

No. 76399-2
(Pierce County Superior Court No. 04-2-14599-1)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON STATE DEMOCRATIC COMMITTEE,

Petitioners/Appellants,

v.

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Respondents.

MOTION TO FILE AMICI CURIAE MEMORANDUM OF
FORMER WA STATE ATTORNEY GENERAL KEN EIKENBERRY
BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

Timothy M. Harris, WSBA # 29906
Timothy D. Ford, WSBA #29254
Andrew C. Cook, WSBA #34004
Attorneys for Amicus Curiae
Building Industry Assn. of Washington
PO Box 1909
Olympia, WA 98507
(360) 352-7800 telephone
(360) 352-7801 facsimile

I. IDENTITY AND INTEREST OF AMICIS CURIAE

FORMER WA STATE ATTORNEY GENERAL KEN EIKENBERRY

Ken Eikenberry served at the Attorney General for the State of Washington from 1981 to 1993. He urged lawyers in his office to respect and adhere strictly to the structure and meaning of statute law, especially when created through the popular initiative process. Every effort was made to ensure that a formal "Opinion" of the Office of Attorney General would take all pertinent words of a statute into account in the process of determining the application of a statute to a given situation.

Ken Eikenberry, as the former Attorney General, fulfilled his constitutional duty under the Washington Constitution Article III, section 21, to advise state agencies of the law. In addition, the office of the Attorney General serves as the public's lawyer in a variety of capacities including the protection of consumers, vulnerable citizens, and defending state laws. The office of Attorney General often submits amicus curiae briefs to the WA Supreme Court to defend state laws. Since the current occupier of the office of Attorney General has a clear conflict of interest and is unable to offer an amicus, former Attorney General Eikenberry moves this court for leave to file an amici memorandum based on an interest to ensure that state election laws are upheld by the courts.

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

The Building Industry Association of Washington (“BIAW”) has over 11,200 members who are involved in construction and homebuilding projects statewide. Construction is a highly regulated industry and BIAW represents its member’s interests to promote affordable housing statewide through reasonable rules, regulations, and enforcement. BIAW employs a staff of administrative claims representatives, lobbyists, and litigators to safeguard of the interests of its members.

BIAW’s members’ are politically active directly through contributions to political campaigns, and indirectly through political action committees (“PAC’s”) such as the Washington Affordable Housing Committee, Changepac 2004, and Walking for WA, formed pursuant to disclosure laws of RCW Chapter 42.17 and administrative rules contained in WAC Title 390.

During the 2004 general elections, BIAW members directly or indirectly contributed over \$1.5 million to political campaigns, providing voter education, campaign assistance, supporter identification, candidate contributions, and opposition research. BIAW political activities reached millions of people and shaped the elections.

BIAW and its members have a very compelling interest to ensure the compliance with election laws by the King County Canvassing Board,

and to ensure that legal votes are not disenfranchised by impermissible recanvassing of votes that were previously rejected.

II. FAMILIARITY WITH THE ISSUES

Amici Curiae has reviewed the briefs filed by the parties and the temporary restraining order in the case of *Washington State Republican Party, et al., v. King County Division of Records, Elections And Licensing Services, et al.*, No. 04-2-14599-1 (December 17, 2004). Amici Curiae is familiar with the issues involved and the scope of the argument presented by the parties on appeal. Amici Curiae has also reviewed the briefs filed and the decision of the Supreme Court in the case of *McDonald, et al., v. Reed, et al.*, No. 76321-6 (December 14, 2004). Amici Curiae Ken Eikenberry is familiar with election laws and has advised and represented Washington state on election issues. Amici Curiae BIAW has participated, instructed, and supervised teams of laypersons and lawyers in the recount observation process for the 2004 gubernatorial election.

III. ISSUE(S) TO BE ADDRESSED BY AMICUS CURIAE

Amici Curiae requests leave to file a brief supporting the trial court's ruling granting a TRO. The main issue to be addressed is whether RCW 29A.60.210 permits any discretion to recanvass votes in light of the WA State Supreme Court ruling in *McDonald, et al v. Reed, et al*, No. 76321-6 (December 14, 2004).

Additionally, Amici will address the arguments advanced by petitioner/appellant that the ruling of *McDonald* should not apply with regard to previously rejected ballots alleged to have been rejected by mistake by the King County elections department.

IV. NEED FOR AMICUS CURIAE MEMORANDUM

An amicus curiae memorandum from amici Former Attorney General Ken Eikenberry, will assist the Court with the perspective of a state official with the duty to uphold state election laws. A memorandum from BIAW will assist the Court with a political perspective of a statewide association representing over 11,200 members who are actively engaged in the 2004 gubernatorial election. Former Attorney General Ken Eikenberry and BIAW believe that the impact of this election on the integrity of the elections system and the integrity of the duly elected governor of the state of Washington can not be overstated, and is the cornerstone of a legitimate representative government.

WHEREFORE, Movant/Amici Curiae Former Attorney General Ken Eikenberry and BIAW respectfully requests leave to file an amici curiae memorandum.

Respectfully submitted this 20th day of December, 2004.

By 

Timothy M. Harris, WSBA # 29906
Timothy D. Ford, WSBA #29254
Andrew C. Cook, WSBA #34004
Attorney for Amicus Curiae
Building Industry Assn. of WA
PO Box 1909
Olympia, WA 98507
(360) 352-7800 telephone
(360) 352-7801 facsimile

No. 76399-2
(Pierce County Superior Court No. 04-2-14599-1)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON STATE DEMOCRATIC COMMITTEE,

Petitioners/Appellants,

v.

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Respondents.

BRIEF AMICI CURIAE OF
FORMER WA STATE ATTORNEY GENERAL KEN EIKENBERRY
BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

Timothy M. Harris, WSBA # 29906
Timothy D. Ford, WSBA #29254
Andrew C. Cook, WSBA #34004
Attorneys for Amicus Curiae
Building Industry Assn. of Washington
PO Box 1909
Olympia, WA 98507
(360) 352-7800 telephone
(360) 352-7801 facsimile

INTRODUCTION

This case concerns 723 King County ballots that were rejected for lack of a file signature in the 2004 Washington gubernatorial election. The King County Canvassing Board seeks to re-canvass these rejected ballots for placement into the pool of valid votes cast in the Nov. 2, 2004 election. Amici urge this court to uphold the lower Court's decision granting a TRO which prevents King County from counting any of those ballots. Public faith in the integrity of our election process depends on it.

King County's attempt to reconsider previously canvassed ballots arouses suspicions that are reminiscent of the Presidential election in 1960, when John F. Kennedy's ultimate victory was clouded by suspicions of voter fraud occasioned by Democratic leaders in Chicago. That election was one of the closest in history – Kennedy won the national election by 113,000 votes, and took Illinois by less than 9,000 votes. Peter Carlson, "Another Race to the Finish," Washington Post, Nov. 17, 2000 at A1. Such a close race was an apparent invitation for the introduction of new and illegal ballots.

On election night in 1960, a neck-and-neck race between Richard Nixon and John F. Kennedy took an amazing turn when a late surge of votes from Chicago put Kennedy in the lead in Illinois, after early returns had shown that Nixon was ahead. The late surge in Chicago was attributed

to improprieties by Democratic Party leaders and Mayor Richard Daley.

Id.

According to Richard Nixon “the Daley Machine was holding back the Chicago results until the downstate Republican counties had reported and it was known how many votes the Democrats would need to carry the state.” Id., quoting Richard M. Nixon, RN, the Memoirs of Richard Nixon. Similarly, King County is the last jurisdiction in the state to report, and Party leaders know precisely how many votes are necessary to secure the election – in this case, only 50. The same opportunity for mischief that existed in Chicago in 1960 exists in King County today. Both Washington and Illinois have large predominantly Democratic metropolises that are the last to report in state-wide elections. Tabulations from such jurisdictions should be carefully scrutinized, and attempts to count previously rejected ballots – particularly on a second recount seven weeks after Election Day – should be met with considerable skepticism.

Yet, the King County Canvassing Board seeks to revisit ballots that were already rejected, in an apparent attempt to narrow the margin of victory, or to turn the result of the election – fully seven weeks after Election Day. If allowed to do so, the 2004 Washington gubernatorial election will be as ignoble as the 1960 Illinois Presidential election results. Amici therefore respectfully urge this Court to uphold the lower Court’s

Temporary Restraining Order precluding King County from adding new votes to the pool of qualified ballots at this late date. A contrary result is an invitation to mischief, and undermines the public's confidence in the election system.

STATEMENT OF THE CASE

On November 17, 2004 Secretary of State Sam Reed ("Secretary of State") announced the official results of the November 2, 2004, general election. Dino Rossi won the Governor's race by a margin of 261 votes. Because the margin of victory was fewer than 2000 votes, the Secretary of State ordered a machine recount of the votes in the race for governor. *See* RCW 29A.64.021.

The votes were re-tabulated, and Governor-Elect Rossi again prevailed. The Secretary of State certified the results and confirmed on November 30, 2004, that Rossi was the Governor-Elect. RCW 29A.60.250.

On December 3, 2004 the Washington State Democratic Central Committee ("WSDCC") requested a state-wide manual recount. RCW 29A.04.139.

On December 3, 2004 the WSDCC filed a petition for a writ of mandamus in the Washington State Supreme Court seeking emergency relief and an order directing the Secretary of State to promulgate "uniform

standards” for the manual recount. McDonald, et al., v. Reed, et al., No. 76321-6 (December 14, 2004). The WSDCC sought an order from the Supreme Court requiring the canvassing boards in all 39 counties in the State of Washington to recanvass all ballots previously canvassed and rejected.

On December 14, 2004 the Supreme Court denied the relief sought by the WSDCC, holding that the word “recount” means the process of retabulating ballots and producing amended election returns” under RCW 29A.04.139. Id., slip op. at 3. The Supreme Court also held that under Washington’s statutory scheme, “ballots are to be ‘retabulated’ only if they have been previously counted or tallied, subject to the provisions of RCW 29A.60.210.” Id., slip op. at 3. In rejecting the arguments of the WSDCC, the Supreme Court specifically noted that King County gave “permitted absentee voters with problem signatures until 4:30 p.m. on November 16 to provide an updated signature.” Id. slip op. at 4.

On December 13, 2004 King County Elections Division disclosed that there were at least an additional 520 ballots which had previously canvassed and rejected and now should be counted.

On December 15, 2004, at the canvassing board meeting, Dean Logan, Director of King County Elections Division, stated that instead of 520 ballots, there were 573 absentee ballots that had previously canvassed

and rejected prior to November 17, 2004 because King County could not match the signatures with any digital voter registration signatures.

Although the Washington State Supreme Court on December 14, 2004 had stated that no recanvassing should occur in the hand recount, the three-member King County Canvassing Board on December 15, 2004 voted (2 to 1) to recanvass the previously rejected 573 absentee ballots.

On December 16, 2004 the Washington State Republican Party ("WSRP") filed this action in Pierce County Superior Court for declaratory and injunctive relief alleging constitutional and statutory violations and requesting a temporary restraining order ("TRO") prohibiting the King County Canvassing Board from recanvassing ballots previously rejected.

In opposition to the WSRP's Motion for a TRO, the WSDCC submitted a report prepared by Bill Huennekens, Superintendent of Elections for King County. That report confirmed that actual notice was provided by letter to voters requesting an updated signature for ballots rejected when no signature existed in the King County registration system. Declaration of William Hava, Exhibit O. King County also provides notice to voters on their website in order to check if their provisional ballot has been counted:

<http://www.metrokc.gov/elections/ballots/provisionalballot/ballotlookup.aspx>.

King County also has a voter information hotline for absentee voters at (206) 296-VOTE. Even the WSDCC acknowledged in McDonald that voters whose ballots were not counted had actual notice through the King County website. Petitioners' Motion and Brief in Support of Emergency Partial Relief, page 4 (citing to affidavit of Campbell, ¶ 6).

On December 17, 2004 the Pierce County Superior Court entered an order granting the WSRP's motion for a TRO relying on the Supreme Court decision in McDonald, and concluding that RCW 29A.60.210 governing the canvassing of ballots does not apply to the 573 ballots previously rejected and uncounted by the King County Canvassing Board.

On December 17, 2004 King County election officials announced that the number of 573 ballots not counted was inaccurate. Bill Huennekens found an additional 150 ballots that will be presented to the King County Canvassing Board to be treated the same as the 573 ballots.

On December 17, 2004 the WSDCC filed a notice of appeal with the Pierce County Superior Court and also filed a statement of grounds for review with the Supreme Court.

ARGUMENT

This court should follow Washington law and uphold the lower court decision granting a TRO to preserve the integrity of the election process.

1. Permitting the Reconsideration of Previously-Rejected Ballots Undermines the Integrity of the Election System.

The integrity of elections is essential to the very preservation of a free society. State v. Conifer Enters., Inc., 82 Wash.2d 94, 508 P.2d 149 (1973). See also Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197, 208 (1982) (noting that Government interests in preventing corruption or the appearance of corruption “directly implicate ‘the integrity of our electoral process, and, not less, the responsibility of the individual citizen for the successful functioning of that process’” (quoting United States v. Automobile Workers, 352 U.S. 567, 570 (1957))). The U.S. Supreme Court has long recognized that a State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process. Burson v. Freeman, 504 U.S. 191, 199 (1992).

This Court should not permit King County to re-canvass the 723 ballots it issue because (if nothing else) it will further the perception of corruption and/or fraud that already exists in King County's ballot counting procedures. See, e.g., John Fund, “All the Votes Fit to Count,

The Wall Street Journal, Dec. 20, 2004 (“there’s now a growing number of people who believe the counting process in King County has been compromised”); “Letters to the Editor,” Seattle Times, Dec. 19, 2004 (providing examples of voter outrage and allegations of fraud); “Prolonged Election Reveals Cracks in System,” Seattle Post-Intelligencer, Dec. 18, 2004 (“Republican State Party Chairman Chris Vance said at first he couldn't tell whether King County's Elections Department was plagued by incompetence or fraud. But by the end of the week he was leaning strongly toward fraud.”) This perception implicates the integrity of our State’s electoral process.

Under King County’s election system, election officials check ballot signatures against signatures provided at registration and stored in the Election Management and Voter Registration System. See Report of Bill Huennekens, Declaration of William C. Rava, Exhibit “O.” The ballots at issue in this case were rejected because the signatures did not match or were unavailable. Id. Matching signatures is one of the few (if not the only) fraud prevention measures taken by the County, and the instant 723 ballots should not be revisited (or re-harvested) because partisan officials apparently seek another 50 votes and to overturn the election. Overturning the lower court’s TRO would only further the

perception of fraud, and invite partisan mischief – in addition to violating the plain language of Washington law.

2. A Recount is a Retabulation of Valid Ballots; Not a Recanvass of Votes Rejected

In pertinent part, Washington statutes discussing how recounts are to take place is clear:

At the time and place established for a recount, the canvassing board or its duly authorized representatives, in the presence of all witnesses who may be in attendance, shall open the sealed containers containing the ballots to be recounted, and shall recount the votes for the offices or issues for which the recount has been ordered.” (Emphasis added).

RCW 29A.64.041.

This Court has explicitly stated that a recount is a retabulation of ballots previously counted or tallied; not ballots that have been fully canvassed and determined invalid. McDonald, et al v. Reed, et al, No. 76321-6 (December 14, 2004). Specifically, this Court stated:

‘Recount’ means the process of retabulating ballots and producing amended election returns...” RCW 29A.04.139 (emphasis added). The procedure for recounts is set forth in RCW 29A.64.041, and starts with the county canvassing board opening “the sealed containers containing the ballots to be recounted.” See RCW 29A.60.110. Thus, under Washington’s statutory scheme, ballots are to be ‘retabulated’ only if they have been previously counted or tallied, subject to the provisions of RCW 29A.60.210.

Id. at Page 3.

The Secretary of State’s “Manual Recount Procedures – Most

Frequently Asked Questions”, found on its website (<http://www.secstate.wa.gov/>) specifically states that statutes require a “recount”, not a “re canvass” of the election. It further states that “prior decisions of the canvassing boards will be the basis for the manual count.” In his November 19, 2004 News Release, “Governor Recount 2004,” the Secretary of State specifically states that “[b]allots where the canvassing board has already made a decision are counted exactly as the canvassing board directed.” Here, the ballots in question were properly considered invalid by King County and have not been previously counted or tallied. Therefore, this Court should reiterate its previous ruling that ballots are only to be “retabulated” if they have been previously counted or tallied.

In its latest brief to this Court, the WSDCC argues the King County Canvassing Board – as a part of a “safety valve” – has authority under RCW 29A.60.210 to recanvass these ballots that have already been determined invalid. Brief of Washington State Democratic Central Committee at 19-20. However, such a reading would render this Court’s language in McDonald and the statutory language supra regarding recounts superfluous and meaningless.

RCW 29A.60.210 allows for a canvassing board to recanvass ballots or voting devices only if there is an apparent “discrepancy or inconsistency” in the returns and before certification. Here, there were no

apparent discrepancies or inconsistencies. Rather, the ballots at hand have already been properly determined invalid. Moreover, certification of the general election already took place on November 17, 2004. Thus, RCW 29A.60.210 does not apply to the 723 ballots at issue in this case.

A. The Ballots at Issue Have Already Been Invalidated and Voters Were Notified of Problems with Their Signatures

According to Bill Huenekens, Superintendent of Elections, the vast majority of the voters who cast these ballots were alerted of problems with their signatures on file. See Declaration of William C. Rava, Exhibit O (Staff Report prepared by Bill Huenekens). If the voter sent back the completed letter, the signature was compared, and if it was a match, the ballot was accepted. Id. However, if the voter did not return the letter, the ballot was properly not tabulated. Id.

In August, King County sent 1,146 letters to voters who did not have a signature in the system. Id. at 2. One hundred and one of the voters whose ballots are involved in the case at hand who received letters informing them that their signature was not on file did not return a letter with an updated signature. Id. Thus, if the voter did not send in an updated signature, logically their ballot would not be counted. Because the ballots were properly canvassed and rejected in the first certification, King County should be precluded from attempting to recanvass as this

Court ruled in McDonald.

B. Ballots Ruled Invalid in McDonald are Similar to the Case at Hand

In McDonald, the WSDCC made similar arguments before this Court that ballots not considered by counties because of signature irregularities should have been counted in the manual recount. Petitioners' Motion and Brief in Support of Emergency Partial Relief, pages 3-5. This Court properly dismissed those arguments, and should do so again in the case at hand.

In McDonald the WSDCC provided examples of voters whose ballots were not counted due to: clerical error, where a voter requested an absentee ballot but never received one, and problems associated with provisional ballots. Petitioners' Motion and Brief in Support of Emergency Partial Relief, page 5. In many cases these voters were not given notice that their vote would not count. Id. at 4.

In the case at hand, the Board and Elections Division staff has already made determinations that the disputed ballots should be rejected. Unlike some of the voters whose ballots were rejected in McDonald, King County actually provided sufficient notice to most of the voters that their signature was not on file, or that there was a problem with their signature. Contrary to the voters in McDonald – where many voters whose ballots were rejected were done so at no fault of their own – here, most voters

were given notice and a chance to update their signature to ensure their ballot would be counted. Like the ballots in McDonald, this Court should reiterate that the manual recount is only a recount, or a retabulation, of ballots previously counted or tallied – not a recanvassing of properly rejected ballots.

Based on the foregoing, this Court should adhere to its December 14, 2004 Opinion Order ruling that ballots are to be “retabulated” only if they have been previously counted or tallied. To rule otherwise would subject this election to greater uncertainty by allowing ballots previously rejected to be recanvassed.

3. The WSDCC’s reading and application of Doyle v. King County, is faulty and misleading.

In State ex rel. Doyle v. King County, 138 Wn. 488 (1926) this Court had to determine whether there were discrepancies in the returns of a ballot proposition adopting a city manager plan. 138 Wn. at 489. The canvassing board sought to open the voting machines to determine if there were discrepancies between the figures reported by the precinct officers and the total votes actually recorded in the machines. Id. at 490. This Court ruled that there were no discrepancies and did not allow the canvassing board to open the voting machines.

The WSDCC relies on Doyle to define “discrepancy” under the applicable statute. Brief of Petitioner Washington State Democratic

Central Committee, page 15 (“A discrepancy as defined by the statute would be something to indicate that an error or a mistake has been made; that the total as shown is not a true one”). However, the WSDCC conspicuously neglects to quote to the second half of Doyle’s “discrepancy” definition: “[t]he sanctity of the ballot box or of the voting machine is not to be invaded simply because a vote is close, and it is hoped that a recheck of the work performed...may possibly show a change or an error.” Id. at 492. Obviously, this omission was calculated, because King County seeks to do precisely what the Doyle court warned against: Invading the sanctity of a ballot box in a close vote in a quest for a change or error.

In King County, there is presently no error with respect to the 723 at-issue ballots that were properly set aside – thanks to the lower Court’s TRO. The King County Elections Division did what was precisely required of them. When they were unable to locate a signature on file, King County staff sent a letter informing the voter to send another signature. Declaration of William C. Rava, Exhibit O.

King County has properly canvassed these ballots and determined them invalid. It is apparent that both King County and the WSDCC are on an expedition to find irregularities simply because the vote is close; not because they altruistically want to count every vote.

CONCLUSION

If the 2004 Washington gubernatorial candidates were not presently separated by 50 votes, the 723 ballots that are the subject of this case would not be at issue, and would never have been counted. They would have been properly rejected under King County's fraud-preventing signature matching system. These ballots are only under consideration because partisans wish to change the outcome of the election at the 11th hour, after all other Washington Counties have reported.

This Court should not countenance an invitation to fraud – or the perception thereof – by allowing the reconsideration of previously-rejected ballots. To do so is contrary to Washington law.

Respectfully submitted this 20th day of December, 2004.

By 

Timothy M. Harris, WSBA # 29906
Timothy D. Ford, WSBA #29254
Andrew C. Cook, WSBA #34004
Attorney for Amicus Curiae
Building Industry Assn. of WA
PO Box 1909
Olympia, WA 98507
(360) 352-7800 telephone
(360) 352-7801 facsimile

No. 76399-2
(Pierce County Superior Court No. 04-2-14599-1)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON STATE DEMOCRATIC COMMITTEE,

Petitioners/Appellants,

v.

WASHINGTON STATE REPUBLICAN PARTY, et al.,

Respondents.

CERTIFICATE OF SERVICE OF
FORMER WA STATE ATTORNEY GENERAL KEN EIKENBERRY
BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

Timothy M. Harris, WSBA # 29906
Timothy D. Ford, WSBA #29254
Andrew C. Cook, WSBA #34004
Attorneys for Amicus Curiae
Building Industry Assn. of Washington
PO Box 1909
Olympia, WA 98507
(360) 352-7800 telephone
(360) 352-7801 facsimile

The undersigned certifies that a copy of Former Ken Eikenberry and the Building Industry Association of Washington's (1) Motion for Leave to file Brief of Amici Curiae; (2) Brief of Amici Curiae; and (3) Certificate of Service were served upon counsel this day as indicated below at the following electronic mail addresses:

Ms. Janine Joly
King County Courthouse
516 3rd Ave
Seattle, WA 98104-2385
206-296-9015
206-296-0191 (fax)
Janine.joly@metrokc.gov

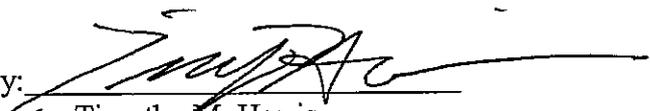
Mr. Thomas Ahearn
Foster Pepper & Schefelman PLLC
1111 3rd Ave, Suite 3400
Seattle, WA 98101-3299
206-447-8934
206-749-1902 (fax)
ahearn@foster.com

Mr. David Burman
Perkins Coie
1201 3rd Ave Floor 40
Seattle, WA 98101-3029
206-359-8000
206-359-9000 (fax)
dburman@perkinscoie.com

Mr. Harry J.F. Korrell III
Davis Wright Tremaine LLP
1501 4th Ave Suite 2600
Seattle, WA 98101-1688
206-628-7680
206-628-7699 (fax)
harrykorrell@dwt.com

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

DATED: December 20, 2004, Olympia, Washington.

By: 
Timothy M. Harris