U.S. v. Layton, C.A.9th, 1985, 767 F.2d 549, 554.

It has been argued that where a rule confers a good deal of primary discretion on the trial judge, the amount of secondary discretion should be diminished. Friendly, Indiscretion About Discretion, 1982, 31 Emory L.J. 747, 755.

Trial court's ruling admitting evidence of a secret Swiss bank account over objection under Rule 403 should be affirmed unless it was arbitrary or irrational. U.S. v. Friedland, C.A.3d, 1981, 660 F.2d 919, 929.

Though the balancing process in Rule 403 is entrusted in the first instance to the trial judge and his discretion should not be disturbed lightly, in case where the prejudicial evidence is a videotape which appellate court has seen

with its own eyes, it can judge the resulting prejudice as well as the trial judge. U.S. v. Schiff, C.A.2d, 1979, 612 F.2d 73, 80.

Trial judges are better able to sense the dynamics of trial than appellate court and broad discretion must be accorded them in balancing probative worth against prejudice. Longenecker v. General Motors Corp., C.A.9th, 1979, 594 F.2d 1283, 1286.

A trial court ruling admitting evidence under Cal.Evid.Code § 352 may only be reviewed to determine if court abused discretion. People v. Loud, 1985, 212 Cal.Rptr. 20, 21, 165 Cal.App.3d 672.

There must be a clear abuse of discretion before an appellate court will disturb a trial court's ruling under Cal.Evid.Code § 352. People v. Demery, 1980, 163 Cal.Rptr. 814, 104 Cal.App.3d 548.

FN37 Deference to discretion

See, e. g., U. S. v. Cowsen, C.A.7th, 1976, 530 F.2d 734, 738.

In reviewing the exercise by a trial court of its discretion under Cal.Evid.Code § 352, an appellate court is not authorized to substitute its judgment for that of the trial judge; relief is available only where the alleged abuse of discretion clearly constitutes a miscarriage of justice. Cain v. State Farm Mut. Automobile Ins. Co. 1975, 121 Cal.Rptr. 200, 47 Cal.App.3d 783.

Pocket Part FN: FN37 Deference to discretion

U.S. v. Devin, C.A.1st, 1990, 918 F.2d 280, 287 (trial judge will be reversed "only rarely--and in extraordinarily compelling circumstances"); U.S. v. Zannino, C.A.1st, 1990, 895 F.2d 1, 17 (same); Bordanaro v. McLeod, C.A.1st, 1989, 871 F.2d 1151, 1166 (same); Freeman v. Package Machinery Co., C.A.1st, 1988, 865 F.2d 1331, 1340 (same); Finch v. Monumental Life Ins. Co., C.A.6th, 1987, 820 F.2d 1426, 1431 (appellate court gives probative worth maximum effect and prejudice minimal effect); Haney v. Mizell Memorial Hospital, C.A.11th, 1984, 744 F.2d 1467, 1476 (only reversed for clear abuse of discretion); U.S. v. Holloway, C.A.6th, 1984, 740 F.2d 1373, 1378 (mini-max review); U.S. v. Heyward, C.A.4th, 1984, 729 F.2d 297, 301 n. 2 (overturned only "under most extraordinary circumstances"); U.S. v. Ranney, C.A.1st, 1983, 719 F.2d 1183, 1188 (on grounds of institutional competence); U.S. v. Neal, C.A.10th, 1983, 718 F.2d 1505, 1510 (broad discretion; abuse review); Bohack Corp. v. Iowa Beef Processors, Inc., C.A.2d, 1983, 715 F.2d 703, 709 (institutional competence); U.S. v. Sepulveda, C.A.5th, 1983, 710 F.2d 188, 189 (wide discretion); U.S. v. Crenshaw, C.A.9th, 1983, 698 F.2d 1060, 1063 (given great deference); U.S. v. Pomerantz, C.A.11th, 1982, 683 F.2d 352 (clear abuse of discretion); U.S. v. Adcock, C.A.5th, 1981, 651 F.2d 338, 343 (same); U.S. v. National Homes Construction Corp., C.A.8th, 1978, 581 F.2d 157, 162 (considerable discretion); U.S. v. Larios, C.A.9th, 1981, 640 F.2d 938, 941 (great deference); U.S. v. Alessandrello, C.A.3d, 1980, 637 F.2d 131, 146 (binding unless arbitrary or irrational); U.S. v. Authement, C.A.5th, 1979, 607 F.2d 1129, 1131 (abuse of discretion); U.S. v. Blevinal, C.A.5th, 1979, 607 F.2d 1124, 1128 (same); U.S. v. Giese, C.A.9th, 1979, 597 F.2d 1170, 1193 (arbitrary and irrational review); U.S. v. McPartlin, C.A.7th, 1979, 595 F.2d 1321, 1345 (institutional competence); U.S. v. Miroyan, C.A.9th, 1978, 577 F.2d 489, 495 (abuse of discretion); U.S. v. Weir, C.A.8th, 1978, 575 F.2d 668, 670 (great deference not required where trial judge waffled); U.S. v. McDaniel, C.A.5th, 1978, 574 F.2d 1224, 1227 (abuse of discretion); U.S. v. Hall, C.A.8th, 1977, 565 F.2d 1052, 1055 (should normally defer); U.S. v. Kilbourne, C.A.4th, 1977, 559 F.2d 1263 (abuse of discretion).

The notion that the appellate court must give evidence admitted under Rule 403 its maximum probative value and its minimum probative value is blamed on another treatise in U.S. v. Moore, C.A.6th, 1990, 917 F.2d 215, 233.

In reversing trial judge's determination that evidence of flight should be excluded under Rule 403, appellate court said not a word of deference to trial court discretion. U.S. v. Martinez, C.A.10th, 1982, 681 F.2d 1248.

For a pre-Rules expression of this deference, see U.S. v. Jenkins, C.A.6th, 1975, 525 F.2d 819, 824.

Reversal for discretionary exclusion of evidence is not warranted for reasonable differences on balance of prejudice and probative worth but only where there has been a manifest miscarriage of justice. People v. Pena, 1984, 198 Cal.Rptr. 819, 151 Cal.App.3d 462.

Balance struck by trial court under Mich.R.Ev. 403 will not be disturbed on appeal unless reviewing court is persuaded there has been an abuse of discretion. People v. Goree, 1984, 349 N.W.2d 220, 224, 132 Mich.App. 693.

FN38 Not reversible error

See vol. 21, § 5035.

Pocket Part FN: FN38 Not reversible error

It was reversible error to exclude evidence of decedent's intoxication under Rule 403 where this left the jury with only one possible cause for accident; defect in vehicle. Swajian v. General Motors Corp., C.A.1st, 1990, 916 F.2d 31, 35.

Court did not abuse discretion in admitting evidence that employer had relied on local union officials in violating contract where court directed verdict on issue on which the evidence was admitted. May v. Interstate Moving & Storage Co., C.A.10th, 1984, 739 F.2d 521, 524.

Courts are under less pressure to affirm the trial judge when the issue arises on an interlocutory appeal by the prosecution. See, e.g., U.S. v. Jamil, C.A.2d, 1983, 707 F.2d 638.

Even if photograph of rifle was prejudicial so that it was an abuse of discretion not to exclude it, the error was harmless. U.S. v. Thetford, C.A.5th, 1982, 676 F.2d 170, 183.

In reviewing a decision under Rule 403, appellate court must look at evidence in a light most favorable to the proponent, maximizing its prejudicial effect. U.S. v. Brady, C.A.6th, 1979, 595 F.2d 359, 361.

One study found that the reversal rate favored criminal defendants in 9% of the cases, civil litigants obtained reversals in 38% of the cases, and prosecutors in 60% of the few cases in which they were able to raise the issue. Tanford, A Political-Choice Approach to Limiting Prejudicial Evidence, 1989, 64 Ind.L.J. 831, 865 n. 228.

FN39 Abuse of discretion

In one case the trial judge was reversed without any mention of abuse of discretion, the appellate court stating only that it disagreed with the trial judge's balancing of prejudice and probative worth. Posttape Associates v. Eastman Kodak Co., C.A.3d, 1976, 537 F.2d 751, 757-758. In another case discretion is mentioned only by the dissenting judge. U. S. v. Amrep, C.A.2d, 1976, 545 F.2d 797, 801.

In a bank robbery case in which government's case rested primarily on the testimony of an accomplice, it was serious and reversible error for the trial judge not to exclude under Rule 403 evidence that the defendant had a pistol similar to that used in the robbery when he was arrested ten weeks after the crime. U. S. v. Robinson, C.A.2d, 1976, 544 F.2d 611, 615-616.

It was an abuse of discretion under Rule 403 to exclude the only defense expert witness who could establish the insanity of defendant. U. S. v. Dwyer, C.A.2d, 1976, 539 F.2d 924, 928.

In prosecution of corporation for safety violations causing the death of 17 persons, it was an abuse of discretion to exclude evidence of gas chromatograph tests offered to support defense theory of cause of blast. People v. Lockheed Shipbuilding & Const. Co., 1975, 123 Cal.Rptr. 778, 50 Cal.App.3d Supp. 15.

Pocket Part FN: FN39 Abuse of discretion

It was an abuse of discretion under Rule 403 to allow cross-examination that appealed to religious bigotry against Jehovah's Witnesses. Munn v. Algee, C.A.5th, 1991, 924 F.2d 568, 572. And, one might add, an affront to common decency.

It was an abuse of discretion to exclude testimony of eyewitness on grounds that it had been rendered unreliable by hypnosis and suggestive police questioning. U.S. v. Gatto, C.A.3d, 1991, 924 F.2d 491, 501.

Trial court should have admitted pleadings in another action which contained inconsistent allegations of fault with those in the instant case as an admission against interest; it was abuse of discretion to exclude when Rule 403 would require admission. Dugan v. EMS Helicopters, C.A.10th, 1990, 915 F.2d 1428, 1435.

Though only extraordinary circumstances justify finding abuse of discretion under Rule 403, such was the case where in prosecution for carrying gun onto airline judge allowed prosecution to show that defendant fit the F.B.I.'s so-called "drug courier profile." U.S. v. Simpson, C.A.4th, 1990, 910 F.2d 154, 157.

It was abuse of discretion not to exclude under Rule 403 evidence that defendant in gun possession was suspected of molestation, torture, and murder of child. U.S. v. Bland, C.A.9th, 1990, 908 F.2d 471, 473.

While it is a rare case in which a Rule 403 ruling should be reversed, review in criminal cases is necessarily heightened to zealously guard against emasculating of important safeguards for criminal defendants. U.S. v. Hays, C.A.5th, 1989, 872 F.2d 582, 587. It should, however, be noted that this stirring rhetoric occurs in a prosecution of savings and loan executives, not alien smugglers or dope peddlers.

It was an abuse of discretion to exclude evidence of cost of monitoring for cancer on ground that "mere mention of that dread disease" would prejudice defendant. Herber v. Johns-Manville Corp., C.A.3d, 1986, 785 F.2d 79, 83.

In civil rights action against police officers who allegedly brutalized relatives of killer, evidence of gruesome details of crime they were investigating should have been excluded under Rule 403 even though relevant to show

dangers officers thought they faced. Llaguno v. Minge, C.A.7th, 1985, 763 F.2d 1560, 1569.

It was an abuse of discretion for trial judge not to exclude evidence that showed employer in F.E.L.A. case had fired employee for filing suit. Adams v. Providence & Worcester Co., C.A.1st, 1983, 721 F.2d 870.

In drug trial already filled with prosecutorial efforts to engender racial resentments, it was an abuse of discretion for trial judge not to exclude evidence of racist shouting match between defendant and police officer that resulted from arrest on wholly unrelated state charge. U.S. v. Brown, C.A.9th, 1983, 720 F.2d 1059, 1069.

In antitrust action by chiropractors against AMA it was an abuse of discretion to admit evidence to prove that plaintiffs were greedy quacks. Wilk v. American Medical Association, C.A.7th, 1983, 719 F.2d 207, 232.

It was an abuse of discretion for trial court to admit vague testimony portraying defendant charged with receiving stolen property as the mastermind of a burglary ring. U.S. v. Melia, C.A.4th, 1982, 691 F.2d 672, 677.

Trial judge abused discretion in excluding prosecution evidence under Rule 403 to show defendant was a danger to others in bank robbery; i.e., a list in someone else's handwriting of guns and ammunition similar to that used in crime. U.S. v. Booth, C.A.9th, 1981, 669 F.2d 1231, 1239.

Appellate court holds as a matter of law that probative worth of blood alcohol test is not substantially outweighed by prejudice when offered to show intoxication of driver in a wrongful death action. Ballou v. Henri Studios, Inc., C.A.5th, 1981, 656 F.2d 1147, 1155.

It is an abuse of discretion for the judge to exclude evidence that is critical to the defense of insanity in a criminal trial. U.S. v. Ives, C.A.9th, 1979, 609 F.2d 930, 933.

Permitting one party to use evidence of absence of racial prejudice in housing discrimination suit, while excluding similar contrary evidence under Rule 403, despite suggestion at pretrial conference that such evidence would be admitted, was an abuse of discretion. Miller v. Poretsky, C.A.1978, 595 F.2d 780, 785, 193 U.S.App.D.C. 395.

Where highly inflammatory evidence had no probative value whatsoever, trial judge had no discretion under Rule 403; the evidence should be excluded. U.S. v. Lord, C.A.2d, 1977, 565 F.2d 831, 837.

In personal injury case it was an abuse of discretion not to exclude evidence that the plaintiff had received payment from collateral sources as probative worth on any exaggeration of plaintiff's injuries was outweighed by prejudicial effect. Evans v. Wilson, 1983, 650 S.W.2d 569, 279 Ark. 224.

In murder prosecution, trial court abused its discretion under Cal.Evid.Code § 352 by permitting extensive questioning on the contents of letters in which the victim claimed defendant had previously threatened her with violence. People v. Coleman, 1985, 211 Cal.Rptr. 102, 117, 38 Cal.3d 69, 92, 695 P.2d 189, 204.

It was abuse of discretion under Cal.Evid.Code § 352 to exclude evidence that manufacturer of Dalkon shield kept product on the market even though it was causing septic abortions and death. Hilliard v. A.H. Robins Co., 1983, 196 Cal.Rptr. 117, 134, 148 Cal.App.3d 374.

In prosecution for battery on police officer, it was an abuse of discretion to exclude the defendant's evidence of the officer's prior history of abusing arrestees. People v. Castain, 1981, 175 Cal.Rptr. 651, 122 Cal.App.3d 138.

Exclusion of non-inflammatory evidence needed by the prosecution to prove a charged prior crime would be an abuse of discretion under Cal.Evid.Code § 352. People v. Owens, 1980, 169 Cal.Rptr. 359, 112 Cal.App.3d 441.

Where probative value of evidence was great and prejudicial effect was negligible, it would be an abuse of discretion to exclude it under Cal.Evid.Code § 352. People v. Martinez, 1980, 165 Cal.Rptr. 160, 106 Cal.App.3d 524.

In obscenity prosecution, it was abuse of discretion under Cal.Evid.Code § 352 to exclude evidence that films depicting similar sexual activities had been seen by millions of persons and grossed millions of dollars when such evidence was offered to prove contemporary community standards. People v. Heller, 1979, 157 Cal.Rptr. 830, 96 Cal.App.3d Supp. 1.

Trial court abused discretion in excluding evidence of the results of a Human Leucocyte Antigen test which showed a 98.3% probability that defendant was the father of child whose paternity was disputed. Cramer v. Morrison, 1978, 153 Cal.Rptr. 865, 88 Cal.App.3d 873.

It was an abuse of discretion under Cal.Evid.Code § 352 to exclude evidence that after injury to plaintiff, defendant had added warning to its label; probative worth of this as proof that champagne corks are a hazard that is not obvious and created a risk of harm outweighed any prejudice to defendant. Burke v. Almaden Vineyards, Inc., 1978, 150 Cal.Rptr. 419, 86 Cal.App.3d 768.

The discretion granted the trial court by Cal.Evid.Code § 352 is not absolute and must be exercised reasonably in accord with the facts before the court. Kessler v. Gray, 1978, 143 Cal.Rptr. 496, 499, 77 Cal.App.3d 284.

Trial court's discretion to exclude probative evidence under Cal.Evid.Code § 352 is not unlimited; it was error to exclude evidence of destruction of records on grounds that negligence had been admitted where spoliation was also relevant to issue of causation. Thor v. Boska, 1974, 113 Cal.Rptr. 296, 38 Cal.App.3d 558.

It was an abuse of discretion for trial court to exclude evidence that would show that the very internal control systems that defendant claimed were insufficient it had previously found not worthy of adverse comment. Lincoln Grain, Inc. v. Coopers & Lybrand, 1984, 345 N.W.2d 300, 216 Neb. 433.

In case that was a swearing contest between the defendant and the arresting officer, trial court abused discretion in refusing to permit cross-examination concerning officer's awareness of departmental discipline for those who abuse arrestees. State v. Hubbard, 1984, 688 P.2d 1311, 1320, 297 Or. 789.

Where defendant's identity as the killer of his stepmother was proved by two confessions and palmprints and footprints left at the scene of the crime, it was an abuse of discretion to admit two pubic hairs found on victim that could have come from defendant as proof of the identity of the killer. State v. Cameron, 1983, 674 P.2d 650, 100 Wash.2d 520.

Trial court abused discretion in drunk driving prosecution in excluding under Rule 403 a chart prepared by state agency showing expected blood alcohol ratio for person of specified weight consuming particular number of drinks. State v. Hinz, App.1984, 360 N.W.2d 56, 121 Wis.2d 282.

FN40 Refusal to exercise discretion

Bowers, Judicial Discretion of Trial Courts, 1931, § § 20-23.

Pocket Part FN: FN40 Refusal to exercise discretion

It was error for trial judge to suppose that he had no discretion in excluding felony convictions because of Proposition 8. People v. Williams, 1985, 215 Cal.Rptr. 612, 616, 169 Cal.App.3d 951.

For court to receive deference to discretionary ruling, record must show that trial court did exercise discretion; appellate court would reverse where court admitted statements of defendant relating deviant sexual fantasies solely because of failure to make pretrial motion to suppress. State v. Brown, 1984, 690 P.2d 1117, 70 Or.App. 707.

Usual deference to discretion is not required when the court did not purport to exercise its discretion but based decision on local custom. State v. Johnson, App.1984, 348 N.W.2d 196, 200, 118 Wis.2d 472.

FN41 Balancing ignored

It was an abuse of discretion for trial court to admit evidence of other insurance to prove malingering without balancing probative worth against possible prejudice. Hrnjak v. Graymar, Inc., 1971, 484 P.2d 599, 4 Cal.3d 725, 94 Cal.Rptr. 623.

Pocket Part FN: FN41 Balancing ignored

It was error as a matter of law for trial court to exclude evidence under Rule 403 without balancing probative worth against prejudice. Swajian v. General Motors Corp., C.A.1st, 1990, 916 F.2d 31, 34.

It is not enough for court to intone that evidence would be confusing; record must show a clear statement of the reasons for supposing that evidence would confuse and that such confusion outweighed probative value. U.S. v. Collorafi, C.A.2d, 1989, 876 F.2d 303, 306.

Trial judge has no discretion to exclude evidence under F.R.Ev. 403 where prejudice that accrues to opponent of the evidence arises from the probative worth of the evidence and is not, therefore, unfair prejudice. Ramos v. Liberty Mutual Ins. Co., C.A.5th, 1980, 615 F.2d 334, 340, decision clarified, rehearing denied 620 F.2d 464.

Where the trial judge did not balance factors under Rule 403, it was inappropriate for appellate court to attempt to do so; case would be remanded for determination under Rule 403 by the court. Contemporary Mission, Inc. v. Famous Music Corp., C.A.2d, 1977, 557 F.2d 918, 928.

Where in objecting to admission of guilty plea of an accomplice, counsel called court's attention to Cal.Evid.Code § 352, it was error for the court to admit the evidence without any indication in the record that it had weighed probative worth against prejudice. People v. Leonard, 1983, 193 Cal.Rptr. 171, 34 Cal.3d 183, 666 P.2d 28.

Reasonable exercise of trial court discretion under Cal.Evid.Code § 352 requires that the trial judge balance the probative value of the evidence against its potential of prejudice, undue consumption of time, and confusion. Kessler v. Gray, 1978, 143 Cal.Rptr. 496, 500, 77 Cal.App.3d 284.

FN42 Cannot ignore

"The essential point reiterated by the dissent is that the trial court had discretion to admit or exclude the evidence. While we of course agree with this statement as a general proposition, it is equally plain that this discretion is far from

unlimited and that appellate courts have a vital role to play in overseeing the exercise of this discretion." U. S. v. Robinson, C.A.2d, 1976, 544 F.2d 611, 616 n. 6.

FN43 Must make offer of proof

If the evidence is excluded under an exercise of discretionary exclusion, the proponent of the evidence must make an offer of proof sufficient to show the probative worth of the evidence in order to raise the issue on appeal. Acosta v. Southern California Rapid Transit Dist., 1970, 465 P.2d 72, 2 Cal.3d 19, 84 Cal.Rptr. 184.

Pocket Part FN: FN43 Must make offer of proof

There was no excuse for failure of party to make an offer of proof sufficient to show that evidence would not be cumulative. Mercado v. Austin Police Department, C.A.5th, 1985, 754 F.2d 1266.

FN44 Adequacy of offer

See vol. 21, § 5040.

Pocket Part FN: FN44 Adequacy of offer

Party could not raise propriety of exclusion of evidence on ground of waste of time where it failed to make an offer of proof. Adams v. Frontier Airlines Federal Credit Union, Colo.App. 1984, 691 P.2d 352, 355.

Pocket Part FN: FN45 State law

The court states that Rule 403 and the cases decided under it are relevant only because the state rule is similar. Rovegno v. Geppert Bros., Inc., C.A.3d, 1982, 677 F.2d 327, 329.

To the extent that state rule excluding evidence of income tax effects on personal injury awards is based on fear of confusion, it should not apply in federal court because Rule 403 provides a federal standard for rejecting evidence on this ground. In re Air Crash Disaster Near Chicago, C.A.7th, 1983, 701 F.2d 1189, 1195.

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The following documents were caused to be served:

1. Letter to Clerk of Chelan County Superior Court;
2. Reply in Support of Washington State Democratic Central Committee's Motion in Limine to Exclude Evidence of "Voter Crediting" and to Require Petitioners to Introduce Best Evidence of Voting;
2. Supplemental Declaration of William C. Rava in Support of Washington State Democratic Central Committee's Motion in Limine to Exclude Evidence of "Voter Crediting" and to Require Petitioners to Introduce Best Evidence of Voting;
4. Letter to Judge Bridges regarding Washington State Democratic Central Committee's Motion in Limine to Exclude Evidence of "Voter Crediting" and to Require Petitioners to Introduce Best Evidence of Voting; and
5. Certificate of Service.

These documents were served in the manner described below.

Thomas F. Ahearne	<input checked="" type="checkbox"/>	E-Service Via E-Filing.com
Foster Pepper & Shefelman PLLC	<input type="checkbox"/>	Via Electronic Mail
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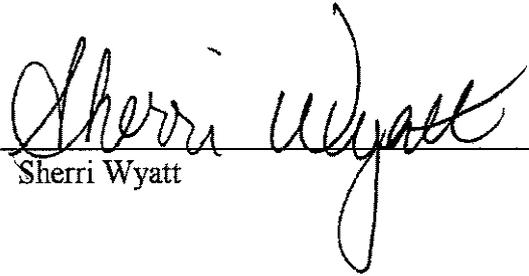
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I declare under penalty of perjury that the foregoing is true and correct, and that this certificate was executed in Seattle, Washington on April 25th, 2005.

By 
Sherri Wyatt