

No. 76321-6

SUPREME COURT OF THE STATE OF WASHINGTON

DAVID T. McDONALD, et al.,

Petitioners,

v.

SECRETARY OF STATE SAM REED, et al.,

Respondents

**WASHINGTON SECRETARY OF STATE'S
MOTION TO CLARIFY
THIS COURT'S DECEMBER 14 OPINION ORDER**

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**Since the current Attorney General is one of the candidates in the election being recounted, the above private counsel (instead of the Attorney General's office) is representing the Secretary of State in this matter.*

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I. INTRODUCTION

This motion by the Washington Secretary of State asks this Court to clarify the wording of its December 14 Opinion Order (“Opinion Order”). The Respondent Secretary of State requests that this Court make it clear that in connection with the ongoing recount process, canvassing boards do have the discretion under RCW 29A.60.210 to correct previous errors where the canvassing board finds an apparent discrepancy or inconsistency in the returns that a recanvassing of specific ballots can correct.

II. BACKGROUND

The Democratic party pursued this action against the Respondent Secretary of State, insisting that Washington law required a wholesale recanvassing of all previously rejected ballots in the ongoing hand recount.

The Washington Secretary of State responded that unlike the recount statutes of other States, the recount statute of Washington does not require a wholesale recanvassing of all ballots.¹

¹ *As the Secretary Of State’s prior Response Brief in this case explained at page 2: “A ‘recount’ is not a re-examination of every ballot. ... [P]etitioners’ demand for a blanket re-examination of all ballots during the upcoming recount does not have a valid statutory basis. [T]he Washington statute’s definition of a ‘recount’ expressly provides only for the retabulation of ballots – not a re-examination of them. Washington’s election statute simply is not the same as the statutes of other States noted in petitioners’ brief which provide for a re-examination or recanvass of the ballots instead of a recount.” See also pages 12-14 under the heading “Petitioners’ Claims Must Be Dismissed Because A “Recount” Is Not A Re-examination Of Every Ballot”.*

Instead, Washington law requires only a retabulation of previously counted ballots, subject to the “safety valve” provisions of RCW 29A.60.210 which grant each county’s canvassing board the discretion to correct errors by recanvassing specific ballots if the canvassing board finds there was an apparent discrepancy or inconsistency in the returns. That provision states in full:

Recanvass -- Generally. Whenever the canvassing board finds that there is an apparent discrepancy or an inconsistency in the returns of a primary or election, the board may recanvass the ballots or voting devices in any precincts of the county. The canvassing board shall conduct any necessary recanvass activity on or before the last day to certify the primary or election and correct any error and document the correction of any error that it finds.

Thus, as the Secretary of State’s prior Response Brief explained at page 3:

To the extent petitioners timely brought forward evidence of an unlawful inconsistency or error that resulted in a valid ballot not being counted, RCW 29A.60.210 in the Washington elections statute provides a safety valve for each county’s canvassing board to correct such a timely raised and identified error. That limited safety valve for a particularly identified error, however, is not a floodgate requiring the wholesale recanvass of all ballots to see if perhaps any errors with respect to any of the ballots might possibly have occurred.²

² *Accord, Secretary of State’s prior Response Brief at page 22 (quoting the applicability of RCW 29A.60.210) and at page 12 (explaining that “If someone believes that there is an inconsistency or discrepancy in the way the county canvassing board is tabulating any particular ballot in the performance of that function, that person must timely bring the alleged inconsistency or discrepancy to the county canvassing board’s attention so it can, pursuant to the safety valve provided by RCW 29A.60.210, correct any error the canvassing board finds with respect to that particular ballot before the county canvassing board certifies the results of its tabulation of its county’s election results. Under our State’s elections laws, that person cannot instead run to this Court demanding that every county canvassing board undertake a wholesale recanvassing of all ballots cast in the election.”).*

The discretion of the canvassing board to correct errors found during the recount was explained in the Secretary of State's prior Response Brief.³

More to the point, the Secretary of State's counsel and this Court discussed King County's announcement earlier in the day that King County had previously rejected approximately 573 ballots on the incorrect premise that none of those ballots' voters had a signature on file:

Court: So if that's what's to be going on during a recount, then is what we were just hearing that King County is prepared to do with these 100 some odd absentee ballots inappropriate, unlawful under while the recount is going on?

Counsel: No, your honor, because of what these counsel referred to as as a "safety valve". There is a provision in 29A.60.210, which people are referring to as the "safety valve", which states that, and is on page 22 of our brief, whenever the canvassing board finds that there is an apparent discrepancy or inconsistency in the returns it may recanvass the ballots and that is precisely what I –

Court: But they have the discretion to do it, even in the midst of a recount?

³ *The Secretary of State's prior Response Brief at page 7 (explaining that: "The Washington elections statute assigns to county canvassing boards the duties of so canvassing election results and, in the event of a recount, retabulating ballots and producing amended election returns based on that retabulation. RCW 29A.60.140, 29A.64.041. Each county's canvassing board consists of the following three persons (or their designees): the County Auditor, the County Prosecuting Attorney, and the chair of the County's legislative body. RCW 29A.60.140. A court can compel a canvassing board to make a canvass of the returns or conduct a recount, but can go no further in directing how the canvassing board shall act as long as it proceeds according to the directions of the statute. Morris v. Board of County Commissioners of Asotin County, 195 Wash. 173, 177-178, 80 P.2d 414 (1938) ("The court is without power to inquire into the [canvassing] boards' manner in arriving at the result").*

Counsel: Yes, if they are aware of a discrepancy or inconsistency.

Court: Don't they have to do that before the day – the last day for certification – it goes on – how does that tie in?

Counsel: Well, the cert –

Court: I'm sorry, wait. It says the canvassing board shall conduct a necessary recanvass on or before the last day to certify the primary or election and correct any error and document the correction of any error that it finds. Can they do that after November 17?

Counsel: If they have not certified the hand recount, yes, your honor.

Court: O.k.

Counsel: And this exactly is another illustration of it. If the legislature intended it to be a recanvass all the time it wouldn't give the canvassing board the discretion to recanvass in certain instances, namely if they have found a discrepancy or inconsistency.

See also this Court's colloquy with the intervernor Republican Party's counsel in this *McDonald v. Reed* case. ⁴

⁴ *Court: Would you agree that during the process of a recount the locals have the discretion to recanvass?*

Counsel: Sure. If there are obviously - - They have a statutory requirement in the WAC or a regulatory requirement, if there are discrepancies in the returns, they have a requirement to go back. And also in the process of retabulating the ballots in a hand retabulation there is a role for the Canvassing Board.

Court: So you don't disagree that they do have that discretion?

Counsel: They have the discretion if it's on the face of the materials before them. You do not want to get in the process, which is what we're talking about potentially here, if we're going to do a recanvass every time, of lines of people standing outside of every county courthouse in the state with an affidavit asking for my vote to be verified.

This Court's Opinion Order affirmed the Secretary of State's interpretation of Washington law, and concluded:

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.

Opinion Order at page 3.

That ruling was consistent not only with the Secretary of State's interpretation of Washington elections law, but also consistent with the way counties across our State have reported their recount results in this November 2 governor's race (both the machine recount and the hand recount). For example, as illustrated by the contemporaneously submitted declaration from the Secretary of State's Office, counties have accordingly certified hand recount results based upon their canvassing boards' conducting a re canvass of specific ballots pursuant to RCW 29A.60.210.

This does not mean, for example, that this Court or any other court should order the King County canvassing board to accept all the ballots in dispute or reject all those ballots. Instead, that determination is a decision for the canvassing board under RCW 29A.60.210. For example, the canvassing board makes that determination in light of factors such as the timeliness of the ballot delivery, the timeliness of the signature submission, whether the voter is a valid registered voter, and whether the voter undervoted/overvoted the ballot.

On December 17, the Republican party filed a suit in Pierce County Superior Court insisting that this Court's Opinion Order prohibited the King County canvassing board from re-canvassing any of the 573

previously rejected ballots, and on that same day secured a Temporary Restraining Order preventing that canvassing board from proceeding. The Pierce County Court based its ruling on its following interpretation of this Court's Opinion Order (**bold** in original):

The [Washington Democratic Party] sought an order from the Supreme Court requiring that the canvassing boards of all 39 counties in the State of Washington recanvass all ballots previously canvassed and rejected.

On December 14, 2004, the Supreme Court denied the relief holding that the word "recount" means the process of retabulating ballots and producing amended election returns under RCW 29A.04.139. No. 76321-6. The Supreme Court further held that under Washington law, ballots are to be "retabulated" **only if they have been previously counted or tallied**. The Supreme Court rejected the position of the [Democrats] that recanvassing of rejected ballots was required under any applicable Washington state statute.

* * * *

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.

December 17 Temporary Restraining Order at pages 2-4, ¶¶4, 5, & 12.

If the Pierce County Superior Court is correct that this Court's Opinion Order held that **no** recanvassing should ever occur in a recount, then the recount results certified in this election's machine recount are not correct, and the results certified by the 38 counties which have reported to date in the hand recount will have to be returned so each county's canvassing board can attempt to pull from their previously certified totals all of the error corrections attributable to the recanvassing of selected ballots in the recount pursuant to RCW 29A.60.210.

The Secretary of State, however, believes that the Pierce County Superior Court's reading of this Court's Opinion Order is not correct – and accordingly believes that the hand recount results certified by the 38 counties reporting thus far are proper.

Given the significant public interest in securing a prompt, uniform, and final closure to this hand recount process, the Respondent Secretary of State files this motion to respectfully request that this Court modify its Opinion Order to clarify that this Court did not hold that “no recanvassing should occur in the hand recount”, but instead held that such recanvassing can only occur pursuant the “safety valve” provisions of RCW 29A.60.210, which grant each county's canvassing board the discretion to correct errors by recanvassing specific ballots if the canvassing board finds there was an apparent discrepancy or inconsistency in the returns.

As the Pierce County Superior Court's ruling confirms, without such clarification or modification, this Court's Opinion Order subjects the pending hand recount and its results to unnecessary uncertainty. That disserves the public's interest because it prohibits the last of our State's 39 counties from fully completing its hand recount process pursuant to the same rules our other 38 counties employed.

**III. NAME & DESIGNATION OF PARTY FILING THIS
MOTION
[RAP 12.4(a) & 17.3(a)(1)]**

This motion is filed by the Respondent Washington Secretary of State.

IV. STATEMENT OF RELIEF SOUGHT
[RAP 12.4(a), 17.3(a)(2), 18.8(a), & 18.12]

This motion respectfully requests that this Court clarify the wording of its Opinion Order to prevent its being misread to hold that no recanvassing should occur in the hand recount.

Specifically, the Respondent Secretary of State respectfully requests that this Court clarify its Opinion Order by adding on page 3 of that Opinion Order the sentence typed below in italics:

.... 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. In other words, Washington's statutory scheme does not allow the wholesale recanvassing of all ballots in a recount, but RCW 29A.60.210 does grant each county's canvassing board the discretion to correct prior errors by recanvassing specific previously rejected or uncounted ballots if the canvassing board finds there was an apparent discrepancy or inconsistency in the returns that such a recanvassing of specific ballots can correct.

Given the unquestionable urgency and importance of bringing the ongoing hand recount of the Washington governor's race to a prompt, uniform, and final closure, the Respondent Secretary of State further respectfully requests that this Court set this clarification motion for accelerated disposition on shortened time. E.g., RAP 18.8(a), 18.12.

V. PARTS OF THE RECORD RELEVANT TO THIS MOTION
[RAP 12.4(a) & 17.3(a)(3)]

This motion is based on this Court's December 14, 2004 Opinion Order, the prior week's pleadings and oral arguments in this *McDonald v. Reed* case, and the contemporaneously submitted declaration from the Secretary of State's Office confirming the facts stated in this motion.

**VI. STATEMENT OF GROUNDS FOR RELIEF SOUGHT,
WITH SUPPORTING ARGUMENT
[RAP 12.4(a), 12.4(c) & 17.3(a)(4)]**

The points of law and fact which support the Secretary of State's motion for clarification are set forth above in Part II of this motion. To avoid repetition, they are not repeated again here.

VII. CONCLUSION

This Court's December 14 Opinion Order correctly held that Washington law limits recounts to a recount – not the wholesale reexamination or re canvassing of **all** ballots as petitioners demanded in this case. This Court's Opinion Order also correctly held that recounts are subject to the safety valve provisions of RCW 29A.60.210, which grant each county's canvassing board the discretion to correct errors by re canvassing **specific** ballots if the canvassing board finds there was an apparent discrepancy or inconsistency in the returns.

And as the Respondent Secretary of State concluded at page 22 of his prior Response Brief in this case, the Washington legislature drafted our State's recount process to strike what our legislature determined to be the appropriate balance for a proper and expeditious closure to close election contests:

The legislature finds that it is in the public interest to determine the winner of close contests for elective offices as expeditiously and as accurately as possible. It is the purpose of this act to provide procedures which promote the prompt and accurate recounting of votes for elective offices and which provide closure to the recount process.

Laws of 1991, chapter 90, §1.

Unfortunately, the current wording of this Court's Opinion Order has resulted in uncertainty and delay instead, because it is apparently capable of being misread to preclude local canvassing boards from recanvassing selected ballots pursuant to RCW 29A.60.210. The Washington Secretary of State accordingly requests that this Court promptly grant this clarification motion, and thereby allow the canvassing board of the last of our State's 39 counties to fully complete their hand recount so the People of our State can finally have closure to this recount process without further litigation delays.

RESPECTFULLY SUBMITTED this 20th day of December, 2004.

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