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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CHELAN

Timothy Borders, et al.,

Petitioners,

v.

King County and Dean Logan, its Director of
Records, Elections and Licensing Services, et al.,

Respondents

No. 05-2-00027-3

**PETITIONERS' MOTION TO
CLARIFY BURDEN OF PROOF
REGARDING ILLEGAL
VOTES**

I. RELIEF REQUESTED

Petitioners respectfully request an order clarifying the burden of proof regarding illegal votes by felons. Upon a *prima facie* showing by Petitioners that a voter is a felon and that court records do not reflect any restoration of civil rights, Respondents and the counties charged with errors should bear the burden of showing that the felon's civil rights have been restored through a certificate of discharge issued by the felon's sentencing court. Absent such a showing by Respondents or the counties charged with error, the Court should deem the felon's vote illegal and invalid.

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II. STATEMENT OF FACTS

A. Petitioners' Search For Illegal Felon Votes Counted in the 2004 General Election.

Petitioners have alleged and will offer evidence that nearly 1,000 votes counted in the 2004 General Election were cast by felons who were disqualified from voting under the Washington Constitution. To determine whether a voter was ineligible to vote because of a felony conviction, Petitioners compared records of felons from the Washington State Patrol and other government agencies with data from voter databases from the Secretary of State and various Washington counties. Where a match occurred based on the voter's name and date of birth, Petitioners then located and reviewed the relevant sentencing court file to confirm that the voter had indeed been convicted of a felony and to look for evidence of whether the voter had been issued a certificate of discharge by the sentencing court, restoring his or her civil rights. *See, e.g.*, the previously-filed affidavits of Julie Sund and Christopher Yetter (filed in support of the Contest Petition).

B. The Process for Restoration of a Felon's Voting Rights.

Under RCW 29A.68.020, citizens may "contest the right of any person declared elected to an office to be issued a certificate of election" based on, among other things, illegal votes "cast by a person disqualified under Article VI, section 3 of the state Constitution." RCW 29A.68.020. Included in those disqualified are all persons convicted of a felony, unless such persons have been "restored to their civil rights." *See Wash. Const. art VI, sec. 3.*

A felon's right to vote can be restored under two separate statutory provisions, neither of which occurs automatically. First, RCW 9.94A.637 provides for the "discharge" of an offender pursuant to his or her completion of the sentence. Where an offender is in the custody or under the supervision of the Department of Corrections, the Department is responsible for notifying the sentencing court when the offender has completed all requirements of the sentence so that the sentencing court can issue a certificate of

1 discharge, which restores the felon's civil rights lost because of the conviction.
2 RCW 9.94A.637 (1)(a)-(b), .637(4). If the offender is not under the supervision of the
3 Department of Corrections when he or she has completed the requirements of the sentence,
4 it is the offender's responsibility to provide the sentencing court with verification of
5 completion of the sentence conditions so that the sentencing court can issue the certificate
6 of discharge. RCW 9.94A.637(1)(c). Under the statute, the court, the county auditor, and
7 the Department of Corrections have reporting and record-keeping requirements. The court
8 must "send a copy of every signed certificate of discharge to the auditor for the county in
9 which the court resides and to the department [of corrections] . . ." RCW 9.94A.637(2).

10 Second, the Governor may restore a felon's civil rights. If the Governor does so,
11 he or she must file a certificate to that effect with the Secretary of State. The Secretary of
12 State in turn must transmit a copy of the certificate to the court, which records it. RCW
13 9.96.020-030.

14 In both cases, a certificate of discharge must be issued for a felon to be restored to
15 his or her civil rights, and that certificate should be included in court and county auditor
16 files.

17 **C. Petitioners' Evidence of The Absence of the Restoration of Felon**
18 **Voters' Civil Rights.**

19 As recounted by Julie Sund and Christopher Yetter, prior to filing this action
20 Petitioners painstakingly searched records and data from the courts, Secretary of State,
21 county offices, the Washington State Patrol, and the Department of Corrections. These
22 efforts have continued throughout the discovery period in this litigation. Petitioners have
23 determined that at least between 900 and 1,000 felons voted in the 2004 General Election
24 and that the court files and dockets for these felon voters contain no certificates of
25 discharge. Petitioners are also issuing subpoenas to various counties seeking any
26 documents which refer to or reflect that the felon voters' civil rights have or have not been
27 restored, and will introduce any responses to these subpoenas as evidence as well.

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III. STATEMENT OF ISSUES

1. Upon a *prima facie* showing by Petitioners that a voter is a felon and that his or her court file or docket contains no certificate of discharge restoring the felon voter's civil rights, should Respondents and the counties charged with error bear the burden of showing that the felon's civil rights have been restored through a certificate of discharge issued by the felon's sentencing court?

2. If Respondents and the counties charged with error fail to satisfy their burden of showing the vote was valid because the felon's civil rights were restored, should the Court deem the vote illegal and invalid?

IV. EVIDENCE RELIED UPON

This motion is based upon the following: 1) the previously filed affidavits of Julie Sund and Christopher Yetter in Support of Election Contest (filed January 26, 2005, along with Petitioner's Opposition to the Democratic Party's Motion to Dismiss Causes for Election Contest); and 2) other pleadings and records previously filed with the Court.

V. AUTHORITY AND ARGUMENT

A. Introduction.

One basis for this election challenge is the nearly 1,000 illegal votes cast by felons and counted in this election. While the election contest statute provides that votes cast by felons are illegal *per se* and constitute a basis for an election contest, it does not specify the burden or order of proof to be applied to the elements of a claim of illegal votes under the statute. Petitioners bring this motion to clarify this issue. Petitioners submit that once they present a *prima facie* case that a voter is a felon and that his or her court file or docket contains no certificate of discharge restoring civil rights, the burden should shift to Respondents and the counties charged with error to present any evidence they may possess that any felon voter's civil rights were, in fact, restored and that the felon was eligible to

1 vote. If they come forward with no such evidence, the Court should conclude that any vote
2 cast by such a felon is an illegal vote under RCW 20A.68.020(5).

3 **B. Petitioners Should Not Have To Prove A Negative -- That a Felon**
4 **Voters' Civil Rights Had Not Been Restored -- When the Counties**
5 **Charged With Error Should Possess Any Documents Restoring Rights**

6 Petitioners have alleged and will prove that a number of felons ineligible to vote
7 under Article VI § 3 of the Constitution cast votes that were counted in the 2004 General
8 Election. Intervenor WSDCC appears to take the position that Petitioners must also prove
9 a negative: that a particular felon did not have his or her civil rights restored. Nothing in
10 RCW 29A.68.020, however, puts the burden on Petitioners to prove that felons have *not*
11 been "restored to their civil rights." Once Petitioners make a *prima facie* showing that a
12 felon illegally voted and that the court file or docket reflects no restoration of rights, the
13 burden should shift to Respondents and the counties charged with error to prove his or her
14 civil rights were restored.

15 As noted above, RCW 9.94A.637 requires the county auditor and the department of
16 corrections to keep records of all certificates of discharge issued by the superior courts.
17 Likewise, RCW 9.96.020 and .030 require the clerk of the superior court and the Secretary
18 of State to keep copies of all instruments restoring civil rights pursuant to gubernatorial
19 action. Once Petitioners show that a voter was convicted of a felony and that the court file
20 or docket shows no certificate of discharge, the burden should shift to Respondents and the
21 counties charged with error to show that the felon was nonetheless eligible to vote. This
22 shifts the burden of proof to the parties that have the most immediate access to the
23 information necessary to rebut Petitioners' claims of illegal votes. Respondents and the
24 counties charged with error should have ready access to any information showing that a
25 felon's rights have been restored (if indeed, restoration occurred), for it is their courts from
26 which certificates of discharge issue and their county auditors who are tasked with keeping
27 records of felons whose civil rights have been restored. Under these circumstances,

1 allocating to Respondents and the counties charged with error the burden of showing the
2 restoration of a felon's civil rights to rebut Petitioner's *prima facie* claim of illegal votes
3 would be efficient and equitable.

4 This approach would also streamline trial proceedings: Between Petitioners
5 disclosure of illegal votes on April 15, 2005 and trial, if Respondents and the counties
6 charged with error cannot identify any evidence of restoration of rights for particular
7 felons, the parties should be able to agree on those felons whose votes were illegal and
8 save significant time at trial. If no party can come forward with evidence that rights have
9 been restored, there is no compelling reason to consume significant trial time on that issue.

10 **C. Courts Do Not Generally Require Proof of a Negative to Establish an**
11 **Element of a Claim**

12 The burden-shifting approach advocated by Petitioners is not unusual. Courts have
13 noted the difficulty of proving a negative, and the Washington Supreme Court has
14 unequivocally stated that “[i]t is only in exceptional instances that a plaintiff is required to
15 plead or prove a negative.” *See Kiessling v. Northwest Greyhound Lines, Inc.*, 38 Wn.2d
16 289, 293, 229 P.2d 335, 338 (1951) (respondent not required to produce evidence in a
17 negligence case that there was no greasy or slippery place on the road that could have
18 served as a proximate cause to the accident).

19 Where proof of a negative fact is unavoidable, courts have devised two general
20 solutions to the problem.¹ The first solution is to focus on the process used by the party
21 attempting to prove the negative. For instance, to establish a claim under the uninsured
22 vehicle provision of an automobile insurance policy, mandated by RCW 48.22.030, the
23 claimant must establish that that the at-fault motorist is uninsured or underinsured. *See*
24 *Dixie Ins. Co. v. Mello* 75 Wn. App. 328, 335, 877 P.2d 740, 744 (1994). However, courts
25 have acknowledged that proving the existence of this negative is “often difficult,” and is

26 ¹ At least one court, while recognizing the difficulty in proving a negative, deemed
27 plaintiff's proof sufficient if it “renders the existence of the negative probable.” *See*
Higgins v. Salewsky, 17 Wn. App. 207, 210, 562 P.2d 655, 656-57 (1977).

1 especially difficult in the case of “phantom” or “hit-and-run” vehicles. *See id.* at 336.
2 Washington courts have therefore held that a claimant may discharge his or her burden
3 under RCW 48.22.030 in two separate ways: First, by showing that the tortfeasor was
4 uninsured or underinsured (the likely choice where the tortfeasor is known) or, second, by
5 showing that the claimant used “all reasonable efforts” to ascertain the existence of any
6 applicable liability insurance and was unsuccessful in this effort. *See id.* at 744.²

7 Where the opposing party has better access to information that could rebut the
8 plaintiff’s case, courts shift the burden of proof to the opposing party. They place the
9 burden of rebutting such assertions on the party with greater access to relevant information.
10 For example, Washington courts have held that a plaintiff claiming nonpayment on a
11 contract “should be required to state facts which, if verified and not denied, prove to the
12 court that the plaintiff is entitled to the judgment on which he demands.” However, since
13 it is “extremely difficult if not impossible to prove nonpayment, a negative, and relatively
14 easy for the defendants to prove that he has paid,” the burden of proof of payment then
15 shifts to the defendant. *West Coast Credit Corp. v. Pedersen*, 64 Wn.2d 33, 35, 390 P.2d
16 551, 553 (1964).

17 The courts shift the burden of proof in these situations for the simple reason that
18 one party has far better access to proof than does the other. It is both more efficient and
19 more equitable to shift the burden to one party to show evidence of payment, than it would
20 be to require the other to prove the negative, that he or she has never been paid. The shift
21 in the burden of proof still requires the establishment of a *prima facie* case, but devises a
22 flexible and equitable outcome in the face of information asymmetry, such as in the case
23

24 ² The issue also arises in the sex offender registration context, where proof of violation of
25 the statute involves a showing that the offender in question did not register upon changing
26 addresses. *See, e.g., State v. Prestegard*, 108 Wn. App. 14, 28 P.3d 817 (2001). In this
27 context, the State is required to prove that the local sheriff’s office has a routine practice
for handling sex offender registrations; that the practice is reliable; and as a result, it would
have the registration on record had the offender actually filed one.

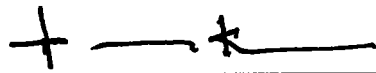
1 here, where the Respondents and counties charged with error are required to maintain
2 records evidencing the status of a convicted felon's right to vote.

3 **VI. CONCLUSION**

4 Based on the foregoing, Petitioners contend that an order clarifying the burden of
5 proof regarding illegal votes is appropriate and necessary. A proposed order is enclosed
6 which states that upon a *prima facie* showing by Petitioners that a voter is a felon and that
7 the court file or docket contains no certificate of discharge restoring civil rights,
8 Respondents and the counties charged with error under the contest statute bear the burden
9 of proving that the felon's civil rights have been restored through a certificate of discharge
10 issued by the felon's sentencing court. In the absence of such proof, the court should deem
11 the vote by such felon illegal.

12
13 DATED this 13th day of April, 2005.

14 Davis Wright Tremaine LLP
15 Attorneys for Petitioners

16
17 By 
18 Harry J. F. Korrell
19 WSBA #23173
20 Robert J. Maguire
21 WSBA #29909

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**[PROPOSED]
ORDER GRANTING
PETITIONER'S MOTION TO
CLARIFY BURDEN OF PROOF
REGARDING ILLEGAL
VOTES**

Having considered Petitioners' motion for an order clarifying the burden of proof regarding illegal votes by felons, and having considered the pleadings submitted in support and in opposition thereto and the arguments of counsel, it is NOW, THEREFORE,

ORDERD:

1. that the Petitioner's motion for an order clarifying the burden of proof regarding illegal votes by felons is GRANTED;
2. that upon a *prima facie* showing by Petitioners that a voter is a felon and his or her court file or docket contains no certificate of discharge restoring civil rights, Respondents and the counties charged with error bear the burden of proving that the felon's civil rights have been restored through a certificate of discharge

