COURT'S ORAL DECISION

No. 05-2-00027-3

TIMOTHY BORDERS, et al., Petitioners,

vs. KING COUNTY and DEAN LOGAN, its Director of Records, Elections and Licensing Services, et al., Respondents.

and WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE, Intervenor-Respondent, and LIBERTARIAN PARTY OF WASHINGTON STATE, et al., Intervenor-Respondent.

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on the 6th day of JUNE, 2005, the above-entitled and numbered cause came on for trial before the HONORABLE JOHN E. BRIDGES at the Chelan County Auditorium, Wenatchee, Washington.

APPEARANCES

FOR THE PETITIONERS:

Mr. Harry Korrell, Mr. Robert Maguire, Mr. Dale Foreman.

FOR THE DEMOCRATIC CENTRAL COMMITTEE:

Ms. Jenny Durkan, Mr. Kevin Hamilton, Mr. Russell Speidel, Mr. David Burman.

FOR THE SECRETARY OF STATE:

Mr. Thomas Ahearne, Mr. Jeffrey Even.

FOR SNOHOMISH COUNTY:

Mr. Gordon Sivley.

THE COURT: Counsel, before I begin this morning, there's two matters I'd like to take up. One has to do with the intervenor's motion to strike the testimony of Mr. Benson which I received late last week and a response probably on Friday. Counsel, unless you want to argue that, I'm going to deny that motion because I want to get to the merits of the case, so I'll note that for the record. And, counsel, the second matter I'd like to address is what I understand from Madam Clerk is a ten-day waiting period in the clerk's office to disgorge the transcript of these proceedings to be sent up to the Court of Appeals. And if you folks want that transcript to go faster than that ten-day waiting period, you'll need to

agree or stipulate that it can go as soon as it's received if you folks are going to appeal. So if you will talk to each other and Madam Clerk about that, I certainly would appreciate it.

MR. HAMILTON: Thank you.

THE COURT: I have some introductory comments I'd like to make and the first is this, for counsel particularly. I want to note for you lady and gentlemen that nothing I say this morning should be interpreted as a criticism of either you or your clients. Secondly, I have been asked in closing argument to send a message. I'm going to decline that invitation. This Court is not in a position to fix the deficiencies in the election process that we heard about in this courtroom over the past nine days. However, the voters of this state are in a position to demand of their executive and legislative bodies that remedial measures be instituted immediately. And clearly, the evidence here suggests that the problems require more than just constructing new buildings and hiring more staff.

Mr. Logan in his testimony in court and, more particularly, in his deposition testimony referred to the culture he found when he assumed the responsibilities of the Director of Elections in King County. Almost anyone who works in state or local government knows exactly what this culture is. It's inertia. It's selfishness. It's taking our paycheck but not doing the work. It's not caring about either our fellow workers or the public we are supposed to serve. It's not taking responsibility. It's refusing to be held accountable. And so it is the voters who should send the message.

Third, both you and I can take some comfort from the knowledge that soon the ladies and gentlemen of our state Supreme Court will review what I've done, what I haven't done and my decision in this case. They are exceedingly bright and diligent and I can assure you that they will utilize their collective wisdom to render a just decision in this case. And, fourth, extraordinary efforts are in place to make it easier to vote but, unfortunately, I fear that it will be much more difficult to account for those votes in the future. Counsel, I am now prepared to make the necessary Findings of Fact and Conclusions of Law in this case and I, unfortunately, do not have a spoonful of sugar for either you or your clients with respect to this decision.

The case which comes before the Court this morning is entitled Borders versus King County. It is Chelan County Cause Number 05-2-00027-3. With respect to this case, the Court will now make its Findings of Fact. The general election for the Office of Governor of the State of Washington was held on November 2nd, 2004. The gubernatorial candidates were Christine Gregoire, Democrat; Dino Rossi, Republican; and Ruth Bennett, Libertarian. On November 17th, the counties completed their initial tabulation of votes and out of the over 2.8 million votes counted, 261 votes separated the two leading candidates, Christine Gregoire and Dino Rossi, with Mr. Rossi in the lead. This is shown by Exhibit 12,001 admitted into evidence. Because the margin separating the candidates was less than one-half of one percent of the total votes cast, the Secretary of State ordered the mandatory recount required by RCW 29A.64.021. The Secretary decided to conduct the mandatory recount as a machine recount. On November 30, after receiving certified recount returns from all 39 counties, Secretary Reed announced the result of the

mandatory recount which indicated that Mr. Rossi's lead was 42 votes. Exhibit 12,002. On December 3, the Washington State Democratic Central Committee requested a hand recount pursuant to RCW 29A.64.011. On December 23, the last of the 39 counties certified the manual recount results in their jurisdictions. On December 30, Secretary of State Sam Reed announced the result of the manual recount and declared that Christine Gregoire was the winner of the 2004 gubernatorial election by a margin of 129 votes. Exhibits 12,003 and 12,004 admitted in this case. Ms. Gregoire received 1,373,361 votes. Mr. Rossi received 1,373,232 votes and Ms. Bennett received 63,456 votes. The total write-in vote equaled 2,618 votes. The grand total was 2,812,675. Secretary Reed delivered the certified county returns to the Speaker of the House of Representatives on the first day of the new legislative session, January 10, 2005. On January 11, 2005, the legislature voted to accept the returns. Pursuant to Article III, Section 4 of the Washington State Constitution, the Speaker of the House of Representatives and the President of the Senate declared Christine Gregoire duly elected as Washington's governor and presented Governor Gregoire with a certificate of election dated January 11, 2005. On January 7, 2005, the Rossi for Governor campaign and seven voters, Timothy Borders, Thomas Canterbury, Paul Elvig, Maggie Ferris, Tom Huff, Edward Monaghan and Christopher Vance, filed a petition in this Court contesting the issuance of a certificate of election to Christine Gregoire as Governor of Washington.

The election contest petition named the 39 counties of the State of Washington, the chief elections official from each of those counties, the Secretary of State, the Speaker of the Washington State House of Representatives and the Lieutenant Governor and President of the Washington State Senate. The petition contested the right of Ms. Gregoire to be issued a certificate of election on account of illegal votes as set forth in RCW 29A.68.020(5), and on account of errors, omissions, mistakes, neglect and other wrongful acts by the 39 counties, the 39 chief election officials, the Secretary of State, the Speaker and the Lieutenant Governor as set forth in RCW 29A.68.011(4) and (5).

The petition did not assert fraud by any election official. The petition alleged that it was impossible to determine which gubernatorial candidate received the greatest number of legitimate votes. Petitioners sought an order declaring the election null and void, setting the election aside, declaring that the certification of the results of the election and any election -- I'm sorry, any certificate of election issued as a result of the election be void and directing that a new election be conducted. On January 12, 2005, the Court granted the Washington State Democratic Central Committee's motion to intervene as a party in the contest. On January 12, the Court also granted the motion of the Libertarian Party of Washington State to intervene as a party in the election contest.

On February 4, the Court dismissed all of the counties and county auditors as respondents in the case but permitted any county or county auditor to choose to remain as a party to the case. The following opted to remain as parties to this contest: Chelan County, Snohomish County, Klickitat County and its auditor and the Lewis County Auditor. On April 5, 2005, the Court set cutoff dates for each party to submit to the other parties a final list identifying with specificity the illegal votes, including the identity of the person alleged to have cast each illegal vote, and election official errors being contested. The

Court set a May 23 trial date and required, pursuant to RCW 29A.68.100, that petitioners disclose their final list of illegal votes and election official errors on April 15th and that the Washington State Democratic Central Committee disclose its final list on May 6. On April 15th, petitioners disclosed their final list of illegal votes and election official errors. That list is incorporated herein by reference as if fully set forth and that list was submitted as an attachment to the declaration of Mr. David Bowman filed April 15th, 2005 with this Court. The disclosure by petitioners did not allege fraud by any election official. On May 9, intervenors filed its final list of illegal votes and election official errors which was submitted as an attachment to the declaration of William Rava, which is by this reference incorporated herein as if fully set forth. At trial the following fact witnesses were called and gave live testimony or their depositions were read: Secretary of State Sam Reed, Dan Brady, Dean Logan, Evelyn Arnold, William Huennekens, Nicole Way, Clark Benson, Vernon Witte, Greg Kimsey, Sue Higginbotham, Vicky Dalton, Anne LaCour, Tim Gray, Christine Swanson, Karen Martin, Nancy McBroom, Brenda Chilton, Nixon Handy, Bob Terwilliger, John Pearson, Linda Sanchez, Noel Frame and Kim Wyman. The following fact witnesses gave testimony by depositions with portions of the deposition transcripts being designated by the parties: Patrice McCarthy, Vicky Dalton, Brenda Chilton and Susie Christopher, Libby Nieland, Debbie Adelstein, Wendy Mauch, Tim Likness, Delores Gilmore, Arthur Welsh, William Nause, Daren Campbell, Mark Knutson, John Schneider, Anne LaCour, Sue Higginbotham, Linda Sanchez, Dean Logan, Bill Huennekens, Lisa Moore, Garth Fell, Carlos Webb, Nicole Way, Vicky Lee Moore, Kimberly Rice, Timothy Gray and Beverly Lamm, Nancy McBroom and Heidi Hunt, Karen Martin and Katrina Menning, Sam Reed, Colleen Kwan and Vernon Witte. The following expert witnesses were called: Dr. Anthony Gill, Dr. Jonathan Katz, Dr. Mark Handcock, and Dr. Christopher Adolph. At trial, exhibits were introduced and admitted into evidence, as shown by the clerk's exhibit list, which is by this reference incorporated herein. Petitioners have submitted evidence that 754 felons voted in accord with Exhibit 284 through 287, mostly in precincts won by Ms. Gregoire. Of the felons that petitioners demonstrated cast ballots in the 2004 general election, the Court received testimony from four of them who indicated that they voted for Mr. Rossi in this election. All of these individuals were registered in precincts that Ms. Gregoire won. The Court finds that each of these votes was an illegal vote which should be deducted from Mr. Rossi's total. Of the felons that cast ballots in the 2004 general election, the Court received testimony from one individual that he voted for the Libertarian candidate, Ms. Bennett. This individual lived in a precinct that Ms. Gregoire won. This illegal vote should be deducted from Ms. Bennett's total. Except as set forth above, neither party provided any evidence that the felon voted for a candidate for governor.

Intervenor demonstrated that 647 felons voted in accord with Exhibit 7,997 and 7,998 in 34 counties across the state, mostly in precincts won by Mr. Rossi. There is no evidence before the Court to suggest if these felon voters voted for a governor candidate. Intervenors demonstrated that six individuals in Pierce County voted despite being excluded from the elective franchise on account of mental incompetence pursuant to Washington Constitution Article VI, Section 3. 19 ballots were cast in the name of deceased persons. There is no indication in this record who cast those ballots or for whom the ballots were cast.

Petitioners have submitted evidence of approximately 875 absentee ballots in King County in excess of the number of absentee ballots received and verified. 190 more votes were counted in Clark County than voters credited with voting. 14 more votes were counted in Kittitas County than voters were credited with voting. 77 more votes were counted in Spokane County than voters credited with voting. 20 more votes were counted in Island County than voters credited with voting. 45 more ballots were cast in Stevens County than voters credited with voting. 45 more ballots were counted in Cowlitz County than voters credited with voting. And 14 more ballots were counted in Adams County than voters credited with voting. Petitioners have submitted evidence of approximately 135 ballots cast in Pierce County in excess of the number of registered voters who were credited with voting. By law, a person must be a registered voter to receive an absentee ballot. Very little, if any, evidence has been provided to create an inference that absentee ballots were tabulated without signature verification. Six individuals cast more than one ballot in the 2004 general election in Washington. There is no evidence that these individuals were not registered voters in the State of Washington. As to these six individuals, the first ballot that they cast was valid but the second was illegal. There is no evidence that individuals marked the ballot in the gubernatorial election and for whom they cast their ballots.

A provisional ballot may be cast in Washington by any registered voter. A provisional ballot must be issued to any person whose name does not appear in the poll book. Under federal law, every county in the state is required to provide voters an opportunity to vote by provisional ballot, even if they are not shown to be a registered voter in the poll book in a polling place. The use of provisional ballots in the 2004 general election exceeded both historical levels and the expectation of election workers in many counties. In the 2004 general election, provisional ballot voters sometimes cast the provisional ballots directly into the tabulating machine or ballot box rather than returning it to the poll worker for placement into the two security and verification envelopes that precinct election officials transmit to the auditor for verification of the voter's registration status and signature before the ballots are counted. In at least 11 counties election officials inadvertently allowed misfed provisional ballots to be counted before verification was completed or failed to verify signatures before counting provisional ballots that were properly returned in their envelopes. 77 provisional ballots were improperly cast in Pierce County. There is no evidence as to who actually cast any of these ballots or to show the precinct in which the person casting the ballots resided. As to the 77 provisional ballots in Pierce County, there is no evidence to indicate whether any of these individuals marked the ballot in the gubernatorial election. 348 provisional ballots were improperly cast in King County by inserting these ballots directly into the Accuvote machine. As to the 348 ballots, 252 were ultimately determined to have been cast by registered voters, leaving a net total of 96.

An additional 437 provisional ballots were cast in King County without labels. Following an investigation by Ms. Sanchez, it was determined that 358 of these ballots were cast by registered voters, leaving a net balance of 79. No evidence exists as to which candidate may have received a vote from the provisional ballots not associated with a registered voter. During the canvas and thereafter, during the course of this litigation, reconciliation

discrepancies were apparent in King County. A substantial number of these discrepancies were explained by crossover voting whereby in a particular polling place a voter from one precinct would receive and vote a ballot from another precinct. The crediting system in Washington is not an accurate reflection of the number of persons who actually voted.

Following the final certification of the election results, 96 absentee ballots were found in King County uncounted. 64 absentee ballots were found in Pierce County uncounted, and eight absentee ballots were found in Spokane County uncounted. These absentee ballots were all misplaced following the 2004 general election. Reconciliation is important because it is the one check that a county has to make sure that there is not -- that there are not ballot box stuffing issues or ballots removed from the ballot box. This is not the first election in Washington that some counties could not reconcile the results.

The King County Elections Department experienced what have been called deep and significant problems during the 2004 general election and the tabulation that followed. King County used new software for the registration of voters in 2004. In some instances the new software worked. In some instances it was deficient, and in some circumstances different people within the Elections Department had different versions of the DIMS software system which caused accountability reports to be exceedingly difficult to prepare accurately. Ms. Nicole Way assisted in the preparation of the mail ballot report. That report improperly accounted for the number of absentee ballots returned. Ms. Way had expressed concerns to her superiors about the ability of the new software to properly verify the absentee ballot numbers. The problems in King County are associated with and result from a lack of communication, lack of taking responsibility for actions, a lower level of accountability and a difficulty documenting procedures.

The Secretary of State is the chief elections officer for the State of Washington and provides oversight, training and direction to the Elections Department of each county. In the 2004 election, the Secretary of State dispatched staff to assist 20 counties with their election difficulties. The Secretary of State's office received no information from any of the state's 39 counties that any election worker either removed ballots or added ballots. Specifically with reference to King County, there is no evidence that the significant errors which occurred resulted from intentional misconduct or someone's desire to manipulate the election. There is no evidence that anybody associated with any of the candidates in the governor's race had anything to do with causing the errors. There is no evidence that has been produced in this Court to suggest that the errors resulted from partisan bias. During the 2004 general election, the various polling sites across the State were populated by inspectors, judges, Accuvote judges, observers, attorneys and the media. No testimony has been placed before the Court to suggest fraud or intentional misconduct. Election officials attempted to perform their responsibilities in a fair and impartial manner. There is no evidence before the Court to question ballot security as to those ballots actually counted. Voters in Washington are treated on the honor system. That is, when a person registers to vote and they take the oath that they are qualified, election officials do not have the right to challenge that voter's qualifications in accord with RCW 29A.08.110. In 2004, there were no statewide databases available to check for felons.

The data on which petitioners' experts, Professors Gill and Katz, relied was not a complete consensus -- or census of illegal votes, nor was it a random or scientific sample of illegal votes within the State of Washington. Petitioners' data was overly weighted to include illegal votes from King County, particularly in precincts in which Ms. Gregoire prevailed. This is not consistent with generally accepted scientific standards and there was no proof that illegal voting by felons or others was more likely to occur in King County than any other county, in light of the distribution of felons in the State of Washington. Relying on any party's selection of illegal votes, when it is clear that there are many more that could have been identified, creates the risk of an erroneous determination.

The Court finds that the statistical methods used in the reports of Professors Gill and Katz depend on an assumption that determines the outcome they obtain. In particular, they depend on the assumption, without any collateral indication of validity, that illegal voters in a precinct vote for a candidate with a probability equal to the overall distribution of votes in the precinct among candidates. The assumption relied upon by Professors Gill and Katz has not been generally accepted in their field of science. The principle of insufficient reason was not shown to be scientifically accepted as a substitute for evidence or other scientific proof in these circumstances.

The Court finds that the method of proportionate deduction and the assumption relied upon by Professors Gill and Katz are a scientifically unaccepted use of the method of ecological inference. In particular, Professors Gill and Katz committed what is referred to as the ecological fallacy in making inferences about a particular individual's voting behavior using only information about the average behavior of groups; in this case, voters assigned to a particular precinct. The ecological fallacy leads to erroneous and misleading results. Election results vary significantly from one similar precinct to another, from one election to another in the same precinct and among different candidates of the same party in the same precinct. Felons and others who vote illegally are not necessarily the same as others in the precinct.

The only voters who testified at trial gave credible testimony that they voted for Rossi or Bennett. Yet, the proportionate reduction method advocated by petitioners and their experts would have partially deducted these votes from Ms. Gregoire's total because these individuals lived in her leaning precincts. The Court finds that the statistical methods used in the reports of Professors Gill and Katz ignore other significant factors in determining how a person is likely to vote. In this case, in light of the candidates, gender may be as significant or a more significant factor than others. The illegal voters were disproportionately male and less likely to have voted for the female candidate. There is no evidence that ballots were changed, the ballot box stuffed or that lawful votes were removed from either candidate's ballot box.

From the foregoing Findings of Fact, the Court now makes and enters the following Conclusions of Law: The Court has jurisdiction over the parties and the subject matter of this action. Election contests are governed by several general principles. Chief among them is the principle that the judiciary should exercise restraint in interfering with the

elective process which is reserved to the people in the State Constitution. Unless an election is clearly invalid, when the people have spoken their verdict should not be disturbed by the courts. In adhering to the principle of judicial restraint, the Court should follow the rule that an informality or irregularity in an election which did not affect the result is not sufficient to invalidate the election.

RCW 29A.68.020 provides, in part, that illegal votes include, but are not limited to, more than one vote cast by a single voter as well as a vote cast by a person disqualified under Article VI, Section 3 of the State Constitution. Here, petitioners have established by clear and convincing evidence that 754 felons voted at the general election in 2004. Intervenors have established that 647 felons voted at the same election. In addition, 19 ballots were tabulated in the name of deceased voters and six voters voted twice. These are all illegal votes pursuant to the statute. Four of the illegal felon votes were cast for Mr. Rossi and one for Ms. Bennett. Washington Administrative Code 434-253-043 instructs as to the manner in which a provisional ballot is submitted. Those instructions preclude inserting the executed ballot directly into an optical scanner or ballot box. Washington Administrative Code 434-253-047 requires that a provisional ballot not be counted unless the voter's name, signature and date of birth, if available, match the voter registration record. The Court concludes, pursuant to the statutes of this state, as well as the Help America Vote Act, that to the extent that such provisional ballots are either illegal or invalid, the Court should not disenfranchise those voters who improperly cast a provisional ballot if the election worker ultimately determined that the provisional ballot was cast by a qualified registered voter. Based on the Court's findings, this leaves a total of 175 provisional ballots as illegal votes.

Based on the findings, the Court concludes that 1,678 illegal votes were cast in the 2004 general election. This includes felons established by petitioners totaling 754, felons established by intervenors totaling 647, deceased voters totaling 19, double voters totaling 6, provisional ballots in King County totaling 96, provisional ballots in Pierce County totaling 79 and additional votes in Pierce County for which there could not be found a registered voter through crediting, at least, totaling 77. And, therefore, the total is 1,678. A witness qualified as an expert may testify on the basis of scientific, technical or other specialized knowledge. The admission of scientific testimony involves two related inquiries. The first is whether the scientific principle or theory from which the testimony is derived has garnered general acceptance in the relevant scientific community under the Frye standard. The second inquiry is whether the expert's testimony is properly admissible under Evidence Rule 702. As noted in State v. Dunn, Wn.App. Number 22215-2-III decided February 3, 2005, the concern of the Court is not to determine if the scientific theory underlying the proposed testimony is correct but, rather, who -- I'm sorry, but whether it is generally accepted in the appropriate scientific community. The core concern in this regard, that is, the core concern of Frye is only whether the evidence being offered is based on established scientific methodology. This involves both an accepted theory and a valid technique to implement that theory.

The Court concludes that petitioners' proffered expert testimony on proportional deduction in the context of this election contest case does not involve either an accepted

theory or a valid technique to implement that theory. Intervenor's motion to exclude the expert testimony of Dr. Gill and Dr. Katz shall be granted. Alternatively, the Court concludes that the testimony of petitioners' experts is not helpful to this Court based on the narrow scope of the datasets provided by such experts -- or provided to such experts by Mr. Benson.

Finally in this regard, even assuming that the proffered expert testimony of Professors Gill and Katz satisfied the Frye standard and meets the requirements of Evidence Rule 702, that testimony does not, in view of intervenor's experts' opinions based on broader data and consensus, satisfy petitioners' burden of proof to convince the Court that Mr. Rossi received more votes than Ms. Gregoire. Indeed, the Court is more inclined to conclude that if this type of testimony is properly admissible, then Ms. Gregoire would have prevailed under a theory of proportional deduction based on the testimony of Drs. Adolph and Handcock. RCW 29A.68.110 provides that no election may be set aside on account of illegal votes unless it appears that an amount of illegal votes has been given to the person whose right 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. The Court concludes, by clear and convincing evidence, that Mr. Rossi received four votes cast illegally by felons and that Ms. Bennett received one vote cast by a felon. There is no evidence, however, in this record that Ms. Gregoire received any illegal votes. Indeed, there has been no evidence produced that Ms. Gregoire received any of the 2,820 votes claimed by petitioners in their closing argument.

This same requirement was recognized in Hill v. Howell in 1912 when that Court held that where there was no evidence to show for whom the elector voted and because both candidates were innocent of wrongdoing, the vote must be treated between the parties as a legitimate vote. There is no evidence before the Court that either Ms. Gregoire or Mr. Rossi directly or indirectly engaged in wrongdoing, and the Court so concludes. RCW 29A.68.020(1) provides that one of the causes for an election contest is misconduct and, more specifically, misconduct on the part of any member of any precinct election board. A precinct election board is comprised of the inspector, judge and other precinct election officers appointed by the county auditor to oversee the election day procedures at a given precinct or polling place. However, RCW 29A.68.070 instructs that no irregularity or improper conduct in the proceedings of any election 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.

In Quigley v. Phelps, a 1913 case, our Court observed that election officers are presumed to have complied with the duties required of them in an honest and careful manner and that the returns of any election official should be entitled to the presumption of regularity. In accord with this presumption is RCW 29A.08.810 which provides that the registration of a person as a voter is presumptive evidence of his or her right to vote. And finally, in McCormick v. Okanogan County, a 1978 case, the Court announced that informality or

irregularity in an election that does not affect the result is not sufficient to invalidate the election.

This Court concludes that the statutes and Supreme Court case law of this state require that petitioner establish not only that illegal, invalid or improper votes were cast and/or that there has been misconduct on the part of any member of any precinct election board but also, that the petitioners must establish the element of causation, that is, in the language of RCW 29A.68.070, that such irregularity or improper conduct was such as to procure Ms. Gregoire's certification. While there is evidence of irregularity, as there appears to be in every election, based on the testimony of various county election officials, there is no substantial evidence by clear and convincing evidence that improper conduct or irregularity procured Ms. Gregoire's election to the Office of Governor.

This Court previously determined that petitioners could assert, as they have, wrongful acts and neglect of duty on the part of election officials under Section (4) and (5) of RCW 29A.68.011. However, the causation element herein above referenced must still be met under the statutory framework of our election contest statute. And here, it has not been. The Court concludes that the burden of proof upon petitioners is to prove their claims by clear and convincing evidence, whether those claims relate to RCW 29A.68.020 or RCW 29A.68.011.

The Court concludes that petitioners have not met either the clear and convincing burden or the preponderance of the evidence burden as to the element of causation. The Court concludes further that no matter the number of illegal votes, whether they total 1,678, as determined by this Court, or 2,820, as argued by petitioners in their closing, this election may not be set aside merely because the number of illegal or invalid votes exceed the margin of victory, because the election contest statute requires the contestant to show that the illegal votes or misconduct changed the election's result. The Washington State legislature has, by enacting RCW 29A.68.110 and 29A.68.020, removed any other choice from this Court's discretion.

The Court concludes that, having neither pled nor disclosed, pursuant to RCW 29A.68.100, fraud cannot -- I'm sorry, pursuant to 29A.68.100, fraud cannot now be claimed and that to the extent that it was claimed, neither the act of fraud nor the causation arising therefrom were proved by the higher burden of proof of clear, cogent and convincing. Finally, with respect to proportional deduction, the Court concludes that an election such as this should not be overturned because one judge picks a number and applies a proportional deduction analysis. To do so, within the context of the facts of this case, would constitute the ultimate act of judicial egotism and judicial activism which neither the voters for Mr. Rossi or for Ms. Gregoire should condone. The Court concludes that mere voter crediting, without other evidence, is not sufficient to show that someone voted. The Court concludes that the election contest petition should be dismissed with prejudice and the certification of Ms. Gregoire as governor confirmed. The Court concludes that from the total votes cast in the 2004 general election, that is, 2,812,675, there should be deducted 1,678. Any questions, counsel? Thank you very much. Court's in recess.