

# KELSO LAW OFFICE

STARR KELSO

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"There are evil men, and they are to be feared. However, the greatest evil we all face today is the indifference of good men!"

November 27, 2012

Stephen W. Kenyon  
Clerk of the Courts  
Idaho Supreme Court  
451 West State Street  
Boise, Idaho 83720-0101

RE: Petition for Rehearing  
Brannon v. City of Coeur d'Alene et al.  
Docket No. 38417-2011

Dear Mr. Kenyon:

I am enclosing herewith the original and six copies of Appellant Brannon's Petition for Rehearing for filing. Pursuant to Rule 42, I will file a brief in support of the Petition within 14 days.

Very truly yours.

  
Starr Kelso

Attorney at Law

cc: Attorneys for Respondents Haman, Reed, and Erbland

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Attorney for Appellant Brannon

IN THE SUPREME COURT OF THE STATE OF IDAHO

JIM BRANNON,	:	
	:	
Plaintiff-Appellant,	:	DOCKET NO. 38417-2011
	:	
v.	:	PETITION FOR REHEARING
	:	PURSUANT TO I.A.R. 42
CITY OF COEUR D'ALENE, IDAHO, a	:	
Municipal corporation; SUSAN K. WEATHERS,	:	Fee: \$76.00
in her capacity as the City of Coeur d'Alene	:	
City Clerk; and MIKE KENNEDY, in his	:	
capacity as the incumbent candidate for the	:	
<u>City of Coeur d'Alene Counsel Seat #2.</u>	:	

COMES NOW the Appellant Jim Brannon, by and through his attorney Starr Kelso, and hereby respectfully petitions the Court to rehear the issue identified in its opinion as:

3. The factual issues of the accuracy of official vote count and the adequacy of the election canvass are moot since Brannon failed to meet his burden of proof.  
Op. E 3, p. 16.

THE BASIS FOR THIS PETITION

The Court's reasoning in determining this issue is based upon a misperception that the five 'UOCAVA' votes are the ones that are relevant to the asserted Idaho Code § 34-2001 (6) error in counting and declaring the election result. They are not. The error is based on the fact that five of the total number of absentee ballots received were rejected and not counted leaving only 2,046 valid absentee ballots to be counted. The district court failed to deduct the five rejected absentee ballots, from the total number of absentee ballots received, when it found that

2051 envelopes, each containing one valid ballot, were received and that number equaled the number of absentee ballots counted.

#### TOTAL ENVELOPES AND BALLOTS RECEIVED

The district court appointed a retired magistrate judge to physically count all of the absentee ballots and return envelopes received for the City's election. He counted every envelope and the total number of received envelopes was 2,086 envelopes. R. 2288. Out of the total number of received envelopes (2,086) it could not be determined whether four (4) envelopes were for the County election or the City election, and thirty-two (32) of the counted envelopes were County election envelopes. R. 2288. After deducting the total of these envelopes (36), the district court found that "the County has physical custody of 2,050 absentee return envelopes received for the City election." R. p. 2288. The district court concluded that the "most likely explanation for one missing return envelope is that it got lost through clerical error." R. 2292. The district court also found that it is "undisputed that there was only one absentee ballot contained within each absentee return envelope received." R. p. 2288.

The district court's finding that the total of the absentee ballot envelopes received, each containing one absentee ballot, for the City election is based upon the following calculation:

Total envelopes presented to the retired magistrate judge to be  
counted as City election absentee envelopes (one ballot in each)..... 2,086

Envelopes that could not be determined whether  
they were City or County absentee envelopes .....(4)

County election absentee envelopes.....(32)

Total City election absentee envelopes (physically existing).....2,050

Envelope added by district court as 'misplaced' ..... + 1

Total absentee envelopes for the City election found by  
the district court to have been received..... 2,051

Based upon the district court's calculation, set forth above, it found that a total of 2,051 absentee ballots were received. The district court then found that each one of the received envelopes contained a valid City absentee ballot (2,051) and therefore the total number of absentee ballots machine counted was correct.

### REJECTED BALLOTS

Idaho Code § 50-451 provides that "If an absentee ballot...is rejected and not counted, such fact shall be noted on the record."

The absentee ballot records kept established that five (5) of the absentee ballots received were rejected and not counted. It was not disputed that Plaintiff's Exhibit 5, confirmed by the testimony of County Clerk English, recorded that five of the returned absentee ballots were rejected.<sup>1</sup> The record is undisputed that none of the 'UOCAVA' absentee ballots were rejected.<sup>2</sup>

### THE DISTRICT COURT'S ERROR

The district court failed to subtract the five rejected and not counted absentee ballots received. The district court's memorandum decision did not acknowledge, or even address, the absentee ballots that were rejected (Voided) and not counted. The proper calculation to determine the total number of physically existing valid absentee ballots to be counted in the City election is as follows:

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<sup>1</sup> Plaintiff's Exhibit 5 at page 175 and T. p. 197, l. 24-p. 201, l.17. County Clerk English's testimony confirmed that five of the returned absentee ballots were rejected (Voided). T. p. 201, l. 21-p. 204, l. 21.

<sup>2</sup> Plaintiff's Exhibit 5 documents that none of the five UOCAVA voters' absentee ballots were rejected (Voided) as follows: Paquin Exhibit 5 at p. 123; Farkes Exhibit 5 at p. 47; Friend Exhibit 5 at p. 53; Dobsloff Exhibit 5 at p. 39; Gagnon (Kimberly) Exhibit 5 at p. 55.

Total envelopes presented to the judge to be counted as City election  
absentee envelopes (one ballot in each).....2,086

Envelopes that could not be determined whether  
they were City or County absentee envelopes .....(4)

County election absentee envelopes.....(32)

Total City election absentee envelopes (physically existing).....2,050

Envelope added by district court as 'misplaced' ..... + 1

Total City absentee envelopes found by the district court  
to have been received.....2,051

**Rejected and not counted absentee ballots.....(5)**

**Total of physically existing valid absentee ballots to be counted.....2,046**

The district court found that 2,051 absentee ballots were run through the counting machine. R. p. 2288. It is undisputed that five of the total number of the received absentee ballots were rejected and not counted. In order for 2,051 absentee ballots to have been counted five 'extra' absentee ballots had to have been added to the absentee ballots when they were counted. There is no other way that a total of 2,051 absentee ballots could have been machine counted because it is undisputed that only 2,046 valid absentee ballots existed.

The district court found that the city council, acting as the board of canvassers, accepted the 'District Canvass' that a total of 2,051 absentee ballots were counted. R. p. 2286. Since the total number of valid absentee ballots that physically existed was only 2,046, there was a clear error by the board of canvassers in counting a number sufficient to change the election result. As a result there was a clear error in declaring the election result.

At trial, based upon the stipulation of the parties that three other counted votes were improper, the district court found that Kennedy received (3) votes more than Brannon. R. p.

2284. The error of the board of canvassers in counting five more absentee ballots than physically existed is error sufficient to change the result of the Brannon-Kennedy election.

THE ELECTION LAWS AND SUPREME COURT OPINIONS  
DO NOT REQUIRE THAT IT BE PROVEN FOR WHOM  
THE FIVE 'EXTRA' ABSENTEE BALLOTS WERE COUNTED

The district court's opinion acknowledged that pursuant to Idaho Code § 34-2001 (6) if the board of canvassers counted a greater number of votes than were cast and the number of 'extra' ballots counted is sufficient in number to change the election result, the person contesting the election is not required to establish for whom each of the 'extra' votes were counted. As the district court articulated; "No voter ever existed, and [thus] no inquiry can be made [into whom it was cast for]." R. p. 2285. When the number of ballots counted is greater than the total number of physically existing valid ballots the *Jaycox v. Varnum*, 39 Idaho 78, 226 P.285 (1924) requirement, that it must be proven for whom each illegal voter cast his or her ballot, does not apply because no voters exist to question regarding for whom each of the five 'extra' ballots was cast. Thus the error in counting raised by Brannon is not moot.

CONCLUSION


This Court's opinion is based upon a misperception that the five 'UOCAVA' votes are the ones that are relevant to the asserted Idaho Code § 34-2001 (6) error in counting and declaring the election result. The error is based on the fact that the district court failed to deduct the five rejected and not counted absentee ballots from the total number of absentee ballots received.

The *Jaycox* decision is not precedential because no voters exist to question regarding for whom each of the five 'extra' ballots was cast.

There is no evidence in the record to substantiate the district court's finding that "2,051 envelopes, each containing one legal absentee ballot to be counted, were received." The record is devoid of any evidence that supports the district court's finding that there was no error in counting votes and declaring the election result. The only evidence in the record establishes that five more absentee ballots were counted than valid absentee ballots physically existed to be counted. The error of the board of canvassers in counting five more absentee ballots than valid absentee ballots physically existed is error sufficient to change the result of the three vote Brannon-Kennedy election.

It is respectfully requested that the Court rehear this issue in light of this clarification of the undisputed record and testimony.

Dated this 27<sup>th</sup> day of November, 2012.


  
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Starr Kelso, Attorney for Appellant Brannon

CERTIFICATE OF SERVICE: I hereby certify that a true and correct copy of this Motion for an Expedited Hearing was mailed by regular U.S. Mail with postage prepaid thereon, on the 27<sup>th</sup> day of November, 2012, to:

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