

**STATE'S
EXHIBIT NO. 3**

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

2 IN AND FOR THE COUNTY OF CHELAN

3 TIMOTHY BORDERS, et al.,)
)
 4 Petitioners,) No. 05-2-00027-3
)
 5 vs.) COURT'S ORAL DECISION
)
 6 KING COUNTY and DEAN LOGAN,)
 its Director of Records,)
 7 Elections and Licensing)
 Services, et al.,)
 8)
 Respondents.)
 9)
 and)
 10)
 WASHINGTON STATE DEMOCRATIC)
 11 CENTRAL COMMITTEE,)
)
 12 Intervenor-Respondent,)
)
 13 and)
)
 14 LIBERTARIAN PARTY OF)
 WASHINGTON STATE, et al.,)
 15)
 Intervenor-Respondent.)

17 VERBATIM REPORT OF PROCEEDINGS

Case 1:05-cv-00634-SEB-VSS Document 79 Filed 12/01/2005 Page 2 of 28

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

22 APPEARANCES

23
 24 FOR THE PETITIONERS: Mr. Harry Korrell
 Mr. Robert Maguire
 25 Mr. Dale Foreman

2186

1 FOR THE DEMOCRATIC Ms. Jenny Durkan
CENTRAL COMMITTEE: Mr. Kevin Hamilton
2 Mr. Russell Speidel
 Mr. David Burman
3
4 FOR THE SECRETARY OF STATE: Mr. Thomas Ahearne
 Mr. Jeffrey Even
5 FOR SNOHOMISH COUNTY: Mr. Gordon Sivley

6 * * *

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

17 in the Court of Appeals. And if you folks want that, Page 3 of 28

18 transcript to go faster than that ten-day waiting period,
19 you'll need to agree or stipulate that it can go as soon as
20 it's received if you folks are going to appeal. So if you
21 will talk to each other and Madam Clerk about that, I
22 certainly would appreciate it.

23 MR. HAMILTON: Thank you.

24 THE COURT: I have some introductory comments I'd like
25 to make and the first is this, for counsel particularly. I

2187

1 want to note for you lady and gentlemen that nothing I say
2 this morning should be interpreted as a criticism of either
3 you or your clients. Secondly, I have been asked in closing
4 argument to send a message. I'm going to decline that
5 invitation. This Court is not in a position to fix the
6 deficiencies in the election process that we heard about in
7 this courtroom over the past nine days. However, the voters
8 of this state are in a position to demand of their executive
9 and legislative bodies that remedial measures be instituted
10 immediately. And clearly, the evidence here suggests that the
11 problems require more than just constructing new buildings and
12 hiring more staff.

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

24 Third, both you and I can take some comfort from the
25 knowledge that soon the ladies and gentlemen of our state

Case 1:05-cv-00634-SEB-VSS Document 79 Filed 12/01/2005 Page 4 of 28

2188

1 Supreme Court will review what I've done, what I haven't done
2 and my decision in this case. They are exceedingly bright and
3 diligent and I can assure you that they will utilize their
4 collective wisdom to render a just decision in this case.
5 And, fourth, extraordinary efforts are in place to make it
6 easier to vote but, unfortunately, I fear that it will be much
7 more difficult to account for those votes in the future.
8 Counsel, I am now prepared to make the necessary Findings of
9 Fact and Conclusions of Law in this case and I, unfortunately,
10 do not have a spoonful of sugar for either you or your clients
11 with respect to this decision.

12 The case which comes before the Court this morning is
13 entitled Borders versus King County. It is Chelan County
14 Cause Number 05-2-00027-3. With respect to this case, the
15 Court will now make its Findings of Fact. The general

16 election for the Office of Governor of the State of Washington
Case 1:05-cv-00634-SEB-VSS Document 79 Filed 12/01/2005 Page 5 of 28

17 was held on November 2nd, 2004. The gubernatorial candidates
18 were Christine Gregoire, Democrat; Dino Rossi, Republican; and
19 Ruth Bennett, Libertarian. On November 17th, the counties
20 completed their initial tabulation of votes and out of the
21 over 2.8 million votes counted, 261 votes separated the two
22 leading candidates, Christine Gregoire and Dino Rossi, with
23 Mr. Rossi in the lead. This is shown by Exhibit 12,001
24 admitted into evidence. Because the margin separating the
25 candidates was less than one-half of one percent of the total

2189

1 votes cast, the Secretary of State ordered the mandatory
2 recount required by RCW 29A.64.021. The Secretary decided to
3 conduct the mandatory recount as a machine recount.

4 On November 30, after receiving certified recount
5 returns from all 39 counties, Secretary Reed announced the
6 result of the mandatory recount which indicated that Mr.
7 Rossi's lead was 42 votes. Exhibit 12,002. On December 3,
8 the Washington State Democratic Central Committee requested a
9 hand recount pursuant to RCW 29A.64.011. On December 23, the
10 last of the 39 counties certified the manual recount results
11 in their jurisdictions. On December 30, Secretary of State
12 Sam Reed announced the result of the manual recount and
13 declared that Christine Gregoire was the winner of the 2004
14 gubernatorial election by a margin of 129 votes. Exhibits
15 12,003 and 12,004 admitted in this case. Ms. Gregoire
16 received 1,373,361 votes. Mr. Rossi received 1,373,232 votes

Case 1:05-cv-00634-SEB-VSS Document 79 Filed 12/01/2005 Page 6 of 28

17 and Ms. Bennett received 63,456 votes. The total write-in
18 vote equaled 2,618 votes. The grand total was 2,812,675.

19 Secretary Reed delivered the certified county returns
20 to the Speaker of the House of Representatives on the first
21 day of the new legislative session, January 10, 2005. On
22 January 11, 2005, the legislature voted to accept the returns.
23 Pursuant to Article III, Section 4 of the Washington State
24 Constitution, the Speaker of the House of Representatives and
25 the President of the Senate declared Christine Gregoire duly

2190

1 elected as Washington's governor and presented Governor
2 Gregoire with a certificate of election dated January 11,
3 2005. On January 7, 2005, the Rossi for Governor campaign and
4 seven voters, Timothy Borders, Thomas Canterbury, Paul Elvig,
5 Maggie Ferris, Tom Huff, Edward Monaghan and Christopher
6 Vance, filed a petition in this Court contesting the issuance
7 of a certificate of election to Christine Gregoire as Governor
8 of Washington.

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

21 The petition did not assert fraud by any election
22 official. The petition alleged that it was impossible to
23 determine which gubernatorial candidate received the greatest
24 number of legitimate votes. Petitioners sought an order
25 declaring the election null and void, setting the election

Case 1:05-cv-00634-SEB-VSS Document 79 Filed 12/07/2005 Page 7 of 28

2191

1 aside, declaring that the certification of the results of the
2 election and any election -- I'm sorry, any certificate of
3 election issued as a result of the election be void and
4 directing that a new election be conducted. On January 12,
5 2005, the Court granted the Washington State Democratic
6 Central Committee's motion to intervene as a party in the
7 contest. On January 12, the Court also granted the motion of
8 the Libertarian Party of Washington State to intervene as a
9 party in the election contest.

10 On February 4, the Court dismissed all of the counties
11 and county auditors as respondents in the case but permitted
12 any county or county auditor to choose to remain as a party to
13 the case. The following opted to remain as parties to this
14 contest: Chelan County, Snohomish County, Klickitat County
15 and its auditor and the Lewis County Auditor. On April 5,
16 2005, the Court set cutoff dates for each party to submit to
17 the other parties a final list identifying with specificity
18 the illegal votes, including the identity of the person
19 alleged to have cast each illegal vote, and election official
20 errors being contested. The Court set a May 23 trial date and
21 required, pursuant to RCW 29A.68.100, that petitioners
22 disclose their final list of illegal votes and election
23 official errors on April 15th and that the Washington State
24 Democratic Central Committee disclose its final list on May 6.

25 On April 15th, petitioners disclosed their final list

Case 1:05-cv-00634-SEB-VSS Document 79 Filed 12/01/2005 Page 8 of 28

2192

1 of illegal votes and election official errors. That list is
2 incorporated herein by reference as if fully set forth and
3 that list was submitted as an attachment to the declaration of
4 Mr. David Bowman filed April 15th, 2005 with this Court. The
5 disclosure by petitioners did not allege fraud by any election
6 official. On May 9, intervenors filed its final list of
7 illegal votes and election official errors which was submitted
8 as an attachment to the declaration of William Rava, which is
9 by this reference incorporated herein as if fully set forth.

10 At trial the following fact witnesses were called and
11 gave live testimony or their depositions were read: Secretary
12 of State Sam Reed, Dan Brady, Dean Logan, Evelyn Arnold,
13 William Huennekens, Nicole Way, Clark Benson, Vernon Witte,

14 Case 1:05-cv-00634-SEB-VSS Document 79 Filed 12/01/2005 Page 9 of 28

15 Greg Kinsley, Sue Higginbotham, Vicky Dalton, Anne LaCour, Tim
16 Gray, Christine Swanson, Karen Martin, Nancy McBroom, Brenda
17 Chilton, Nixon Handy, Bob Terwilliger, John Pearson, Linda
18 Sanchez, Noel Frame and Kim Wyman. The following fact
19 witnesses gave testimony by depositions with portions of the
20 deposition transcripts being designated by the parties:
21 Patrice McCarthy, Vicky Dalton, Brenda Chilton and Susie
22 Christopher, Libby Nieland, Debbie Adelstein, Wendy Mauch, Tim
23 Likness, Delores Gilmore, Arthur Welsh, William Nause, Daren
24 Campbell, Mark Knutson, John Schneider, Anne LaCour, Sue
25 Higginbotham, Linda Sanchez, Dean Logan, Bill Huennekens, Lisa
Moore, Garth Fell, Carlos Webb, Nicole Way, Vicky Lee Moore,

2193

1 Kimberly Rice, Timothy Gray and Beverly Lamm, Nancy McBroom
2 and Heidi Hunt, Karen Martin and Katrina Menning, Sam Reed,
3 Colleen Kwan and Vernon Witte. The following expert witnesses
4 were called: Dr. Anthony Gill, Dr. Jonathan Katz, Dr. Mark
5 Handcock, and Dr. Christopher Adolph. At trial, exhibits were
6 introduced and admitted into evidence, as shown by the clerk's
7 exhibit list, which is by this reference incorporated herein.

8 Petitioners have submitted evidence that 754 felons
9 voted in accord with Exhibit 284 through 287, mostly in
10 precincts won by Ms. Gregoire. Of the felons that petitioners
11 demonstrated cast ballots in the 2004 general election, the
12 Court received testimony from four of them who indicated that
13 they voted for Mr. Rossi in this election. All of these
14 individuals were registered in precincts that Ms. Gregoire
15 won. The Court finds that each of these votes was an illegal
16 vote which should be deducted from Mr. Rossi's total. Of the
17 felons that cast ballots in the 2004 general election, the
18 Court received testimony from one individual that he voted for
19 the Libertarian candidate, Ms. Bennett. This individual lived
20 in a precinct that Ms. Gregoire won. This illegal vote should
21 be deducted from Ms. Bennett's total. Except as set forth
22 above, neither party provided any evidence that the felon
23 voted for a candidate for governor.

24 Intervenor demonstrated that 647 felons voted in accord
25 with Exhibit 7,997 and 7,998 in 34 counties across the state,

Case 1:05-cv-00634-SEB-VSS Document 79 Filed 12/01/2005 Page 10 of 28

2194

1 mostly in precincts won by Mr. Rossi. There is no evidence
2 before the Court to suggest if these felon voters voted for a
3 governor candidate. Intervenors demonstrated that six
4 individuals in Pierce County voted despite being excluded from
5 the elective franchise on account of mental incompetence
6 pursuant to Washington Constitution Article VI, Section 3. 19
7 ballots were cast in the name of deceased persons. There is
8 no indication in this record who cast those ballots or for
9 whom the ballots were cast.

10 Petitioners have submitted evidence of approximately
11 875 absentee ballots in King County in excess of the number of
12 absentee ballots received and verified. 190 more votes were

13 counted in Clark County than voters credited with voting. 14
Case 1:05-cv-00634-SEB-VSS Document 79 Filed 12/01/2005 Page 11 of 28

14 more votes were counted in Kittitas County than voters were
15 credited with voting. 77 more votes were counted in Spokane
16 County than voters credited with voting. 20 more votes were
17 counted in Island County than voters credited with voting. 45
18 more ballots were cast in Stevens County than voters credited
19 with voting. 45 more ballots were counted in Cowlitz County
20 than voters credited with voting. And 14 more ballots were
21 counted in Adams County than voters credited with voting.
22 Petitioners have submitted evidence of approximately 135
23 ballots cast in Pierce County in excess of the number of
24 registered voters who were credited with voting.

25 By law, a person must be a registered voter to receive

2195

1 an absentee ballot. Very little, if any, evidence has been
2 provided to create an inference that absentee ballots were
3 tabulated without signature verification. Six individuals
4 cast more than one ballot in the 2004 general election in
5 Washington. There is no evidence that these individuals were
6 not registered voters in the State of Washington. As to these
7 six individuals, the first ballot that they cast was valid but
8 the second was illegal. There is no evidence that individuals
9 marked the ballot in the gubernatorial election and for whom
10 they cast their ballots.

11 A provisional ballot may be cast in Washington by any
12 registered voter. A provisional ballot must be issued to any
13 person whose name does not appear in the poll book. Under
14 federal law, every county in the state is required to provide
15 voters an opportunity to vote by provisional ballot, even if
16 they are not shown to be a registered voter in the poll book
17 in a polling place. The use of provisional ballots in the
18 2004 general election exceeded both historical levels and the
19 expectation of election workers in many counties. In the 2004
20 general election, provisional ballot voters sometimes cast the
21 provisional ballots directly into the tabulating machine or
22 ballot box rather than returning it to the poll worker for
23 placement into the two security and verification envelopes
24 that precinct election officials transmit to the auditor for

Case 1:05-cv-00634-SEB-VSS Document 79 Filed 12/01/2005 Page 12 of 28

25 verification of the voter's registration status and signature

2196

1 before the ballots are counted.

2 In at least 11 counties election officials
3 inadvertently allowed misfed provisional ballots to be counted
4 before verification was completed or failed to verify
5 signatures before counting provisional ballots that were
6 properly returned in their envelopes. 77 provisional ballots
7 were improperly cast in Pierce County. There is no evidence
8 as to who actually cast any of these ballots or to show the
9 precinct in which the person casting the ballots resided. As
10 to the 77 provisional ballots in Pierce County, there is no
11 evidence to indicate whether any of these individuals marked

12 Case 1:05-cv-00634-SEB-VSS Document 79 Filed 12/01/2005 Page 13 of 28

13 the ballot in the gubernatorial election. 348 provisional
14 ballots were improperly cast in King County by inserting these
15 ballots directly into the Accuvote machine. As to the 348
16 ballots, 252 were ultimately determined to have been cast by
17 registered voters, leaving a net total of 96.

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

25 King County. A substantial number of these discrepancies were

2197

1 explained by crossover voting whereby in a particular polling
2 place a voter from one precinct would receive and vote a
3 ballot from another precinct. The crediting system in
4 Washington is not an accurate reflection of the number of
5 persons who actually voted.

6 Following the final certification of the election
7 results, 96 absentee ballots were found in King County
8 uncounted. 64 absentee ballots were found in Pierce County
9 uncounted, and eight absentee ballots were found in Spokane
10 County uncounted. These absentee ballots were all misplaced

11 following the 2004 general election. Reconciliation is
12 important because it is the one check that a county has to

Case 1:05-cv-00634-SEB-VSS Document 79 Filed 12/01/2005 Page 14 of 28

13 make sure that there is not -- that there are not ballot box
14 stuffing issues or ballots removed from the ballot box. This
15 is not the first election in Washington that some counties
16 could not reconcile the results.

17 The King County Elections Department experienced what
18 have been called deep and significant problems during the 2004
19 general election and the tabulation that followed. King
20 County used new software for the registration of voters in
21 2004. In some instances the new software worked. In some
22 instances it was deficient, and in some circumstances
23 different people within the Elections Department had different

24 versions of the DIMS software system which caused
25 accountability reports to be exceedingly difficult to prepare

2198

1 accurately. Ms. Nicole Way assisted in the preparation of the
2 mail ballot report. That report improperly accounted for the
3 number of absentee ballots returned. Ms. Way had expressed
4 concerns to her superiors about the ability of the new
5 software to properly verify the absentee ballot numbers. The
6 problems in King County are associated with and result from a
7 lack of communication, lack of taking responsibility for
8 actions, a lower level of accountability and a difficulty
9 documenting procedures.

10 The Secretary of State is the chief elections officer

11 Case 1:05-cv-00634-SEB-VSS Document 79 Filed 12/01/2005 Page 15 of 28
the State of Washington and provides oversight training

12 and direction to the Elections Department of each county. In
13 the 2004 election, the Secretary of State dispatched staff to
14 assist 20 counties with their election difficulties. The
15 Secretary of State's office received no information from any
16 of the state's 39 counties that any election worker either
17 removed ballots or added ballots. Specifically with reference
18 to King County, there is no evidence that the significant
19 errors which occurred resulted from intentional misconduct or
20 someone's desire to manipulate the election. There is no
21 evidence that anybody associated with any of the candidates in
22 the governor's race had anything to do with causing the
23 errors. There is no evidence that has been produced in this

24 Court to suggest that the errors resulted from partisan bias.

25 During the 2004 general election, the various polling

2199

1 sites across the State were populated by inspectors, judges,
2 Accuvote judges, observers, attorneys and the media. No
3 testimony has been placed before the Court to suggest fraud or
4 intentional misconduct. Election officials attempted to
5 perform their responsibilities in a fair and impartial manner.
6 There is no evidence before the Court to question ballot
7 security as to those ballots actually counted. Voters in
8 Washington are treated on the honor system. That is, when a
9 person registers to vote and they take the oath that they are
10 qualified, election officials do not have the right to
11 challenge that voter's qualifications in accord with RCW

Case 1:05-cv-00634-SEB-VSS Document 79 Filed 12/01/2005 Page 16 of 28

12 29A.08.110. In 2004, there were no statewide databases
13 available to check for felons.

14 The data on which petitioners' experts, Professors Gill
15 and Katz, relied was not a complete consensus -- or census of
16 illegal votes, nor was it a random or scientific sample of
17 illegal votes within the State of Washington. Petitioners'
18 data was overly weighted to include illegal votes from King
19 County, particularly in precincts in which Ms. Gregoire
20 prevailed. This is not consistent with generally accepted
21 scientific standards and there was no proof that illegal
22 voting by felons or others was more likely to occur in King

23 County than any other county, in light of the distribution of
24 felons in the State of Washington. Relying on any party's
25 selection of illegal votes, when it is clear that there are

2200

1 many more that could have been identified, creates the risk of
2 an erroneous determination.

3 The Court finds that the statistical methods used in
4 the reports of Professors Gill and Katz depend on an
5 assumption that determines the outcome they obtain. In
6 particular, they depend on the assumption, without any
7 collateral indication of validity, that illegal voters in a
8 precinct vote for a candidate with a probability equal to the
9 overall distribution of votes in the precinct among

10 candidates. The assumption relied upon by Professors Gill and
Case 1:05-cv-00634-SEB-VSS Document 79 Filed 12/01/2005 Page 17 of 28

11 Katz has not been generally accepted in their field of
12 science. The principle of insufficient reason was not shown
13 to be scientifically accepted as a substitute for evidence or
14 other scientific proof in these circumstances.

15 The Court finds that the method of proportionate
16 deduction and the assumption relied upon by Professors Gill
17 and Katz are a scientifically unaccepted use of the method of
18 ecological inference. In particular, Professors Gill and Katz
19 committed what is referred to as the ecological fallacy in
20 making inferences about a particular individual's voting
21 behavior using only information about the average behavior of
22 groups; in this case, voters assigned to a particular

23 precinct. The ecological fallacy leads to erroneous and
24 misleading results. Election results vary significantly from
25 one similar precinct to another, from one election to another

2201

1 in the same precinct and among different candidates of the
2 same party in the same precinct. Felons and others who vote
3 illegally are not necessarily the same as others in the
4 precinct.

5 The only voters who testified at trial gave credible
6 testimony that they voted for Rossi or Bennett. Yet, the
7 proportionate reduction method advocated by petitioners and
8 their experts would have partially deducted these votes from

9 Ms. Gregoire's total because these individuals lived in her
Case 1:05-cv-00634-SEB-VSS Document 79 Filed 12/01/2005 Page 18 of 28
10 leaning precincts. The Court finds that the statistical

11 methods used in the reports of Professors Gill and Katz ignore
12 other significant factors in determining how a person is
13 likely to vote. In this case, in light of the candidates,
14 gender may be as significant or a more significant factor than
15 others. The illegal voters were disproportionately male and
16 less likely to have voted for the female candidate. There is
17 no evidence that ballots were changed, the ballot box stuffed
18 or that lawful votes were removed from either candidate's
19 ballot box.

20 From the foregoing Findings of Fact, the Court now
21 makes and enters the following Conclusions of Law: The Court

22 has jurisdiction over the parties and the subject matter of
23 this action. Election contests are governed by several
24 general principles. Chief among them is the principle that
25 the judiciary should exercise restraint in interfering with

2202

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

9 Case 1:05-cv-00634-SEB-VSS Document 79 Filed 12/01/2005 Page 19 of 28
RCW 29A.68.020 provides, in part, that illegal votes

10 include, but are not limited to, more than one vote cast by a
11 single voter as well as a vote cast by a person disqualified
12 under Article VI, Section 3 of the State Constitution. Here,
13 petitioners have established by clear and convincing evidence
14 that 754 felons voted at the general election in 2004.
15 Intervenors have established that 647 felons voted at the same
16 election. In addition, 19 ballots were tabulated in the name
17 of deceased voters and six voters voted twice. These are all
18 illegal votes pursuant to the statute. Four of the illegal
19 felon votes were cast for Mr. Rossi and one for Ms. Bennett.

20 Washington Administrative Code 434-253-043 instructs as
21 to the manner in which a provisional ballot is submitted.

22 Those instructions preclude inserting the executed ballot
23 directly into an optical scanner or ballot box. Washington
24 Administrative Code 434-253-047 requires that a provisional
25 ballot not be counted unless the voter's name, signature and

2203

1 date of birth, if available, match the voter registration
2 record. The Court concludes, pursuant to the statutes of this
3 state, as well as the Help America Vote Act, that to the
4 extent that such provisional ballots are either illegal or
5 invalid, the Court should not disenfranchise those voters who
6 improperly cast a provisional ballot if the election worker
7 ultimately determined that the provisional ballot was cast by
8 a qualified registered voter. Based on the Court's findings,
Case 1:05-cv-00634-SEB-VSS Document 79 Filed 12/01/2005 Page 20 of 28
9 this leaves a total of 175 provisional ballots as illegal
10 votes.

11 Based on the findings, the Court concludes that 1,678
12 illegal votes were cast in the 2004 general election. This
13 includes felons established by petitioners totaling 754,
14 felons established by intervenors totaling 647, deceased
15 voters totaling 19, double voters totaling 6, provisional
16 ballots in King County totaling 96, provisional ballots in
17 Pierce County totaling 79 and additional votes in Pierce
18 County for which there could not be found a registered voter
19 through crediting, at least, totaling 77. And, therefore, the
20 total is 1,678.

21 A witness qualified as an expert may testify on the
22 basis of scientific, technical or other specialized knowledge.
23 The admission of scientific testimony involves two related
24 inquiries. The first is whether the scientific principle or
25 theory from which the testimony is derived has garnered

2204

1 general acceptance in the relevant scientific community under
2 the Frye standard. The second inquiry is whether the expert's
3 testimony is properly admissible under Evidence Rule 702. As
4 noted in State v. Dunn, Wn.App. Number 22215-2-III decided
5 February 3, 2005, the concern of the Court is not to determine
6 if the scientific theory underlying the proposed testimony is
7 correct but, rather, who -- I'm sorry, but whether it is

8 generally accepted in the appropriate scientific community
Case 1:05-cv-00034-SEB-VSS Document 79 Filed 12/04/2005 Page 21 of 28

9 The core concern in this regard, that is, the core concern of
10 Frye is only whether the evidence being offered is based on
11 established scientific methodology. This involves both an
12 accepted theory and a valid technique to implement that
13 theory.

14 The Court concludes that petitioners' proffered expert
15 testimony on proportional deduction in the context of this
16 election contest case does not involve either an accepted
17 theory or a valid technique to implement that theory.
18 Intervenor's motion to exclude the expert testimony of Dr.
19 Gill and Dr. Katz shall be granted. Alternatively, the Court
20 concludes that the testimony of petitioners' experts is not

21 helpful to this Court based on the narrow scope of the
22 datasets provided by such experts -- or provided to such
23 experts by Mr. Benson.

24 Finally in this regard, even assuming that the
25 proffered expert testimony of Professors Gill and Katz

2205

1 satisfied the Frye standard and meets the requirements of
2 Evidence Rule 702, that testimony does not, in view of
3 intervenor's experts' opinions based on broader data and
4 consensus, satisfy petitioners' burden of proof to convince
5 the Court that Mr. Rossi received more votes than Ms.
6 Gregoire. Indeed, the Court is more inclined to conclude that
7 if this type of testimony is properly admissible, then Ms.

Case 1:05-cv-00634-SEB-VSS Document 79 Filed 12/01/2005 Page 22 of 28

8 Gregoire would have prevailed under a theory of proportional
9 deduction based on the testimony of Drs. Adolph and Handcock.

10 RCW 29A.68.110 provides that no election may be set
11 aside on account of illegal votes unless it appears that an
12 amount of illegal votes has been given to the person whose
13 right is being contested that, if taken from that person,
14 would reduce the number of the person's legal votes below the
15 number of votes given to some other person for the same office
16 after deducting therefrom the illegal votes that may be shown
17 to have been given to the other person. The Court concludes,
18 by clear and convincing evidence, that Mr. Rossi received four
19 votes cast illegally by felons and that Ms. Bennett received

20 one vote cast by a felon. There is no evidence, however, in
21 this record that Ms. Gregoire received any illegal votes.
22 Indeed, there has been no evidence produced that Ms. Gregoire
23 received any of the 2,820 votes claimed by petitioners in
24 their closing argument.

25 This same requirement was recognized in Hill v. Howell

2206

1 in 1912 when that Court held that where there was no evidence
2 to show for whom the elector voted and because both candidates
3 were innocent of wrongdoing, the vote must be treated between
4 the parties as a legitimate vote. There is no evidence before
5 the Court that either Ms. Gregoire or Mr. Rossi directly or
6 indirectly engaged in wrongdoing, and the Court so concludes.

7 RCW 29A.68.020(1) provides that one of the causes for
Case 1:05-cv-00634-SEB-VSS Document 79 Filed 12/01/2005 Page 23 of 28

8 an election contest is misconduct and, more specifically,
9 misconduct on the part of any member of any precinct election
10 board. A precinct election board is comprised of the
11 inspector, judge and other precinct election officers
12 appointed by the county auditor to oversee the election day
13 procedures at a given precinct or polling place. However, RCW
14 29A.68.070 instructs that no irregularity or improper conduct
15 in the proceedings of any election board or any member of the
16 board amounts to such malconduct as to annul or set aside any
17 election unless the irregularity or improper conduct was such
18 as to procure the person whose right to the office may be
19 contested.

20 In Quigley v. Phelps, a 1913 case, our Court observed
21 that election officers are presumed to have complied with the
22 duties required of them in an honest and careful manner and
23 that the returns of any election official should be entitled
24 to the presumption of regularity. In accord with this
25 presumption is RCW 29A.08.810 which provides that the

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1 registration of a person as a voter is presumptive evidence of
2 his or her right to vote. And finally, in McCormick v.
3 Okanogan County, a 1978 case, the Court announced that
4 informality or irregularity in an election that does not
5 affect the result is not sufficient to invalidate the
6 election.

Case 1:05-cv-00634-SEB-VSS Document 79 Filed 12/01/2005 Page 24 of 28

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

19 conduct or irregularity procured Ms. Gregoire's election to
20 the Office of Governor.

21 This Court previously determined that petitioners could
22 assert, as they have, wrongful acts and neglect of duty on the
23 part of election officials under Section (4) and (5) of RCW
24 29A.68.011. However, the causation element herein above
25 referenced must still be met under the statutory framework of

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1 our election contest statute. And here, it has not been. The
2 Court concludes that the burden of proof upon petitioners is
3 to prove their claims by clear and convincing evidence,
4 whether those claims relate to RCW 29A.68.020 or RCW
5 29A.68.011.

6 The Court concludes that petitioners have not met
Case 1:05-cv-00634-SEB-VSS Document 79 Filed 12/01/2005 Page 25 of 28

7 either the clear and convincing burden or the preponderance of
8 the evidence burden as to the element of causation. The Court
9 concludes further that no matter the number of illegal votes,
10 whether they total 1,678, as determined by this Court, or
11 2,820, as argued by petitioners in their closing, this
12 election may not be set aside merely because the number of
13 illegal or invalid votes exceed the margin of victory, because
14 the election contest statute requires the contestant to show
15 that the illegal votes or misconduct changed the election's
16 result. The Washington State legislature has, by enacting RCW
17 29A.68.110 and 29A.68.020, removed any other choice from this
18 Court's discretion.

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1 STATE OF WASHINGTON)
 : ss
2 County of Chelan)

3 I, LuAnne Nelson, a Certified Shorthand Reporter, and
4 official reporter for Chelan County Superior Court, do hereby

5 Case 1:05-cv-00684-SEB-VSS Document 79 Filed 12/01/2005 Page 27 of 28

6 That the foregoing Verbatim Report of Proceedings was
7 reported at the time and place therein stated and thereafter
8 transcribed under my direction and that such transcription is
9 a true, complete and correct record of the proceedings.

10 I further certify that I am not interested in the
11 outcome of said action, nor connected with, nor related to any
12 of the parties in said action or their respective counsel.

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Official Court Reporter
CSR No. 299-06 NE-LS-OL-M464C7

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