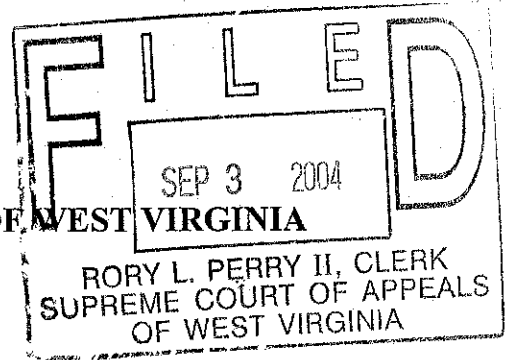


NO. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON



THE STATE OF WEST VIRGINIA, by
DARRELL V. McGRAW, JR., ATTORNEY
GENERAL,

Plaintiff,

v.

Civil Action No.: 04-MISC-332
Circuit Court of Kanawha County

RALPH NADER,

Defendant.

PETITION FOR INJUNCTION

Now comes the State of West Virginia, pursuant to West Virginia Code § 53-5-5¹, and petitions this Court to issue an injunction precluding Ralph Nader from appearing on the ballot as a candidate for president of the United States, and as grounds therefore says:

I.

SUMMARY OF THE PROCEEDINGS BELOW

The injunction sought here was denied below on September 2, 2004, by the Honorable Tod Kaufman, Judge of Circuit Court of Kanawha County. As noted in his

¹West Virginia Code § 53-5-5 provides that should a circuit court "refuse to award an injunction, a copy of the orders entered . . . and the original papers presented to the court . . . may be presented to the supreme court of appeals, . . . which may thereupon award the injunction." The pleadings, exhibits, and orders entered below are provided herewith as an Appendix. Transcripts of certain witnesses' testimony have been ordered and should be available for filing on Tuesday morning, September 7, 2004.

ruling (App. A), the injunction was sought by the Attorney General pursuant to West Virginia Code § 3-5-23(e), which requires him to institute a *quo warranto* action in the name of the State upon a finding by the Secretary of State that there is “doubt as to the legitimacy and the validity” of a nominating petition. The Attorney General’s Complaint was filed on Monday, August 23rd, 2004, together with a “Motion of Injunctive Relief” and “Memorandum in Support.” (Appendices B, C, and D respectively.) The relief sought was an expedited hearing followed by an injunction precluding Ralph Nader from being nominated by petition for president of the United States.

Although Mr. Nader’s nominating petition contained enough signatures to meet the statutory threshold (2% of the votes cast in the last presidential election), the Complaint alleged that the signatures were obtained by overt deception; were obtained in violation of the statutory requirement that the canvassers display “credentials” identifying themselves as Nader petitioners (Code § 3-5-23(b)); and that canvassers hid the top of the petition so that signers did not know what they were signing. Approximately 20 affidavits were appended to the Complaint from persons witnessing such tactics, some of whom were thereby misled into signing the petition by mistake.

On August 25, 2004, Judge Kaufmann conducted a status conference by telephone and issued orders setting the hearing for the afternoon of August 30, 2004 and requiring the parties to exchange witness lists. (App. E. and F). The defense elected not to seek a continuance, and the hearing proceeded as scheduled.

The State's Evidence

The Nader campaign solicited signatures in West Virginia in July of 2004. At the hearing, the Attorney General produced twelve witnesses² who observed Nader canvassers engaging in the deceptive tactics summarized in Judge Kaufmann's ruling, including: failing to show credentials; failing to inform prospective signatories of the purpose of the petition; actively concealing the contents by obscuring the top (where Nader's name appeared); evading, denying, or giving inconsistent answers to direct questions regarding whether the Petition was for Nader; and "strategically placing solicitors at tables that contained signs that said 'get out of Iraq' and 'raise the minimum wage.'" (App. A at 3-4.) Eight of these witnesses authenticated affidavits they had earlier submitted to the Secretary of State or to the Prosecuting Attorney of Kanawha County complaining of these tactics. (App. G, items 1, 2, and 5-11.) Three of them testified that they had been duped into signing Nader petitions without realizing it, only later learning, from press reports, that the canvassers were working for Nader. All three recognized their signatures on Nader petitions shown to them as they were testifying, and two also identified the signatures of family members who had been with them at the time.³ Two additional witnesses testified that they observed other

²Two of the witnesses, Jennifer Taylor and Dierdre Purdy, appeared by deposition, and a third (Janette Campbell) by an affidavit stipulated into evidence. (App. G, item 9).

³Witnesses Michael Goldman and Eric Tolbert each testified that they and a family member were approached at the Marquis Cinemas in South Charleston, by solicitors seeking signatures to allow third party or independent candidates to run for office. Alondra McDonald was similarly approached at a K-Mart in Charleston. On all three occasions, the solicitors specifically denied that the petition was for a particular candidate, failed to display credentials, and hid the tops of the

incidents where persons had signed such petitions after being misinformed as to their purpose.⁴

The remaining State's witnesses had not been successfully duped, but observed various incidents where persons petitioning for Nader refused, or were reluctant, to disclose their purpose, failed to display credentials, hid the tops of their petitions, and/or were working from tables saying "get of out Iraq" and "raise the minimum wage."⁵

petitions. Mr. Tolbert was additionally told by his canvasser that it was "too late to get anyone on this year; this is really for the next election."

⁴Martin Glasser testified that one woman near the Charleston Town Center believed she had signed a petition to "raise the minimum wage," after which Mr. Glasser ascertained from the canvassers that they were seeking signatures for Nader while working from a table with signs in large font saying, "**raise the minimum wage**" and "**get out of Iraq**," and in small font, "Ralph Nader says: . . ." (See, App. G, item 7.) Johnny Cambell testified that he and his wife, and several others, were approached by canvassers at the Lewis County Fair seeking signatures "to get anyone on the ballot," without offering or displaying any information as to whom they were representing, and covering the tops of their clipboards to hide the petition. He observed one woman sign the petition after being so approached, after which another woman confronted the same canvasser and finally obtained an admission that the petition was for Nader. (See, App. G, item 6.)

⁵For instance, upon being approached on Capitol Street in Charleston by two people with a petition that was "covered up, so that I could not see what the petition was for," witness Dierdre Purdy asked if it was for Nader, after which one said "no" and the other said "yes" and both ran away. Jennifer Taylor was similarly approached several times on Capitol Street by canvassers saying they were seeking signatures to "get a minority candidate on the ballot," without disclosing whom it was for, and without identification or credentials. (See, App. G, items 1 and 2.) Another witness described several canvassers he had seen in downtown Charleston on various occasions, two of whom were wearing "W 04" buttons, not displaying credentials, and seeking signatures "to get an independent candidate on the ballot;" another of whom, upon being confronted, had to be asked three times before admitting he was working for the Nader campaign; and another who claimed he was working for the "Metropolitan Police Department." (See, App. G, item 8.)

The Defense

Mr. Nader produced only one witness who observed a canvasser, which witness stated that he had been asked to sign a petition for Nader, saw Nader's name at the top, and signed it.⁶ None of the witnesses, either for the State or for Nader, ever observed a canvasser displaying identifying credentials as required by Code § 3-5-23(b).

Testimony from several witnesses described a meeting held on July 12th, involving Jennie Breslin, owner of the JSM, Inc., the contractor hired by the Nader campaign to obtain signatures, and staff of the Secretary of State. Ms. Breslin was there provided with several Secretary of State publications stressing the need to display credentials (all of which are also available on the internet) and not to hide the top of the petition, including a copy of the governing statute itself. (*See*, App. G., items 11 to 15.) Despite this information, Ms. Breslin left with the impression that there was no need to display credentials.

Later, in two meetings with Kanawha County Prosecutor Mike Clifford on July 19th and 23rd it was stressed to Ms. Breslin that the statutory requirement to display credentials must be observed, and the contractor so promised. However, canvassers were still seen without credentials by five witnesses on dates ranging from July 19th to July 28th, and not a single witness for either side ever saw a canvasser display identifying credentials, as required by the statute, at any time. (*See*, App. B, items 2, 5, 6, 8, and 10.)

⁶Testimony of Frank Young. Testimony from all witnesses who actually observed canvasser conduct is being transcribed.

Ms. Breslin received about \$1.50 for every signature obtained, and paid \$1.00 or \$1.10 *per signature* to her workers. Remarkably, she testified that she did not supervise their conduct:

Q. Do you or does your business have a mechanism in place to monitor the actions of these petitioners, and if so can you describe that?

A. No, not really, because they are independent contractors. And if I supervise, give direction or control, then the states say they become employees. And all of that needs to fall in place. The Supreme Court has ruled that they are independent contractors. They cannot be told to carry a badge, wear a uniform, or told where to go, how to go, when to go or any of that.

(Breslin Deposition at 9.)

Thus, an unsupervised cadre of 38 people, paid on a per-signature basis, was released on unsuspecting West Virginians, without any restraints imposed upon their conduct, none of whom could be found by the State to appear for the hearing, and none of whom were produced by Mr. Nader's campaign. Thus, the easiest means of rebutting the State's evidence – calling the canvassers themselves – was a telling omission in Mr. Nader's evidentiary presentation.

II.

ARGUMENT

A. Error of law #1

The circuit court erred in its failure to consider West Virginia Jurisprudence concerning illegal votes and the case law in American Jurisprudence concerning remedies provided in circumstances involving suppositions of fraud in the petition gathering process.

As stated in the Conclusions of Law of the Circuit Court of Kanawha County, West Virginia, the State of West Virginia has a legitimate interest in the regulation of its elections if its elections are to be fair and honest and conducted in an orderly matter. *Hess v. Hechler*, 925 F. Supp. 1140 (1995). West Virginia's entire statutory scheme regarding the oversight of the electoral process is designed to promote fairness and honesty. The requirements include filing deadlines, numbers of required signatures on nominating petitions, and, *inter alia*, credentialing requirements. Moreover, the State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates. *Socialist Workers Party, et al. v. Hechler, et al.*, 890 Fed. 2nd 1303 (4th Cir., W.Va. 1989).

Having stated the noble purpose of the regulation of elections, such pronouncements are meaningless bleatings unless there is a recognition of the reality of illegality and fraud which has been shown to exist in the electoral process and a realistic means of sanctions against that fraud and other illegality. Decisional law from West Virginia and other jurisdictions provide guidance in those situations.

While *Terry v. Sencindiver*, 171 S.E.2d 480, 153 W.Va. 651, (1969) did not involve a nominating petition, this case cannot be cavalierly dismissed as irrelevant. *Terry* involved the casting of illegal ballots in that the ballots were cast after the statutorily mandated closing time. The votes were, in fact, illegal. The votes were, in fact, commingled with

votes which were unquestionably legal. In dealing with this anomaly, the West Virginia Supreme Court of Appeals held that since the void votes cannot be purged, the entire precinct must be thrown out. Ample evidence was produced at the hearing of this matter that irregularities and non-compliance with West Virginia law seemed to be the order of the day insofar as the canvassers were concerned, and the resulting mixture of invalid signatures and valid signatures, must be purged together, as the *Terry* court instructs us.

The District of Columbia Court of Appeals is another jurisdiction that had to face the problem of numerous examples of fraud in a nominating petition. In *Williams v. District of Columbia Board of Elections and Ethics*, 804 A.2nd 316, (D.C. Court of Appeals, 2002), the evidence was that purported signatures on petitions included actors, television characters, sports figures, a non-existent date, many signatures appear to be in the same handwriting, the acquiring of 540 signatures in a 24-hour period by one circulator, among other infirmities, which resulted in the disallowance of all signatures submitted by circulators without engaging in a signature by signature analysis. The *Williams* case cited decisions from other jurisdictions that upheld the discounting of petitions in their entirety when there is evidence that the nominating petitions were tainted by fraud or the strong appearance of fraud. See *Brousseau v. Fitzgerald*, 138 Ariz. 453, 675 P.2nd 713 (1984). The *Brousseau* court reviewed similar decisions from Ohio, Illinois, Pennsylvania, New York and New Jersey and concluded that the only way to protect the integrity of the nominating process was to void petitions containing false certifications by circulators and bar any signatures on those

petitions from being considered in determining the sufficiency in the number of signatures to qualify for placement on the ballot. Thus, the remedy sought in the Petition for Writ of Quo Warranto is proper, and is not a unique theory but is recognized jurisprudence from many other jurisdictions.

B. Error of law #2

The Circuit Court erred when it ignored the mandates of W.Va. Code § 3-5-23(b).

The Circuit Court of Kanawha County correctly notes that in its conclusions of law numbered two through five that the State of West Virginia has an interest in holding canvassers accountable for improper conduct; that canvassers are required to exhibit to each voted canvassed or solicited credentials which has been issued by the Clerk of the County Commission; that the requirement that credentials be exhibited to each votes canvassed or solicited serves a substantial state interest in insuring integrity of the signature solicitation process; and finally, if credentials are not exhibited to each voter canvassed or solicited, the integrity of the specific signatures obtained without credentials shown is compromised.

A recent federal court decision enjoined some requirements of W. Va. Code § 3-5-23 and left others intact. *McClure v. Manchin*, 301 F. Supp.2d 564 (N.D. W. Va. 2003) examined the credentialing requirements of W. Va. Code § 3-5-23(b) and enjoined the Secretary of State from enforcing the statutory requirements that individuals who obtained credentials had to include personal identification and that they had to obtain the credentials in person. Other notice provisions were also enjoined. Not affected was the specific

statutory requirement that credentials be exhibited to "each voter canvassed or solicited. . . ."

The *McClure* court also stated that it was important to maintain some method of accountability for nominating certificate canvassers, and that ". . . credentials serve the State's interest in preserving the integrity of signature solicitation." *McClure* at 573.

Again, it must follow, as the night the day, that there must be a remedy for not following the credentialing requirement and other requirements in our law. When the *Williams* court was deciding the issues before it, there was presented to the court by the losing candidate an argument that because an electoral statute specifies criminal misdemeanor penalties for willful misconduct by a petition circulator the conduct could only be dealt with in the criminal forum. That position was rejected by the *Williams* court and the disallowance of all the signatures submitted by the candidate's circulators, without a signature by signature analysis was the remedy. That remedy is available to this Court on this day. If this remedy does not exist in this case on this day, *no* remedy exists and canvassers are simply not accountable and the State's interest in holding canvassers accountable is defeated and held for naught. Surely this is not the result that our society intends.

Finally, the court below was wrong for focusing on the numbers of signatures obtained and not focusing on the process of how those signatures were obtained. In *Cynoe v. Board of Elections of the City of New York*, 164 A.D.2d 929, 559 N.Y.S. 2d 588 (1990). The court held that a candidate's participation in fraudulently inducing a person sign a

petition as a subscribing witness when she was not a subscribing witness warranted invalidation of the entire petition regardless of whether there were sufficient valid signatures independent of those fraudulently procured. So that this Court may know that the New York Courts have not restricted such a decision to a candidate's knowing participation in the fraud, see *Proskin v. May*, 40 N.Y.2d 829, 355 N.E.2d 793, 297 N.Y.S.2d 654 (N.Y. 1976), where the candidate had no personal knowledge of the fraud and irregularity, and the entire petition was invalidated.

C. Error of law #3

The Court erred when it failed to grant Plaintiff's Injunctive Relief.

The court erred in denying plaintiff's relief as the balancing of harm test falls on the side of the plaintiff. "The settled principles which govern consideration on whether a preliminary injunction should issue. . . have been enumerated in *Blackwelder Furniture Co. of Statesville, Inc. v. Seilig Manufacturing Co., Inc.*, 550 F.2d 189 (4th Cir. 1977)." *American Hospital Assn. v. Hansbarger*, 594 F. Supp. 483, 487 W. Va. 1984). "In *Blackwelder*, the court held that the court must "balance the likelihood of irreparable harm to the plaintiff against the likelihood of harm to the defendant." *Id.* at 487. In addition, the *Blackwelder* court held that" The two more important factors are those of probable irreparable injury to plaintiff without a decree and of likely harm to the defendant with a decree. If that balance is struck in favor of plaintiff, it is enough that grave or serious

questions are presented; and plaintiff need not show a likelihood of success. Always, of course, the public interest should be considered. *Blackwelder* at 196.

If there is any harm to the defendant, it resulted from the defendant's failure to comply with statutory requirements outlined in W. Va. Code § 3-5-23(b). Moreover, the fact that the defendant may not reflect on the West Virginia 2004 general election ballot does not rise to the level of "probably irreparable injury" as, no individual has the absolute right to be included on the ballot.

It is clear that a significant likelihood of harm will result to the State and the public's interest in the fair and honest conduct of elections if the plaintiff is directed to place defendant's name on the ballot where the defendant utterly failed to comply with the statutory requirements of nominating petitions.

III.

PRAYER FOR RELIEF

Wherefore, the State of West Virginia prays that this Court issue an order requiring an immediate response to this Petition, and thereafter issue an injunction directing that Ralph Nader's name not appear on the ballot as a candidate for president of the United States in the November, 2004 general election in the State of West Virginia.

Respectfully submitted,

**THE STATE OF WEST VIRGINIA, by
DARRELL V. McGRAW, JR., ATTORNEY
GENERAL,
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by Counsel

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