

COF  
STATE OF IDAHO  
COUNTY OF KOOTENAI  
FILED: ORIGINAL

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2010 AUG -5 AM 10:57

CLERK DISTRICT COURT

DEPUTY

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF  
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JIM BRANNON,

Case No. CV-09-10010

Plaintiff,

Vs.

SUSAN K. WEATHERS, in her capacity  
as the City of Coeur d'Alene City Clerk;  
MIKE KENNEDY, in his capacity as the  
incumbent candidate for the City of  
Coeur d'Alene Council Seat #2,

DEFENDANT KENNEDY'S MOTION  
FOR THE COURT TO HOLD  
WILLIAM L. McCrory IN CONTEMPT  
OF COURT

Defendants.

Pursuant to Rule 75, Idaho Rules of Civil Procedure defendant Mike Kennedy moves that this Court find William L. McCrory to be in contempt of court and impose sanctions as provided in Rule 75, I.R.Civ.P. Defendant Mike Kennedy represents to the Court as follows:

1. As a condition to participate on behalf of plaintiff Jim Brannon in the examination of election documents provided by Kootenai County regarding
- MOTION FOR CONTEMPT OF COURT

the November 3, 2009 City of Coeur d'Alene General Election, William L. McCrory signed the Confidentiality Agreement, a true copy of which is attached as Exhibit 1. Said Confidentiality Agreement was filed of record in this case on July 22, 2010.

2. The third paragraph of said Confidentiality Agreement reads as follows:
3. **That if I violate this Confidentiality Agreement by discussing or utilizing any information observed while examining documents produced by Kootenai County in this present election contest, in any form or manner, other than for the sole purpose of the present election contest and with anyone who has not signed a copy of this Confidentiality Agreement, or in open court, I understand and agree that I will be held in contempt of court in this election contest and may be punished to the fullest extent permissible by the law as warranted, in the discretion of the Honorable Benjamin Simpson, or any other presiding judge who may be called upon to hear the matter.**
4. On June 22, 2010, together with plaintiff Jim Brannon and attorney Starr Kelso, William L. McCrory observed the counting of the absentee ballots by Magistrate Eugene Marano, examined some of the absentee ballot return envelopes and saw the absentee ballot return envelopes placed in a large plastic tub sealed by a representative of Kootenai County.
5. On July 7, 2010, William L. McCrory requested a county representative to unseal and open the plastic tub. For approximately seven hours, he then examined the absentee ballot return envelopes and photographed a selective number.
6. As of July 7<sup>th</sup> and continuing to this date, there was nothing pending in this case by way of motions. An open date for hearing before Judge Hosack had

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been set for August 31, 2010 for motions that might be filed by any party. That open date was eight weeks away from July 7<sup>th</sup>.

7. In a pleading prepared by plaintiff's attorney Starr Kelso, William L. McCrory executed an nine page affidavit to which are attached a two page memorandum dated July 8<sup>th</sup> and color photographs of absentee ballot return envelopes and related county election documents labeled as Exhibits B through F totaling 26 pages.
8. Exhibits B through F give the names of seventeen (17) voters and, in most instances, also show addresses.
9. This affidavit was filed in District Court on July 8<sup>th</sup>. Early in the next week, a representative of plaintiff "tipped off" reporter Tom Hasslinger of the Coeur d'Alene Press that a new pleading had been filed in the case about which nothing had been reported for more than one month.
10. Reporter Hasslinger then prepared a news story which was on the front page of the Coeur d'Alene Press on Friday, July 16<sup>th</sup>. A copy of the news story is attached as Exhibit w.
11. Relying on the McCrory affidavit, reporter Tim Hasslinger wrote that he attempted to seek out the alleged wrong doers identified in Exhibit E:  
  
Included in the affidavit are photos of two envelopes where the signature didn't match the label name. Both appear to be from married couples with the same last name, where the female signed the envelope with the male's label, such as with Christopher and Debra Locke. Debra Locke signed the envelope on which was Christopher Locke's printed label. The couples could not be located for comment.

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The McCrory affidavit allowed this invasion of privacy of the Lockes.

12. In the Confidentiality Agreement, William L. McCrory under oath swore as follows:

**That any information that I observe in the examination of any election documents provided by Kootenai County regarding the November 3, 2009, City of Coeur d'Alene General Election, will be kept to myself as confidential, and I will not utilize any of this information in any manner or for any purpose other than this election contest, and I will not discuss the same with any person, unless they too have signed a copy of this Confidentiality Agreement.**

13. All that William L. McCrory set forth in paragraphs 4 through 11 of his affidavit, and in Exhibit A, his memo of July 8, and in Exhibits B through F is information he observed in the examination of election documents that he swore he would keep to himself as confidential. Any such filing should have been in camera restricted to view only by the court and counsel.
14. On Saturday, July 17<sup>th</sup>, William L. McCrory, using the website "opencda.com" which he controls published the complete affidavit with comments and the Coeur d'Alene Press news story. A true copy of this entire internal publication with comments from others as appearing subsequently is attached to the Affidavit of Christa Hazel filed herewith.
15. Such internal publication constituted a far reaching invasion of the privacy of at least seventeen (17) persons named with addresses in the affidavit and exhibits.
16. By the characterization given in his published July 8<sup>th</sup> memo with reference to Exhibits B, E and F which show names and addresses, William L. McCrory

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was accusing the named persons of violating Idaho election laws as set forth in Idaho Code §18-2306, a felony, and Idaho Code §18-2307, a misdemeanor.

17. On July 17<sup>th</sup> at 9:37 a.m. William L. McCrory posted upon his website the following introduction and then invited answers and questions all related to information he obtained subject to the Confidentiality Agreement:

**Further in the post is my affidavit with exhibits filed with the District Court in the Coeur d'Alene election contest (CV-09-10010). After looking at both the article and my affidavit, here are some questions you may wish to consider asking of your elected state representatives and senators and your mayor and city council:**

3. **When an elector signs his voter's affidavit falsely or fails to sign the affidavit as required, was it the Idaho legislature's intent that particular vote would be counted in the same manner as the vote cast by an elector who signed truthfully and completed the affidavit in the form prescribed? (Both the poll book at polling places and the absent elector's ballot envelope are affidavits.)**

The "elector signs his voter's affidavit falsely" is an accusation that one or more of those identified (plus by inference many more unidentified voters acting similarly) had committed a crime.

18. Disregarding the confidentiality oath, William L. McCrory continues:

**The Press article refers to my affidavit filed with the District Court on July 9, 2010. It is a public record, so I've linked to it and its exhibits below. My sworn affidavit speaks for itself.**

The affidavit and exhibits are entirely based on information obtained by William L. McCrory after signing the Confidentiality Agreement.

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19. Posting on the website continued with comments by "LTR," "Dan," "Mary," and "Wannabee JD" and replied by "Bill" all related to information obtained by William L. McCrory conditioned upon the Confidentiality Agreement.
20. The affidavit with exhibits filed without any kind of motion and at a time when nothing was pending needing response was intended by plaintiff to generate news stories, and publication on the website was intended to make all of the information obtained by William L. McCrory to be available to as many as 5,000 persons. Affidavit of Christa Hazel.
21. As would be well known to plaintiff's attorney Starr Kelso, the McCrory affidavit with attached Exhibits A through F would be inadmissible for any purpose in the election contest in the case of *Brannon v. City of Coeur d'Alene*. Paragraphs 4 through 11, the July 8<sup>th</sup> memo, Exhibit A and Exhibits B to F are all hearsay; the election documents are not authenticated by the Kootenai County clerk and McCrory is not qualified to give legal opinions. The purpose of filing the McCrory affidavit was to give the illusion of a court filing public record to be published on the website for the maximum public viewing for political purposes, not for use in the election contest.

The foregoing constitute factual allegations supporting nonsummary contempt proceedings as provided in Rule 75 (c) (3), I.R.Civ.P.

MOTION FOR CONTEMPT OF COURT

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Dated this 5<sup>th</sup> day of August, 2010.



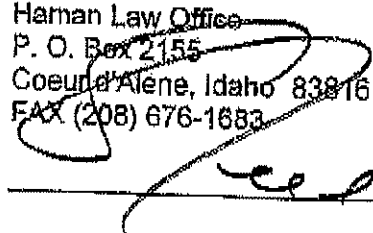
Scott W. Reed  
Attorney for Defendant  
Mike Kennedy

CERTIFICATE OF SERVICE

I certify that a true copy of the above and foregoing was served by first class mail, this 5<sup>th</sup> day of August, 2010 to:

Starr Kelso  
Attorney at Law  
P. O. Box 1312  
Coeur d'Alene, Idaho 83816  
FAX (208) 664-6261

Michael L. Haman  
Haman Law Office  
P. O. Box 2155  
Coeur d'Alene, Idaho 83816  
FAX (208) 676-1683



MOTION FOR CONTEMPT OF COURT

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EXHIBIT 1

 STATE OF IDAHO  
 COUNTY OF KOOTENAI } 35  
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2010 JUL 22 AM 10:58

CLERK DISTRICT COURT

DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE  
 STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

JIM BRANNON,

Plaintiff,

vs.

 CITY OF COEUR D'ALENE, IDAHO, a  
 municipal corporation, et al.,

Defendants.

Case No. CV-09-10010

CONFIDENTIALITY AGREEMENT

 STATE OF IDAHO )  
 ) ss.  
 COUNTY OF KOOTENAI )

WILLIAM L. McCrory, being first duly sworn upon oath does  
 hereby state:

1. That I am over the age of 18 years, competent, and make this agreement voluntarily.
2. That any information that I observe in the examination of any election documents provided by Kootenai County regarding the November 3, 2009, City of Coeur d'Alene General Election, will be kept to myself as confidential, and I will not utilize any of this information in any manner or for any purpose other than this election

CONFIDENTIALITY AGREEMENT - 1

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 Agreement(2).Docx

No. 6473 P. 9

AUG 5 2010 4:35PM Scott W Reed Attorney At Law



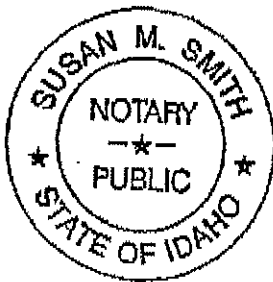
contest, and I will not discuss the same with any person, unless they too have signed a copy of this Confidentiality Agreement.

3. That if I violate this Confidentiality Agreement by discussing or utilizing any information observed while examining documents produced by Kootenai County in this present election contest, in any form or manner, other than for the sole purpose of the present election contest and with anyone who has not signed a copy of this Confidentiality Agreement, or in open court, I understand and agree that I will be held in contempt of court in this election contest and may be punished to the fullest extent permissible by the law as warranted, in the discretion of the Honorable Benjamin Simpson, or any other presiding judge who may be called upon to hear the matter.

DATED this 22<sup>nd</sup> day of JUNE, 2010.

William L. McCrory

SUBSCRIBED AND SWORN to before me this 22<sup>nd</sup> day of June, 2010.



Susan M. Smith  
Notary Public for Idaho  
Residing at East Falls, Idaho  
Commission Expires: 3-18-2016

CONFIDENTIALITY AGREEMENT - 2

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Aug. 5, 2010 4:35PM Scott W Reed Attorney At Law

CERTIFICATE OF SERVICE

I hereby certify that on the 22<sup>nd</sup> day of July, 2010, I caused to be served a true and correct copy of the foregoing via facsimile (FAX) to the following persons:

☒ U.S. Mail  
☐ HAND DELIVERED  
☐ OVERNIGHT MAIL  
☐ TELEFAX (FAX)

Starr Kelso  
Attorney at Law  
P.O. Box 1312  
1621 N. Third Street, Suite 600  
Coeur d'Alene, ID 83816  
Fax: (208) 664-6261

☒ U.S. Mail  
☐ HAND DELIVERED  
☐ OVERNIGHT MAIL  
☐ TELEFAX (FAX)

Peter C. Erbland  
Paine Hamblen Coffin Brooke  
& Miller  
701 Front Avenue, Suite 101  
P.O. Box "E"  
Coeur d'Alene, ID 83816-0328  
Fax: (208) 664-6338

☒ U.S. Mail  
☐ HAND DELIVERED  
☐ OVERNIGHT MAIL  
☐ TELEFAX (FAX)

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Fax: (208) 765-5117

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☐ HAND DELIVERED  
☐ OVERNIGHT MAIL  
☐ TELEFAX (FAX)

Michael L. Haman  
Attorney at Law  
P.O. Box 2155  
Coeur d'Alene, ID 83816  
Fax: (208) 676-1683

  
John A. Cafferty

CONFIDENTIALITY AGREEMENT - 3

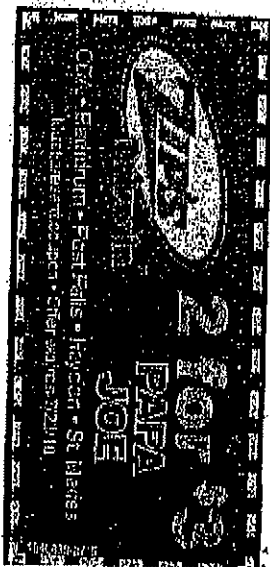
C:\Documents And Settings\Bmchugh\Local Settings\Temporary Internet Files\Content.Outlook\3RFN9Naw\Confidentiality Agreement(2).Docx

11 'J 8769 'ON

Aug 5, 2010 4:35PM Scott W Reed Attorney At Law

EXHIBIT 2

# COLEUR D'ALENE PAPER PRESS



Friday  
July 16, 2010



Sunny, breezy  
High 84, Low 55  
Weather, A2

CHILD DEPT

## Affidavit: Many ballot irregularities

www.cdapress.com

McCroy claims he found 877 anomalies after reviewing ballots

By TOM HASSLINGER  
Staff writer

**COEUR D'ALENE** — The absentee ballot envelopes have been reviewed, and around 900 have possible irregularities, a

court filing says.

Bill McCroy, a supporter of seat 2 challenger Jim Brammon and who recently attempted unsuccessfully to intervene in the election challenge lawsuit, signed a court affidavit claiming he found 877 anomalies after reviewing the absentee ballot envelopes July 7.

Those range from questionable elector signatures and

envelopes that weren't dated or time stamped by the election staff when they were received, the affidavit states.

But election officials said they aren't so sure those are mistakes at all.

They took an oath of privacy



English

pertaining to the ballot material that was reviewed last week, but said the alleged envelope anomalies could just appear that way to the untrained eye.

"That's certainly the big picture," said Dan English, Kootenai County clerk. "I just have to wonder if there was an inaccurate conclusion."

see BALLOT, A3

## BALLOT

from A1

The biggest number of envelopes with alleged anomalies, according to the affidavit, is the 699 envelopes that didn't have the time stamped on them, and another 593 envelopes that weren't dated, violations of Idaho code, the affidavit states.

It's called time stamping, and must be done by the office when it receives the absentee votes "mailed or delivered to the officer," according to Idaho code 50-447.

But just because they're not time-stamped doesn't mean they're inadmissible, English said, as some aren't required to be.

The Secretary of State's Office classifies voters who walk in early to vote — not the ones who receive ballots through the mail — as their voting day, and therefore don't need to be time stamped.

Of the roughly 2,000 people who voted absentee leading up to the Nov. 3, 2009, city general election, just over 900 of them walked in early, meaning their envelopes wouldn't need it.

It's unclear if those are the same ballots McCrory entered as questionable pertaining to time stamping. He did not return messages from The Press. Brannon's attorney, Starr Kelso, declined to comment.

"The affidavit speaks for itself," Kelso said. "It is what it is."

Brannon is challenging his five vote loss to seat 2 incumbent Mike Kennedy.

After dozens of motions and several court hearings, the county turned over the requested ballot materials for review. They're back under lock and key now, but McCrory's affidavit included photographs of several of the questionable envelopes.

"Anyone can say anything. They can take anything and turn it this way and that," said Deedie Beard, election manager at the time of the election, since retired. "I conducted that election, and I can tell you from the bottom of my heart that nothing was illegal."

The affidavit said about 56 envelopes did not have bar codes, and 35 lacked labels.

The bar codes are akin to bar codes in a supermarket, essentially a convenience tool that allows the election staff to swipe in the received ballot through a computer, Beard and English said. If the bar code is absent or is only a partial that can't be read, the staff can enter the voter information by hand.

"It's great to have in a bigger county like ours," English said. "But it's not a requirement."

Beard's envelope was included in the affidavit.

The labels are the voter's name and address printed out. Beard said those too could be written by hand, and were not a matter of law. Idaho codes 50-446 and 50-447, which the affidavit cited, does not say that either the label or code is required.

The affidavit also pinpoints about 15 envelopes that had signature anomalies. Of those, either the signature didn't match

all, or had a "whited out" signature.

Included in the affidavit are photos of two envelopes where the signature didn't match the label name. Both appear to be from married couples with the same last name, where the female signed the envelope with the male's label, such as with Christopher and Debra Locke. Debra Locke signed the envelope on which was Christopher Locke's printed label.

The couples could not be located for comment. But it could be a case

of a common mistake made by married couples, Beard said.

When a couple each receives an absentee ballot in the mail, they can accidentally switch envelopes before signing and mailing them back. Their votes are mailed back separately, but in switched envelopes, and therefore counted.

"Every time we go to training the Secretary of State's office tells us time and time again to err on the side of the voter," English said of the allowance.

There are four examples in the affidavit that state the envelopes weren't signed. In each case, the envelope was signed, but under the line that only military and abroad voters are to sign. Regular absentee ballots have only one place for the elector's signature. For military and abroad, there are two, but they are only supposed to sign the second one which affirms they are indeed military or abroad.

There were several envelopes included under other types of anomalies.