

1 The "Washington State Democratic Central Committee's Motion In Limine To Exclude
2 Petitioners' Proposed Speculative Attribution Of Illegal Votes" raises an important question of
3 statutory interpretation under our State's election contest statute.

4 This is the Respondent Secretary of State's Response.

5 **I. SUMMARY OF THIS RESPONSE**

6 Our State's election contest statute gives every voter the right to challenge an election by
7 filing an election contest petition. And subsections .070 & .110 provide that in order to prevail
8 in that challenge, the petitioner must show that the illegal votes and/or election official
9 misconduct relied upon by the petitioner changed the outcome of the election.

10 But Washington's election contest statute does not limit the type of evidence the
11 petitioner can submit to make that showing. Our election contest statute does not limit the
12 petitioner to using direct rather than circumstantial evidence. Nor does our election contest
13 statute limit the petitioner to using lay rather than expert testimony. As a straightforward matter
14 of statutory interpretation, our statute does not prohibit the petitioners from relying upon
15 circumstantial evidence or expert witness testimony to show for whom the illegal votes or
16 improperly counted ballots they rely upon were cast.

17 If the Democrats' objection is really that the proportional analysis testimony of
18 petitioners' experts will not satisfy Evidence Rule 702, then once the expert discovery is
19 finished, they should request a *Frye* hearing to address that evidentiary objection.

20 Similarly, if the Democrats' argument is really that the petitioners' expert testimony will
21 not persuade this Court at trial, then at trial they should make that argument concerning
22 petitioners' evidence.

23 But they should not be allowed to prevent petitioners' expert testimony from ever being
24 considered at a *Frye* hearing or trial by demanding that this Court instead read an unwritten
25 evidentiary exclusion into our State's election contest statute to limit the type of evidence a
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1 petitioner can use to show that illegal votes and/or misconduct changed the outcome of the
2 election.

3 The Respondent Secretary of State accordingly requests that the Democrats' motion be
4 denied as a matter of statutory interpretation, and that this Court schedule a *Frye* hearing closer
5 to trial to determine whether the petitioners' expert testimony will be admitted in that trial.

6 **II. DISCUSSION**

7 **A. The Secretary Of State's Prior Interpretation Of Our Election Contest Statute In**
8 **This Case.**

9 Washington's election contest statute provides the following with respect to election
10 contests based on illegal votes:

11 **Illegal votes - Number of votes affected - Enough to change result.**

12 No election may be set aside on account of illegal votes, unless it appears
13 that *an amount of illegal votes has been given to the person* whose right
14 is being contested, that, if taken from that person, would reduce the
number of the person's legal votes below the number of votes given to
some other person for the same office, after deducting therefrom the
illegal votes that may be shown to have been given to the other person.

15 RCW 29A.68.110 (italic emphasis added).

16 Washington's election contest statute provides the following with respect to election
17 contests based on election official misconduct:

18 **Misconduct of board - Irregularity material to result.**

19 No irregularity or improper conduct in the proceedings of any election
20 board or any member of the board amounts to such malconduct as to annul
or set aside any election unless the irregularity or improper conduct was
such as to procure the person whose right to the office may be contested,
21 to be declared duly elected although *the person did not receive the*
highest number of legal votes.

22 RCW 29A.68.070 (italic emphasis added).

23 At the February 4 hearing in this case, the Secretary of State responded as follows to the
24 Petitioners' and Democrats' competing interpretations of the proof required by those provisions
25 of our State's election contest statute:

26 Put simply, the election contest statute gives every voter the right to
challenge an election. But the election contest statute does not negate the

1 presumption, until proven otherwise, that the last count was the correct
2 count for the determination of the winner.

3 To rebut that presumption requires clear evidence that it appears the illegal
4 votes and/or misconduct changed the outcome of the election.

5 But that evidence can be direct or circumstantial.

6 The petitioners are exactly right – they do not have to show a vote-by-vote
7 comparison of who voted for whom. They can show it circumstantially.
8 For example, . . . They can simply prove circumstantially in the
9 proportional analysis that Mr. Korrell was talking about that there are a net
10 20 Gregoire votes in that batch of [100] illegal votes.

11 Verbatim Report Of [February 4] Proceedings Excerpt, transcript page 4, line 18 –
12 transcript page 5, line 11 (punctuation corrected) (attached at Tab B).

13 The Democrats' motion agrees with the first two paragraphs of the Secretary of State's
14 above interpretation of our State's election contest statute. And as outlined below, the
15 Democrats' motion does not refute the second two paragraphs of the Secretary of State's
16 interpretation.

17 **B. The Secretary Of State's Current Interpretation Of Our Election Contest Statute**
18 **In This Case Is Still The Same.**

19 The Respondent Secretary of State's current interpretation of our State's election contest
20 statute is the same as before: Although our election contest statute requires petitioners to show
21 that the illegal votes and/or election official errors they allege changed the outcome of the
22 election, our statute does not prohibit the petitioner from using circumstantial evidence or expert
23 witness testimony to make that showing. (Such evidence would of course still have to satisfy
24 generally applicable evidence rules, such are ER 702 and the *Frye* test noted in Part II.B.4
25 below.)

26 **1. The Secretary of State's interpretation makes common sense.**

Take an election where the difference between the winner and second place candidate
was 13 votes. And assume that a group of 100 identified voters voted twice in that election –
with 60 voting twice for the winner, and 40 voting twice for second place finisher. Removing
those 100 double-voters would therefore change the result of the election.

1 There is no common sense reason to require the petitioner to prove which 60
2 double-voted for the winner and which 40 double-voted for the runner up. All that matters is
3 whether the petitioner can prove that in this group of 100 illegal votes, the amount of illegal
4 votes given to the winner was 60 and the amount given to the runner up was 40. Proving that
5 60-40 split could be done with direct evidence such as the actual ballots cast by those 100
6 double-voters – but there is no common sense reason for prohibiting the petitioner from trying
7 to show that split with circumstantial or expert evidence instead.

8 **2. The Secretary of State’s interpretation also makes statutory sense.**

9 The Secretary of State’s interpretation tracks the language of our State’s election contest
10 statute.

11 Subsection .110 of our election contest statute specifically refers to showing the
12 “amount of illegal votes” given to the person who was declared duly elected. “Amount” is an
13 aggregate figure. Nothing requires that aggregate amount to be shown with an individualized
14 showing for each vote separately as opposed to an aggregate showing for the votes as a group.

15 Similarly, subsection .070 of our election contest statute specifically refers to showing
16 whether the person declared duly elected received the “highest number of legal votes”.
17 “Number” is an aggregate figure. Nothing requires that aggregate number to be shown with an
18 individualized showing for each vote separately as opposed to an aggregate showing for the
19 votes as a group.

20 **3. The Secretary of State’s interpretation also makes sense under the Washington
21 case law cited by the Democrats.**

22 The Democrats cite the *Dumas*¹ and *Schoessler*² cases for the proposition that the
23 petitioner’s burden of proof is to show the election at issue was “clearly invalid”. They also
24 note in their other contemporaneous filings that voter registration challenges under

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26 ¹ *Dumas v. Gagner*, 137 Wn.2d 268 (1999).

² *In re Contested Election of Schoessler*, 140 Wn.2d 363 (2000).

1 RCW 29A.08 carry a “clear and convincing” burden of proof,³ and that the Secretary of State’s
2 briefing in the *Becker v. County of Pierce* case reiterated that clear evidence burden.

3 But petitioners’ having a “clear” evidence burden of proof does not mean that petitioners
4 cannot use circumstantial or expert witness evidence to satisfy that burden. Indeed, the
5 prosecutor in a criminal trial has a “beyond a reasonable doubt” burden of proof, but no one
6 would argue that precludes the prosecutor from using circumstantial or expert witness evidence
7 to satisfy that burden.

8 Similarly, the Democrats repeatedly cite the *Hill v. Howell*⁴ case for the proposition that
9 if there is “no evidence” to show for whom an illegal vote was cast, that vote must be treated as
10 legitimate.

11 But circumstantial evidence is evidence.

12 So is expert witness testimony.

13 This accordingly is not a case where the petitioners have “no evidence”.

14 Instead, what the petitioners have is evidence that the Democrats think will not be very
15 weighty or persuasive. This Court should weigh the persuasiveness of a petitioner’s
16 circumstantial evidence and expert witness testimony at trial – not ignore petitioners’ evidence
17 outright by interpreting our State’s election contest statute to bar the use of circumstantial and
18 expert witness evidence to show whether the election being contested was clearly invalid.

19 **4. The Secretary of State’s interpretation is not rebutted by the Democrats’**
20 **“speculative attribution” mantra.**

21 The Democrats suggest that the proportional analysis testimony of petitioners’ two
22 experts will be “speculative” – repeating the catchphrase “speculative attribution” at least 48
23 times on their motion’s pages.

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25 ³ RCW 29A.08.820 (“The challenging party must prove to the canvassing board by clear and convincing
26 evidence that the challenged voter’s registration is improper. If the challenging party fails to meet this burden, the
challenged ballot shall be accepted as valid and counted.”).

⁴ *Hill v. Howell*, 70 Wn. 603 (1912).

1 But if the Democrats' objection is that the expert testimony of Professor Gill and
2 Professor Katz will be too speculative to qualify as expert testimony under Evidence Rule 702,
3 the time and place to make that objection is in a *Frye* hearing. See, e.g., *State v. Woo*, 84 Wn.2d
4 472, 527 P.2d 271 (1974) (adopting the test established in *Frye v. U.S.*, 293 F. 1013 (D.C. Cir.
5 1923), to determine the admissibility of expert evidence); *State v. Riker*, 123 Wn.2d 351, 869
6 P.2d 43 (1994) (holding that *Frye* continues to be the test in Washington); *Reese v. Stroh*, 128
7 Wn.2d 300, 907 P.2d 282 (1995) (application of the federal courts' more recent *Daubert* test
8 unnecessary because the evidence was admissible under the standards set forth in *Frye* and
9 Washington Evidence Rule 702); *State v. Copeland*, 130 Wn.2d 244, 922 P.2d 1304 (1996)
10 (again rejecting *Daubert*, holding that admissibility of expert evidence in Washington requires
11 first that the evidence satisfy the "general acceptance" requirement under *Frye*, and second that
12 the witness be an expert with information helpful to the trier of fact under ER 702); *State v.*
13 *Strauss*, 106 Wn. App. 1, 20 P.3d 1022 (2001) (the *Frye* test, rather than *Daubert* test, applies to
14 the admissibility of expert testimony in Washington) ; *In re Detention of Thorell*, 149 Wn.2d
15 724, 72 P.3d 708 (2003) (applying the *Frye* standard).

16 The Democrats' counsel (Ms. Durkan) accordingly noted at the April 5 Status
17 Conference that this Court should hold a *Frye* (she referred to it as *Daubert*) hearing to assess
18 the admissibility of the petitioners' expert witness testimony on proportional analysis.

19 That request had merit. The Democrats' subsequent motion to avoid such a hearing by
20 reading an unwritten evidentiary exclusion into our State's election contest statute does not.

21 The Respondent Secretary of State therefore requests that this Court resolve the
22 Democrats' "speculative attribution" argument by scheduling a *Frye* hearing after the expert
23 witness discovery is completed – not by interpreting our State's election contest statute to have
24 an unwritten evidentiary exclusion that prohibits petitioners from submitting circumstantial
25 evidence or expert testimony to support their case. And if the petitioners' expert witness
26 testimony survives that *Frye* hearing, then the weight of that evidence should be duly

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1 considered by this Court at trial – not ignored by writing an unwritten evidentiary exclusion into
2 our State’s election contest statute.

3 **III. CONCLUSION**

4 The Respondent Secretary of State believes the above interpretation is the correct
5 interpretation of our State’s election contest statute as currently written. That interpretation is
6 also consistent with common sense, the aggregate “amount” and “number” language of
7 subsections .110 & .070, the petitioners’ burden of proof, and the *Frye* evidentiary standard that
8 controls the admission of expert witness testimony. The Democrats’ motion concerning this
9 aspect of the Washington election contest statute should be accordingly be denied.

10 RESPECTFULLY SUBMITTED this 20th day of April, 2005.

11
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**SECRETARY OF STATE’S RESPONSE RE:
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TAB B

[Transcript excerpt from February 4 Hearing in this case]

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