IN THE SUPREME COURT OF THE STATE OF MONTANA
No. 04-[redacted]851

ANITA BIG SPRING, Contestant/Appellant, -vs- RICK JORE, Contestee/ Respondent.	FILED DEC 21 2004 Ed Smith CLERK OF THE SUPREME COURT STATE OF MONTANA

From the Montana Twentieth Judicial District Court
Cause No. DV-04-258
Honorable Deborah Kim Christopher, Presiding

JORE'S ANSWER BRIEF

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STATEMENT OF THE ISSUES

In addition to the issues set forth in Big Spring's Statement of the Issues, there is the additional issue:

May Anita Big Spring contest seven ballots from a class of 77 substantially identical ballots that have received uniform treatment from Lake County election officials?

STATEMENT OF THE FACTS

In addition to the background Big Spring sets forth in her "Procedural Background," this matter has also been the subject matter of a lawsuit that Jeanne Windham filed in First Judicial District Court, *Jeanne Windham v. Judy Martz and Bob Brown*, Case No. ADV 2004-896. In that case, on November 30, 2004, Judge Sherlock, acting for Judge McCarter, entered an *ex parte* temporary restraining order enjoining the defendants from certifying the election results of HD 12 or appointing a candidate. At the hearing on December 9, 2004, Judge McCarter denied Windham's request for relief, and allowed the temporary restraining order to expire the following day on its own terms. *See*, Rick Jore's Submission of Pleadings, Statutes, Cases and Related Materials, Exhibits A-D, submitted to Judge Christopher.

On December 6, 2004, Windham also filed an Application for Writ of Mandamus or Declaratory Relief in this Court. On December 9, 2004, this Court

denied the application. *Id.*; Exhibits E-G.

Big Spring also wrongly suggests that Lake County Recount Board member Dave Stipes testified that the decision to count the contest seven ballots for Jore "required a level of speculation." Appellant's Opening Brief, page 5. On redirect examination by Jore's counsel, Mr. Stipes clarified that his testimony about "speculation" applied to Big Spring's Exhibit 10, not to the seven contest ballots. Tr. of Hrg., Test. of Mr. Stipes, Appendix "A", pages 60-62.

SUMMARY OF ARGUMENT

Big Spring's request for this Court to treat seven ballots differently than 70 other substantially identical ballots would violate the equal protection guarantees of the Fourteenth Amendment to the United State Constitution and Article II, § 4 of the Montana Constitution. It would violate § 13-15-206, MCA, which requires that votes be counted "in a uniform manner." Jore respectfully submits that this case presents an opportunity for this Court to consider whether the *de novo* standard of review for ballots is still appropriate. But even if this Court reviews the seven contested ballots *de novo,* on each ballot the voter used a clear mark to indicate the voter's vote for Jore.

ARGUMENT

I. Changes in Montana Law Following *Bush v. Gore*

In 2003, the Montana Legislature enacted a new and significantly changed law

governing how ballots would be counted in Montana elections. *See* HB 155[1]. This change followed the United States Supreme Court decision of *Bush v. Gore* (2000), 531 U.S. 98, which, among other things, mandated that states employ uniform voting procedures for determining voter intent ("[H]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."). *Bush v. Gore* at 104-105.

In response to *Bush v. Gore*, the Montana 2001 Legislature passed HJR 8, which established an interim committee to study Montana's election laws, including any "problems associated with recounts and resolution of voter intent with respect to disputed ballots." *See*, HJR 8, paragraph (4)(b), Appendix "B." In 2003, the interim committee reported its findings to the Montana Legislature. *See*, *Equal Protection of Your Vote*, Montana Legislative Services Division, November 2002. See, Appellant's Appendix, No. 13. The interim committee recommended the following changes in Montana's vote-counting procedures:

* Require that if an automated system rejects a ballot or records an undervote or overvote on the ballot, the ballot must be set aside and

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[1] This bill is 56 pages long. It was provided to Judge Christopher in Rick Jore's Submission of Pleadings, Statutes, Cases and Related Materials as Exhibit "H." Because this Court has given Jore permission to file his brief electronically, he is attempting to limit his appendices. Thus he is not attaching this lengthy bill, but rather directs the Court to his submission to Judge Christopher or to the Legislature website: http://leg.state.mt.us/css/default.asp.

manually evaluated so that it can either be processed by the system or manually counted;

* Direct the Secretary of State to adopt uniform rules on what constitutes a valid vote for each type of ballot used in the state; and

* Provide that when manually counting votes, a vote is valid if the voter's intent can be clearly determined as agreed upon by a majority of election judges applying uniform rules adopted by the Secretary of State. *Id.* at page 10.

These recommendations were incorporated into Montana House Bill 155 (the "Act"), the 56 page omnibus election bill, which passed into law and took effect on October 1, 2003. The Legislature set forth its reasons for passing the Act in its preamble:

> WHEREAS, the U.S. Supreme Court in Bush v. Gore, 531 U.S. 98 (2000), found that the lack of uniform procedures for determining voter intent in Florida during the 2000 presidential election led to a violation of the U.S. Constitution's Equal Protection Clause of the 14th Amendment; and
>
> WHEREAS, at the request of the 57th Legislature, the State Administration and Veterans' Affairs Interim Committee devoted much of the 2001-2002 interim to a review of Montana election laws with respect to voting systems and counting processes in light of Bush v. Gore; and
>
> WHEREAS, the interim study found that Montana's statutory provisions relating to ballots, voting systems, and vote counting processes needed to be updated, clarified, and in some instances revised **to better define uniform standards and procedures to provide equal protection for votes cast by Montana voters**; and

> WHEREAS, the Subcommittee on Voting Standards of the State Administration and Veterans' Affairs Interim Committee agreed that statutory changes should be made with an eye on future technology but should also standardize current practices to the greatest extent possible.
>
> THEREFORE, this legislation will enable the Secretary of State to adopt a statewide benchmark performance measure that voting systems must meet before they can be approved for use in the state; allow local election administrators to continue to choose which of the approved voting systems should be used locally; **require the Secretary of State to adopt uniform statewide rules regarding ballot form, votes and vote counts**, and other operational procedures specific to each voting system and to **provide training to local election administrators**; and **require all counting boards to use the uniform counting procedures specified**. *See*, HB 155, Preamble (emphasis added).

II. New Statutory Test to Determine Whether to Count Votes

HB 155 repealed § 13-15-202, MCA, Montana's previous statutory test for determining whether to count a ballot. That repealed statute had provided the following:

> A ballot or part of a ballot is void and may not be counted if the elector's choice cannot be determined. If part of a ballot is sufficiently plain to determine the elector's intention, the election judges shall count that part.... *Id.* at paragraph 3.

Thus, Montana's old process for determining a valid vote contained no explicit uniformity requirement. HB 155 replaced this outdated provision with § 13-15-206, MCA, which requires Montana's vote counting boards to "count and determine the validity of each vote in a *uniform manner*...." *Id.* at para. 1 (emphasis added). Specifically, § 13-15-206, MCA, directs the Secretary of State to:

> [A]dopt rules defining a valid vote and a valid write-in vote for each type of ballot and for each type of voting system used in the state. The rules must provide a sufficient guarantee that *all votes are treated equally* among jurisdictions using similar ballot types and voting systems. § 13-15-206(7), MCA (emphasis added).

Additionally, § 13-15-206, MCA, updated the test for determining whether a vote is counted. That statute provides:

> A vote is not valid and may not be counted if the elector's choice cannot be determined as provided in this section (emphasis added). § 13-15-206(6), MCA.

Read together, these two new provisions of § 13-15-206(6) and (7), MCA, make clear that the Secretary of State's rules are to be used by Montana election officials as the basis for determining whether a vote is valid and should be counted.

Pursuant to this grant of authority, the Secretary of State, in conjunction with a task force comprised of Montana county election administrators, promulgated new election rules that took effect on January 16, 2004. These rules set forth various ballot conditions and clearly state whether Montana election officials should count such ballots. These new rules, in pertinent part, state:

> 44.3.2402 DETERMINING A VALID VOTE IN MANUALLY COUNTING AND RECOUNTING PAPER AND OPTI-SCAN BALLOTS (1) The following general rules shall apply in a count or recount of paper and opti-scan ballots:
>
> (a) two (or more) designated voting areas have been marked and one (or more) mark has been erased, but residue is left. The election official shall clarify the ballot and cause a vote to be

counted for the designated voting area that has been marked;

(b) one designated voting area is marked and a second designated voting area is marked with a heavy mark and no erasure has been attempted. The election official shall cause this to be counted as an overvote;

(c) the designated voting area has been marked for one response and a partially completed mark is made in a designated voting area. The mark may or may not have some erasure although for the purpose of this rule erasure is not required. The election official shall cause this to be counted as an overvote;

(d) the designated voting area has been marked for one response and a hesitation mark is present within other designated voting area. The election official shall clarify the ballot and cause a vote to be counted for the designated voting area that has been marked;

(e) the designated voting area has not been marked according to instructions but the response is circled. The election official shall clarify the ballot by marking the designated voting area beside the circled vote if the marking of the designated voting area is consistent throughout the individual's ballot, and cause a vote to be counted for the marked designated voting area;

(f) the designated voting area has not been marked according to instructions but there is a connective line or arrow between the response and the designated voting area to indicate the vote. The election official shall clarify the ballot if the connective line or arrow beside the designated voting area is consistent throughout the individual's ballot, and cause a vote to be counted for the marked designated voting area;

(g) more than one designated voting area has been marked, but no clear mark is used to indicate the correct vote. The election official shall cause this to be counted as an overvote;

(h) more than one designated voting area has been marked,

> **but a clear word, mark or statement is used to indicate the correct vote. The election official shall clarify the ballot and cause a vote to be counted for the designated voting area indicated as the correct vote;**
>
> (I) a word or statement has been used to indicate the correct vote instead of marking the designated voting area. The election official shall clarify the ballot and cause a vote to be counted for the designated voting area indicated as the correct vote;
>
> (j) all of the designated voting areas are crossed out. The election official shall clarify the ballot and cause this to be counted as an undervote. (emphasis added).

III. Lake County's Recount Process

The first certified ballot report in the 2004 Montana State House District 12 race showed Jore winning by two votes. Windham requested that Lake County undertake a recount. During the recount, the Lake County Recount Board considered three sets of ballots:

A. The first set consisted of two ballots on which the voter filled in both the oval next to Windham's name and the write-in oval. *See*, Jore's Exhibits B-1, B-2. The Resolution Board rejected these ballots as overvotes, relying on an example in the Election Judge's Handbook 2004. *See* Jore Exhibit "F." The Handbook's instruction not to count such ballots, however, proved to be a typographical error and was not consistent with the Secretary of State's rules. Tr. of Hrg., Test. of Newgardt. The

Recount Board, relying on ARM 44.3.2403(b) and (c), overturned the Resolution Board's decision and counted the two ballots for Windham.

B. The second set consisted of one ballot in which the voter slightly filled in the oval for Cross, then completely filled in the oval for Jore. *See*, Jore's Exhibit "C." Jore challenged the Resolution Board's decision to count this ballot as an overvote. By a vote of 2-1, the Recount Board determined the light mark was not a "hesitation mark" pursuant to ARM 44.3.2402(d), but rather an overvote pursuant to ARM 44.3.2402(b) and thus was not counted.

C. The third set consisted of seven ballots where the voter filled in both Jore's oval and another oval, then crossed out or drew a line through the other candidate's oval or name. The Resolution Board had originally determined these ballots to be Jore votes, and upon review, the bipartisan (two elected Republicans and one Democrat) Recount Board agreed. The Recount Board unanimously held that the marks on each of the seven ballot clearly indicated that the voter (1) did not intend to vote for the candidate or ballot issue next to which the oval had been darkened but which was crossed out; and (2) did intend to vote for Jore. It is this group of twice-examined ballots that are currently before this Court.

IV. Ballots Currently Before the Court

Big Spring contests only the seven ballots where Lake County Resolution Board and Recount Board found the voter crossed out his or her mistake and counted the ballot for Jore. *See*, Big Spring's Exhibits 1-7. There are, however, at least 70 other ballots substantially similar to the contested seven ballots. *See*, Jore's Exhibit A1-A70. Each of these other 70 ballots was subjected to the same treatment by the county election judges and Resolution Board; in each case Mont. Admin. R. 44.3.2402(h) was applied in a uniform fashion.[2] In each of these 70 cases, the county election judges and Resolution Board determined that the marks on the ballot clearly indicated that the voter (1) did not intend to vote for the candidate or ballot issue next to where the oval was both darkened and crossed out; and (2) did intend to vote for the candidate or ballot issue with the darkened oval that was not crossed out. In each

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[2] There are two additional ballots that were inadvertently not treated in this uniform fashion. Three Lake County election officers spent two full days (December 14 and 15, 2004) reviewing the 12,702 ballots cast in the 2004 general election and checking for errors. They found one ballot on Initiative 149 and one ballot on Initiative 147, in which the voter filled out two ovals, then crossed out one choice. *See*, Jore's exhibits D-1 and D-2. For an unexplained reason, the Resolution Board failed to count those ballots that had not been crossed out. At trial, election supervisor Kathie Newgardt testified this failure to count the non-crossed out vote was a mistake. Because there was no recount on either ballot initiative, these two mistakes were not found until the ballots were inspected for this contest.

case, Lake County counted the ballot because "the voter's intent [could] be clearly determined and agreed upon by a majority of the election judges on the counting board." § 13-15-206(4)(a), MCA.

V. Big Spring's Challenge Must be Dismissed

The relief Big Spring seeks is fundamentally flawed: by asking this Court to subject seven ballots to a different standard than 70 other similar ballots, Big Spring is asking this Court to change the "rules of the game" after the election has been held. This request violates both the United States and Montana State Constitutions as well as Montana law. Big Spring offers no compelling reason to do so; indeed, apart from purely political self-interest, Big Spring offers no legitimate reasons whatsoever. As a result, this Court should deny Big Spring's request.

A. Big Spring's request would violate Montana voters' Fourteenth Amendment right to equal protection.

The Fourteenth Amendment to the United States Constitution provides that no state "shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. In *Bush v. Gore*, the United States Supreme Court made clear that according different weight to different voters' votes violates the Constitution's equal protection clause. *See, Bush*, 531 U.S. at 104-105 ("...the right to vote as the legislature has prescribed is fundamental; and one source of its

fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter"); see also *Reynolds v. Sims* (1964) , 377 U.S. 533, 555 ("[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise"). In direct response to this ruling, the Montana Legislature enacted § 13-15-206, MCA , which sets forth clear standards and directs that the standards be applied uniformly. The Secretary of State promulgated specific rules that provided clear guidance to Montana election officials. In 2004, election officials uniformly applied these statutes and rules. Big Spring's disagreement with the result of this application is not a reason for this Court to now second-guess the election officials, the Resolution Board, and the Recount Board. In essence, Big Spring is making a facial challenge to the statute and rules themselves. This litigation is simply not an appropriate vehicle for Appellant to do so.

During the election, 77 ballots were similarly "double-marked." These ballots, including the seven at issue, were all examined in accordance with § 13-15-206, MCA, and the Secretary of State's rules. This equal application of a uniform statutory scheme precisely satisfies the equal protection concerns of the *Bush v. Gore* decision.

Despite this, however, Big Spring now demands that these 77 ballots be divided into two separate classes: (1) seven that voted for Jore; and (2) the other 70.

Big Spring then requests that, in turn, this Court engage in a process of second-guessing and rewriting the Legislature's clear direction. This request may serve Big Spring's political interests, she offers no compelling state reason for treating such similar ballots differently, nor any authority for her proposition. Lacking any compelling justification, no state entity or political subdivision, including Lake County, may accord such disparate treatment to voters by treating the same type and class of ballots differently.

B. Big Spring's request violates Montana Constitutional rights to equal protection

Not only does Big Spring's request to throw out seven ballots from a class of 77 violate the United States Constitution, it runs afoul of the equal protection clause of the Montana Constitution. Article II, § IV of the Montana Constitution provides that, "No person shall be denied the equal protection of the laws." Mont. Const. Art. II, § 4. The right of suffrage is found in the Declaration of Rights in Montana's Constitution. Mont. Const. Art. II, § 13, provides:

> All elections shall be free and open, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Clearly, Big Spring's division of the 77 ballots into two classes – seven that help Mr. Jore and 70 that do not – does not serve a compelling state interest. *See, State v. Davison* (2003), 314 Mont. 427, 67 P.3d 203 (general rule of strict scrutiny

for fundamental rights); *Finke v. McGrath* (2003), 314 Mont. 314, 65 P.3d 576. Thus, Big Spring's unsupported request to treat some ballots differently than other substantially identical ballots falls far short of the necessary standard, and would violate Article II, § 4 of the Montana Constitution.

C. Big Spring's request violates Montana statutes requesting uniformity

Section 13-15-206, MCA, requires Montana election officials to count votes "in a uniform manner" and "that all votes are [to be] treated equally." In accordance with § 13-15-206, MCA, Lake County subjected the entire set of 77 ballots to equal scrutiny and determined that in each case the elector's choice was clear. By asking this Court to order a different level of scrutiny to a small subset of those ballots, Big Spring's request violates § 13-15-206, MCA.

VI. Judicial Review and Class of Ballots

As this Court reviews Lake County's and Judge Christopher's decisions, two related issues arise that this Court should consider:

(1) What standard of review should apply to the Court's review of the ballots in question? and

(2) Which, if any, ballots should this Court review?

A. Relevant standard of review

Three separate reviewing bodies have now examined the seven ballots that Big

Spring contests: the Resolution Board, the Recount Board, and the Lake County District Court. All have unanimously found that these ballots constitute votes for Jore. Regardless of what standard of review this Court applies, the conclusion should be the same.

In the past, this Court has held that such a review will be undertaken *de novo*. *See, Rennie v. Nistler* (1987), 226 Mont. 412, 735 P.2d 1124. However, in light of the recent developments in election law, including *Bush* v. *Gore* and the resulting wholesale changes made to Montana's Election Code, Jore respectfully submits that this case presents an opportunity for this Court to consider whether the *de novo* standard is still appropriate. The Montana Legislature has made a valiant effort to create a uniform election process, and state and local election officials have worked diligently to implement the Legislature's efforts. The new system has shown itself to be successful, and a standard of deference might best assure that the Legislature's goals continue to be met. *See, Bowling v. Greenbrier County Commission* (2002), 212 W.Va. 647, 649, 575 S.E.2d 257, 259 ("Thus, in the absence of evidence of patent error or of fraud, courts should be cautious about "monkeying" with reasoned determinations of designated election officials – particularly when judicial intervention would result in the disenfranchisement of voters.")

Justice Trieweiler's dissent in *Marsh*, points out that local election judges are

in a better position to determine voter intent than the Supreme Court. He wrote:

> Galen Marsh waged a write-in campaign for Sheriff of Sheridan County and won. Mike Overland lost. Election judges in Sheridan County who were responsible for determining the voters' intent, and who were in the best position to do so, agreed that Gaylen Marsh won. Now this Court, far removed from the politics of Sheridan County and total unfamiliar with the persons involved, has set aside Gaylen Marsh's election, disenfranchised hundreds of Sheridan County voters who chose him as their sheriff, struck a blow against democracy, and once again has elevated form over substance. *Marsh v. Overland* (1995), 274 Mont. 21, 31, 905 P.2d. 1088, 1094.

And:

> It is obvious from this clear statutory scheme that only election judges, with their superior familiarity and qualifications, are authorized by statute to reject and accept ballots. The majority's conclusion to the contrary is a transparent attempt to affirm an unauthorized result without any support in the law. By their decision in this case, the majority thumb their collective noses at the voters in Sheridan County, strike a blow against democracy, and demonstrate once again that technicalities are more important than substance in the rarified atmosphere of the Supreme Court. *Id* at 38.

Here, Big Spring herself argues that the determination of voter intent does not revolve solely around a cold review of the ballots. She has introduced extrinsic evidence about radio advertisements in support of Republican candidate Jack Cross. Both Mr. Stipe and Ms. Newgardt testified they never heard the advertisements. *See*, Tr. of Hrg., Test. of Stipe and Newgardt. Judge Christopher stated the advertisement had no effect. *See*, Finding of Fact No. 38. These witnesses and the trial judge, as

Justice Trieweiler observed, were in the best position to determine the advertisement's effect on voter intent.

Jore stresses, however, that regardless of the standard this Court applies to its review of the seven contested ballots, the ballots clearly constitute Jore votes. Even Judge Christopher found, that under a *de novo* review, the ballots constitute votes for Jore. *See*, Order, paras. 3 and 4.

B. Which ballots, if any, should the Court review?

The question of which ballots the Court should review is one of first impression. If this Court reviews only seven ballots from the larger class of 77, as Big Spring requests, then the Court has engaged in the very uneven treatment of ballots that the United States Supreme Court forbade in *Bush v. Gore*. At a minimum, equal protection requires that the Court review all of the 77 substantially similar ballots in Lake County and apply the same uniform standard. Under a standard of deference, the question then facing the Court is: did the local officials on the Resolution Board and Recount Board abuse their discretion in deciding that the voters' intent was clear on these 77 ballots? Alternatively, under a *de novo* standard of review, the question facing the Court is: should this Court reject or count all 77 ballots that are substantially similar? This way, the Court could throw out all 77 ballots, or uphold Lake County's decision to count all of them. This Court, however, may not do what

Big Spring requests and discriminate among these ballots absent some compelling state interest.

Big Spring's decision to contest only seven Jore ballots, and not the other 70 similarly situated ballots, is fatal to her challenge.[3] Without all these ballots in contest before the Court, it cannot rule on a few of them without necessarily facing *Bush v. Gore* – forbidden uneven treatment.

VII. The Authority Cited by Big Spring is Not Dispositive

All Montana cases that Big Spring cites are clearly distinguishable from the instant case. *Rennie*, 226 Mont. 412, 735 P.2d 1174; *Marsh*, 274 Mont. 21, 905 P.2d

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[3] Even including these other 70 Lake County ballots in this contest may not have been enough to satisfy *Bush v. Gore*. There are other substantially identical ballots treated in the same uniform fashion in other Montana counties. The shortage of time prevented a survey of the other 55 counties, but Missoula County, for instance, counted these type of ballots as a vote for the non-crossed out candidate or ballot issue, just as Lake County did. *See*, Affidavit of Vickie Zeier, attached as Appendix "C." If this Court threw out the 77 Lake County ballots, but not the identical ballots in Missoula County, Montana ballots would be treated unevenly.

In the 2004 general election, 12,702 people voted in Lake County. At least 77 of them filled in two ovals in one race, and then crossed out their mistake; resulting in 0.6 percent of ballots with this characteristic. According to the Secretary of State's website, there were 456,096 votes cast statewide in the 2004 general election. *See*, 2004 Statewide Election Results, Appendix "D." If the same percent as Lake County crossed out their mistakes statewide, it would occur on about 2,736 ballots. This number of ballots is roughly equal to the entire amount of votes cast in the 2004 general election in Mineral County (2,707).

1088 and *Paulsen v. Huestis* (2000), 302 Mont. 157, 13 P.3d 931, all revolve around write-in ballots with various spellings of the candidates' names. *Spaeth v. Kendall* (1990), 245 Mont. 352, 801 P.2d 591, involves a single ballot with two ovals filled in for a single office, but does not involve any names being stricken or crossed out. All these cases involve unique individual ballots. None of these cases involve a handful of ballots chosen from a class of over 70 ballots that all share the same challenged characteristics and were all counted in a uniform fashion.

Moreover, all Big Spring's case law relies on § 13-15-202, MCA, which is no longer valid law; it has been repealed and replaced with § 13-15-206, MCA. This new statute requires election officials to "determine the validity of each vote in a uniform manner."

Finally, all the Montana cases cited by Big Spring were decided before *Bush v. Gore*, which, as previously discussed, sets new precedent that requires equal treatment of ballots. Put simply, Big Spring offers no authority to support her proposition that this Court should treat ballots with the same characteristics differently.

VIII. How the Montana Election System Handles Voter Mistakes

Big Spring asserts that when, as here, voters make a mistake in the polling booth they must request a new ballot instead of attempting to fix the mistake on the same ballot. This argument ignores the practical reality of the voting booth. The

pencils given to voters in Lake County had no erasers on them – erasing simply was not an option. Moreover, requesting a new ballot required a voter to leave the election booth, find the judge, explain the circumstances, obtain a new ballot, return to the election booth, and begin the voting process anew. Findings of Fact, No. 31. For various reasons, including the delay to the voter and to other voters waiting in line, requests for new ballots are uncommon. Thus, many voters do cross out markings they make on their ballots, despite clear election instructions not to do so.

The Secretary of State has specifically recognized that voters do cross out and/or erase mistakes on their ballots, which is why the Secretary of State promulgated Mont. Admin. R. 44.3.2402(h), which provides uniform rules on how to handle cross outs and does not require an erase or attempted erase. There is no statute, rule or authority that forbids cross-outs. As Judge Christopher found, "The method of striking through or crossing out a corrected or changed choice is the method used by many legal documents to reflect the original language and change." Findings of Fact, No. 13.

IX. There are No Irregularities with Lake County Resolution Board

Big Spring suggests that the Lake County Resolution Board was "illegally constituted" because its two members were a Republican and independent. Opening Brief, page 21. This suggestion has no merit. The fact is that the Democratic Party

failed to submit a list of qualified registered electors as set forth in § 13-4-102(1), MCA. (Tr. Of Hrg., Test. of Ms. Newgardt.) The election administrator chooses election judges from these submitted lists. *Id.* When a political party fails to submit a list, as the Democratic Party did here, then the governing body shall appoint judges "*insofar as possible*" so that all parties eligible to participate in the primary are represented. *Id.* at (3). In other words, without the Democrats' list, Lake County had little choice but to appoint a Republican and independent.

Big Spring's underlying suggestion here is that Lake County election officials reviewed ballots through a political lens, rather than objectively. The facts contradict this suggestion. The bipartisan Recount Board unanimously found that each of the seven contested ballots were Jore votes. On each of these ballots, the Democrat on the Recount Board agreed with her two Republican colleagues. Furthermore, on the ballot labeled Jore Exhibit C-1, with a slight mark for Cross and heavy mark for Jore, which Jore argued was a clear vote for him, the bipartisan Recount Board ruled against Jore. Unquestionably, Lake County officials applied the uniform rules objectively without regard to politics.

X. Montana Legislature is Sole Judge of Elections and Qualifications

Under Montana's Constitution, the final judge of this dispute is the House of Representatives. The Constitution provides:

> The Montana House of Representatives is the judge of the elections and qualification of its members. It may by law vest in the courts the power to try and determine contested elections. Mont. Const. Art. V, § 10.

The Legislature established a statutory process for contesting elections that is set forth in § 13-36-101, MCA, et. seq. Any court decision is non-binding on the House of Representatives, who may disregard the election certificate or court decision, and, instead, conduct its own investigation and decide for itself who shall be entitled to the seat. *Ainsworth v. Dist. Court* (1938), 107 Mont. 370, 373, 86 P.2d 5, 8.

XI. Conclusion

The Lake County Resolution Board and Recount Board applied Mont. Admin. R. 44.3.2402(h) uniformly and consistently when considering all double marked and crossed-out ballots, including the seven at issue here. A decision by this Court to throw out the seven double marked, crossed-out ballots would be grounds for throwing out the 70 other ballots that share the identical characteristics and were interpreted in the same fashion in Lake County. To the extent that judicial review of these seven ballots is proper at all, the Court must find, as did the Resolution Board, the Recount Board and Judge Christopher: that the elector used a clear mark to indicate that the elector intended to vote for Jore.

For these reasons, Jore respectfully requests that this Court uphold Judge

Christopher's Finds of Fact, Conclusions of Law and Order, dismiss Big Spring's appeal, and remand this matter to Judge Christopher to hear the issue of Jore's costs and reasonable attorney's fees.

Respectfully submitted this 21st day of December 2004, with Best Holiday Wishes. *See,* Appendix "E".

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