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April 25, 2005

Via E-Filing

Ms. Siri Woods
Chelan County Superior Court Clerk
350 Orondo, 5th Level
Wenatchee, WA 98801

Re: *Borders v. King County et al.*
Chelan County Cause No. 05-00027-3

Dear Ms. Woods:

Attached please find the following documents for filing:

1. PETITIONERS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO CLARIFY BURDEN OF PROOF REGARDING ILLEGAL VOTES;
2. DECLARATION OF CHRISTOPHER L. YETTER and
3. DECLARATION OF E-FILING AND SERVICE.

Very truly yours,

Davis Wright Tremaine LLP

A handwritten signature in cursive script, appearing to read 'Heather Klapmeier', written over a horizontal line.

Heather Klapmeier
Secretary to Robert J. Maguire and Harry Korrell

Enclosures

1 have to refute Petitioner's showing by producing evidence that a certificate of discharge
2 was issued by the sentencing court (even though it does not appear in the appropriate files)
3 or that the felon's right to vote was restored by some other means.

4 II. AUTHORITY AND ARGUMENT

5 A. An Affirmative Act Is Required To Restore A Felon's Civil Rights, and 6 Government Records Should Reflect the Restoration of Rights.

7 As the Secretary of State explains in his Response to WSDCC's Motion In Limine
8 to Exclude Evidence of Petitioners' Erroneously Listed "Illegal Convicted Felon Voters,"
9 there are five ways in which the civil rights of a convicted felon can be restored. Each
10 requires an affirmative act on the part of the sentencing court, the Indeterminate Sentence
11 Review Board, the Governor, or the Clemency and Pardons Board. *Id.* at 3. No discharge
12 happens automatically, as WSDCC suggests, just because a felon has satisfied the
13 requirements of his or her sentence, including the legal financial obligations. Instead, as
14 the Secretary explains:

- 15 ■ The sentencing court [shall] issue a certificate of discharge
16 pursuant to RCW 9.94A.637;
- 17 ■ The sentencing court may enter an order restoring civil rights
18 upon termination of a suspended sentence under RCW 9.92.066;
- 19 ■ The Indeterminate Sentence Review Board may enter a final
20 order of discharge of an offender under its jurisdiction, as
21 provided in RCW 9.96.050;¹
- 22 ■ The governor may issue a pardon, which has the effect of
23 restoring civil rights, as provided in RCW 9.96.020; or
- 24 ■ The Clemency and Pardons Board may issue a certificate
25 restoring the right to vote – but not civil rights more generally –
26 to any offender convicted of a felony in federal court or in any
27 out-of-state court, as provided in RCW 9.94A.885(2).²

24 ¹ This issue has even the potential to affect only 47 of the 946 felons on Petitioners' list who are there based
25 solely on convictions prior to the SRA. Yetter Decl. at ¶ 6.

26 ² Petitioners have only challenged the votes of felons who were convicted in the state courts of Washington.
27 Much of the brief of the ACLU is inapposite because federal felony convictions and out-of-state felony
convictions are not the basis for challenge by Petitioners. However, in light of the huge number of
Washington felons voting in King County, it is a certainty that King County also counted the votes of felons
who were not entitled to vote because of convictions in other states or because of federal convictions.

Petitioners also note that, at the time of this submission, the Court has not granted leave to submit

1 See Secretary of State's Response to WSDCC's Motion In Limine at 3.³ As WSDCC
2 argues (*see, e.g.*, WSDCC's Opposition to Petitioner's Motion To Clarify Burden of Proof
3 Regarding Illegal Votes, at 5-6, citing *Rosso v. State Personnel Bd.*, 68 Wn.2d 16, 20
4 (1966)), these government entities must be presumed to have performed their duties
5 properly, and a certificate of discharge or other record reflecting a restoration of civil rights
6 – if such a record ever existed – should be kept by these agencies. If the record does not
7 exist where it is supposed to be, then the Court can and should conclude that the felon
8 remains disenfranchised, unless the Secretary of State or one of the counties charged with
9 error (or WSDCC) offers probative evidence, and not just speculation, to the contrary.

10 Petitioners do not contend that simply because a felon voted, the vote should be
11 deemed illegal. To the contrary, Petitioners will present at trial evidence that the felon
12 voters on Petitioners' list did not have the right to cast a legal vote. This evidence will
13 include the absence of records of discharge for these felon voters (as established by
14 testimony of witnesses who examined the relevant court files) and documentary evidence
15 of the absence of records of discharge that Petitioners expect to receive as the result of
16 subpoenas and document requests issued to various government agencies (including the
17 Department of Corrections,⁴ the Office of the Administrator for the Courts, the Secretary

18 _____
19 the brief offered by the ACLU. Petitioners address certain arguments made in that brief in order to ensure
20 the Court was aware of those arguments in the event leave to submit the amicus brief is granted. The Court
21 has already denied requests to intervene by others, and because of the widespread public and partisan interest
22 in this case, Petitioners are concerned that allowing this amicus brief could lead to a flood of submissions
23 from other interested organizations and individuals on both sides of the dispute and therefore object to the
24 participation of the ACLU as amicus.

25 ³ The ACLU argues that other events "should be considered orders restoring civil rights," but those are
26 matters for the legislature to decide. As the ACLU points out, under the current means by which a felon may
27 be re-enfranchised, the most likely sources of information regarding a felon's right to vote are court files
from the sentencing court (which should contain a certificate of discharge or other record of restoration of
rights, such as a pardon), the county auditor's record of eligible voters (auditors are supposed to receive from
the courts notices of restoration of civil rights and notices of conviction which are supposed to be used to
remove voters from the voter lists), the Department of Corrections (that is required to maintain a list of all
felons who have been issued a certificate of discharge from a sentencing court) or the Indeterminate Sentence
Review Board, which may issue a final order of discharge to a felon whose sentence was imposed before the
1981 Sentencing Reform Act. Petitioners have been investigating these sources for evidence of illegal votes
and any restoration of rights.

⁴ As noted above, the Department of Corrections is required to maintain records of Certificates of Discharge

PETITIONERS' REPLY ON BURDEN OF PROOF RE
ILLEGAL VOTES- 3

SEA 1637536v1 55441-4

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1 of State, and court clerks and auditors in the counties charged with error). Once Petitioners
2 demonstrate that the relevant records do not indicate that a convicted felon's right to vote
3 has been restored, they will have carried their burden of proving that an illegal vote
4 occurred that should not have been counted in the 2004 General Election, *see e.g.* CR 44
5 (b), ER 803(a)(10), unless one the Respondents, the counties charged with error, or
6 WSDCC offer probative evidence to the contrary.

7 **B. Petitioners Do Not Seek to Avoid Their Burden of Proof, Only to**
8 **Clarify What Will be Required of Them at Trial.**

9 The WSDCC complains that Petitioners seek to impose their burden on others who
10 are not parties. This argument lacks merit.

11 First, the method by which Petitioners propose to prove that a felon's vote was
12 illegal is sensible and appropriate, in light of the obligations on the counties charged with
13 error and other governmental entities to maintain the relevant records. Petitioners intend to
14 carry their burden by showing that a felon voted and that no records reflecting a restoration
15 of rights exist in the places they are supposed to be kept. Once Petitioners have proven
16 this, if someone wants to argue that the rights were in fact restored, he should have to come
17 forward with some probative evidence, not just speculation.

18 Second, the Court's dismissal of many of the counties and their auditors from this
19 litigation⁵ does not mean that their role in the election contest has ended. As the Secretary
20 of State and the WSDCC well know, the election contest statute contemplates that parties
21 charged with error will be called to court to respond to Petitioners' claims. Under RCW
22 29A.68.040 the clerk of the court will issue a citation for a person charged with the error or
23 omission in an election contest to appear and answer the allegations, and under RCW
24 29A.68.011, the court may order "any person charged with error, wrongful act, or neglect"

25 _____
26 issued by a sentencing court. Based on a review and analysis of data extracted from the Department's
27 database (produced in response to a Public Disclosure Act request and shared with WSDCC and the other
parties through discovery), it appears that discharges occurred for only 16,681 of the 107,886 felony
convictions listed in the Department of Corrections databases. Yetter Decl. at ¶¶ 4-5.

⁵ Petitioners did not "stipulate" to the dismissal of the counties, as WSDCC alleges. The Court ordered their
dismissal.

PETITIONERS' REPLY ON BURDEN OF PROOF RE
ILLEGAL VOTES- 4

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1 to “do as the court orders or to show cause forthwith why the error should not be corrected
2 . . . or the duty or order not performed.” As WSDCC concedes, RCW 9.94A.637 requires
3 the county auditor and the Department of Corrections to maintain records of all certificates
4 of discharge issued by the superior courts. Likewise, RCW 9.96.020 and .030 require the
5 clerk of the superior court and the Secretary of State to keep copies of all instruments
6 restoring civil rights pursuant to gubernatorial action. Petitioners will show that many
7 voters were convicted felons and that the court files and other records that would reflect a
8 certificate of discharge if one had been issued do not reflect any such certificate or other
9 restoration of rights. The Secretary of State and counties charged with error will be
10 required to answer that evidence under RCW 29A.68.011 and .040, and they should have
11 the records reflecting a restoration of rights, if any exist. If they fail to produce any to
12 rebut Petitioners’ showing, Petitioners will have established their claim.

13 **C. WSDCC’s Position Would Disenfranchise Legal Voters.**

14 In Section III.C. of its brief, WSDCC argues that “[i]f anything, absent an
15 indication in the court record, the presumption should be that discharge occurred.”
16 WSDCC’s Opposition at 8. This statement is remarkable for two reasons. First, there will
17 not be any document in the court records specifically indicating that rights have *not* been
18 restored, because civil rights are lost automatically upon conviction of a felony. Thus the
19 only notations regarding civil rights after the conviction will be those indicating that any
20 rights were restored. The absence of an indication in the court record is evidence that the
21 rights have not been restored, not the opposite as WSDCC contends. Second, the
22 statement is remarkable given the cases cited by WSDCC. *State v. Swanson* recognizes a
23 mandatory duty on the court to issue a certificate of discharge when a felon completes all
24 the requirements of his or her sentence. *Rosso v. State Personnel Bd.* confirms “the
25 presumption that public officers will properly and legally perform their duties until the
26 contrary is shown.” 68 Wn.2d 16, 20 (1966). Under *Swanson* and *Rosso*, the Court must
27

1 presume the Department of Corrections, clerks of court, and sentencing courts have
2 performed their jobs properly, and that the absence of a certificate of discharge in the court
3 file means the felon has not had his or her voting rights restored.

4 Furthermore, the presumption proposed by WSDCC (under which a felon would be
5 authorized to vote if there is no express indication in the court record “not restoring” civil
6 rights) would result in the disenfranchisement of lawful voters by canceling or diluting
7 their votes by those cast by felons whom the Washington Constitution bars from voting.
8 In light of the ACLU’s observation that there are tens of thousands of felons in
9 Washington who have not had their rights restored (and the fact that the Department of
10 Corrections database identifies only about 15% the convictions in its records for which a
11 discharge was entered), this dilution is the result the Court should avoid:

12 The right to vote freely for the candidate of one’s choice is of
13 the essence of a democratic society, and any restrictions on
14 that right strike at the heart of representative government.
15 *And the right of suffrage can be denied by a debasement or
16 dilution of the weight of a citizen’s vote just as effectively as
17 by wholly prohibiting the free exercise of the franchise.*

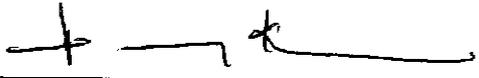
18 *Gold Bar Citizens for Good Government v. Whalen*, 99 Wn.2d 724, 730 (1983) (footnote
19 omitted, emphasis added). WSDCC’s position would leave counties with no functional
20 method to enforce Washington’s constitutional ban on felons’ voting.

21 III. CONCLUSION

22 Based on the foregoing, Petitioners contend that an order clarifying the burden and
23 order of proof regarding illegal votes is appropriate. That order should state that upon a
24 showing by Petitioners that a voter is a felon and that the court file or docket contains no
25 record of any certificate of discharge issued by the sentencing court or other document
26 restoring civil rights, the court will find that the vote was illegal unless the Secretary of
27 State, one of the counties charged with error, or the WSDCC comes forward with evidence
that his or her rights were restored.

1 DATED this 25th day of April, 2005.

2 Davis Wright Tremaine LLP
3 Attorneys for Petitioners

4
5 By 

6 Harry J. F. Korrell
7 WSBA #23173
8 Robert J. Maguire
9 WSBA #29909

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PETITIONERS' REPLY ON BURDEN OF PROOF RE
ILLEGAL VOTES- 7

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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,
v.
Washington State Democratic Central
Committee,
Intervenor-Respondent,
v.
Libertarian Party of Washington State et al.,
Intervenor-Respondents.

No. 05-00027-3

**DECLARATION OF
CHRISTOPHER L. YETTER**

I, Christopher L. Yetter, declare as follows:

1. I make the statements in this declaration based on personal knowledge and if called and sworn as a witness in any proceeding, could and would testify competently thereto.
2. I am a consulting technical analyst for the Rossi for Governor campaign.

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3. For the last several months I have been engaged in collecting and analyzing documents and databases relating to the identification of illegal votes in the 2004 general election.

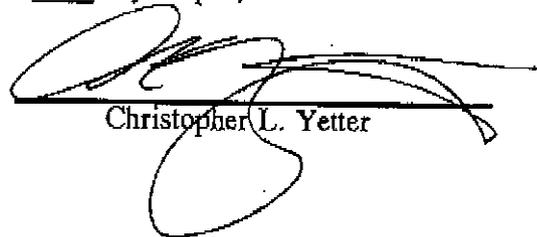
4. In response to a Public Disclosure Act request, the Washington State Department of Corrections produced a set of four related databases containing information on felons and felony convictions in the state. Those databases include a field called Discharge Date, indicating the date (if any) when a felony conviction was discharged.

5. Based on my review and analysis of the data extracted from this database it appears that discharges occurred for only 16,681 of the 107,886 felony convictions listed in the Department of Corrections databases.

6. I am familiar with the list of felon voters submitted to the court by Petitioners in this case, as I helped compile it. Of the 946 felons on that list, only 47 were included based solely on convictions before 1984, when I understood that the Sentencing Reform Act became effective.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct

Executed at Seattle, Washington, this 25th day of April, 2005.



Christopher L. Yetter

1 3. On April 25, 2005, I caused the document listed below:

2 **PETITIONERS' REPLY MEMORANDUM IN SUPPORT OF THEIR**
3 **MOTION TO CLARIFY BURDEN OF PROOF REGARDING ILLEGAL VOTES;**
4 **and**

5 **DECLARATION OF CHRISTOPHER L. YETTER**

6 to be filed with the Clerk of Chelan County Superior Court via Electronic Filing Legal
7 Services (E-Filing.com) which sent notification of such filing to the following persons,
8 with this Certificate to follow:
9

10 **Kevin Hamilton, Esq.**
11 Perkins Coie LLP
12 Attorneys for Washington State Democratic
13 Central Committee
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15 Seattle, WA 98101

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 Foster Pepper & Shefelman
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For: Secretary of State Sam Reed
Attorney General's Office
PO Box 40100
Olympia WA 98504-0100

5 **Russell J. Speidel,**
6 Speidel Law Firm,
7 7 North Wenatchee Avenue, Suite 600,
8 Wenatchee, WA 98807

9 I certify under penalty of perjury under the laws of the State of Washington that the
10 foregoing is true and correct.

11 DATED this 25th day of April, 2005, at Seattle, Washington.

12
13 
14 Heather Klapmeier