

STATE OF WASHINGTON
CHELAN COUNTY SUPERIOR COURT

TIMOTHY BORDERS, et al.,
Petitioners,
v.
KING COUNTY, et al.,
Respondents.

NO. 05-2-00027-3
SECRETARY OF STATE'S
RESPONSE TO PETITIONERS'
MOTION TO CLARIFY BURDEN OF
PROOF REGARDING ILLEGAL
VOTES

I. INTRODUCTION

COMES NOW Respondent Sam Reed, as Secretary of State of the State of Washington ("Secretary Reed" or "the Secretary"), by and through the undersigned counsel, and responds as follows to the Petitioners' Motion to Clarify Burden of Proof Regarding Illegal Votes ("Motion").¹ Petitioners contest the validity of the 2004 general election for the office of governor based in part on the allegation of illegal votes, principally votes cast by alleged felons. By this motion, Petitioners seek an order of this Court shifting the burden of proof of illegal voting away from Petitioners and to the "Respondents and the counties charged with errors"² if Petitioners provide what they describe as a "*prima facie* showing . . . that a voter is a felon and that court records do not reflect any restoration of civil rights". Motion at 1. This motion should be denied because the burden of proof rests with the party alleging a vote to have been cast illegally and makes no provision for shifting that burden.

¹ The issues raised by this motion interrelate with those raised by the Washington State Democratic Central Committee's Motion in Limine to Exclude Evidence of Petitioners' Erroneously Listed "Illegal Convicted Felon Voters." The Secretary respectfully suggests that the Court should consider these motions together.

² Most counties and county auditors have previously been dismissed from this action. Petitioners' motion therefore appears to contend that the burden of proof should, under some circumstances, shift to an entity that is not even a party to this action.

1 **II. ARGUMENT**

2 **A. Evidence of a Felony Conviction Coupled with the Absence of a Certificate of**
3 **Discharge In a Court File Does Not Establish a *Prima Facie* Case Of Illegal Felon**
4 **Voting**

5 Petitioners’ motion assumes that evidence of a felony conviction, coupled with the
6 absence of a certificate of discharge in a court file or docket, amounts to a *prima facie*
7 showing of an illegal felon vote. Motion at 4. Petitioners cite no authority for such a
8 contention, and it is unsound, for two reasons.

9 First, merely showing the absence of a certificate of discharge in a court file does not
10 establish that a voter’s civil rights have not been restored, because there are multiple ways in
11 which civil rights can be restored. There are five ways in which the civil rights of a convicted
12 felon can be restored:

- 13 • The sentencing court may issue a certificate of discharge pursuant to RCW
14 9.94A.637;
- 15 • The sentencing court may enter an order restoring civil rights upon termination of
16 a suspended sentence under RCW 9.92.066;
- 17 • The Indeterminate Sentence Review Board may enter a final order of discharge of
18 an offender under its jurisdiction, as provided in RCW 9.96.050;
- 19 • The Governor may issue a pardon, which has the effect of restoring civil rights
20 (RCW 9.96.020); or
- 21 • The Clemency and Pardons Board may issue a certificate restoring the right to
22 vote—but not civil rights more generally—to any offender convicted of a felony in
23 federal court in any out-of-state court. RCW 9.94A.885(2).

24 Given the multiple ways in which civil rights can be restored, simply showing that
25 somebody looked in a court file or checked a court docket does not establish a *prima facie*
26 case that civil rights have not been restored.

1 Second, under ER 803(7), evidence that a matter is not included in business records
2 maintained in accordance with RCW 5.45 may be used to prove the nonoccurrence of the
3 matter only upon a showing that the matter is “of a kind of which” a record “was regularly
4 made and preserved, unless the sources of information or other circumstances indicate a lack
5 of trustworthiness.” “A qualified witness seemingly would be necessary to make a foundation
6 showing that the business routinely kept the records of the information not located, and that
7 the information would have come promptly to the attention of regular record keepers and
8 would have been recorded at that time.” 5C Tegland, Washington Practice, Evidence, §
9 803.44 (4th Ed.) For example, in *State v. Prestegard*, 108 Wn. App. 14, 19, 28 P.3d 817, 820
10 (2001), the state was required to prove a negative: that Prestegard did not register as a sex
11 offender after changing addresses. The court explained, “[t]o prove this negative, the State
12 had to prove that the sheriff’s office had a routine practice for handling sex offenders’
13 registrations; that its practice was reliable; and thus, that it would have Prestegard’s new
14 registration with his change of address if he filed one.” *Id.* Petitioners have made no such
15 showing.

16 **B. The Burden of Proof Rests With the Party Contesting the Election and Does Not**
17 **Shift**

18 The burden of proof in an election contest rests squarely on the shoulders of
19 Petitioners, and the statutes governing this process make no reference to the burden shifting to
20 any other party. Both the law and the public interest require that the certified results of an
21 election be presumed valid until clearly proven otherwise. For these reasons, the burden of
22 proof of all required elements of an election contest remains with the party challenging the
23 validity of the election.³

24 ³ This is not to suggest that if some party other than the Petitioner also offers proof of one or more
25 illegal votes as an alleged “offsetting error” that anybody other than the party challenging the validity of the vote
26 would assume the burden of proof. *See* Petitioners’ Motion in Limine to Exclude Evidence Concerning
Previously Rejected Ballots and Other “Offsetting Errors.”

1 Washington courts presume the certified results of an election to be valid unless the
2 contrary is clearly established. *In re Contested Election of Schoessler*, 140 Wn.2d 368, 392,
3 998 P.2d 818 (2000).⁴ “Unless an election is clearly invalid, ‘when the people have spoken,
4 their verdict should not be disturbed by the courts[.]’ ” *Dumas v. Gagner*, 137 Wn.2d 268,
5 284, 971 P.2d 17 (1999) (quoting *Murphy v. City of Spokane*, 64 Wash. 681, 684, 117 P. 476
6 (1911)). An informality or irregularity in an election is not sufficient to invalidate the election
7 unless it affected the result. *Id.* (citing *McCormick v. Okanogan County*, 90 Wn.2d 71, 75,
8 578 P.2d 1303 (1978)). Public policy requires that courts recognize every reasonable
9 presumption in favor of election results, so that the stability of democratic government is not
10 called into question by insubstantial election contest lawsuits. This is not to suggest that the
11 remedies available under the contest statutes should not be fully employed when the proven
12 facts justify them, but the burden of proof should remain at all times with the party
13 challenging the election results.

14 Illegal votes are one of the grounds upon which a contest may proceed, including the
15 allegation that an illegal vote was cast by a convicted felon whose rights have not been
16 restored. RCW 29A.68.020(5)(a)(ii). The state constitution provides that, “All persons
17 convicted of an infamous crime unless restored to their civil rights . . . are excluded from the
18 elective franchise.” Const. art. VI, § 3. Accordingly, the party challenging the validity of a
19 vote bears the burden of proving both (1) that the voter must have been convicted of an
20 infamous crime;⁵ and(2) the voter’s civil rights must not have been restored. *Id.*

21 By statute, “Registration of a person as a voter is presumptive evidence of his or her
22 right to vote”. RCW 29A.08.810. When a voter’s registration is challenged before the

23 ⁴ The election at issue in *Schoessler* was contested under RCW 35A.12.030, a statute imposing a
24 residence requirement for city offices. The court held in that context that “the party contesting an election under
25 RCW 35A.12.030 bears the initial burden of proving a successful candidate did not satisfy the one-year residence
26 requirement.” There is no reason why the rule should be any different in a contest commenced under title 29A.

⁵ “Infamous crime” is defined for this purpose as meaning “a crime punishable by death in the state
penitentiary or imprisonment in a state correctional facility.” RCW 29A.04.079.

1 election, the burden of proving that he or she is improperly registered rests with the challenger
2 and must be proven by clear and convincing evidence. RCW 29A.08.820. The same standard
3 should apply when election results are contested under RCW 29A.68.020, since the inquiry
4 into the voter’s qualifications is essentially the same.⁶

5 Moreover, voting is a constitutional right, albeit a right that does not extend to felons
6 whose civil rights have not been restored. *State v. Schmidt*, 143 Wn.2d 658, 681, 23 P.3d 462
7 (2001) (Madsen, J., concurring). Given both the presumption that election results are valid
8 until proven otherwise and the constitutionally-protected nature of the right to vote, no vote
9 should be held illegal and discounted absent clear proof that the voter was legally
10 disenfranchised. Under governing constitutional and statutory provisions, that burden rests
11 with the party seeking to set aside the election results or to contest a particular person’s right
12 to vote.

13 Finally, the cases cited by Petitioners in support of their motion are inapposite.⁷
14 Petitioners cite a case involving an uninsured motorist, even though the court in that case did
15 not shift the burden of proof. Motion at 6-7 (citing *Dixie Ins. Co. v. Mello*, 75 Wn. App. 328,
16 877 P.2d 740 (1994)). Even though that court acknowledged that proving a negative fact is
17 sometimes difficult, *id.* at 336, it nevertheless declined to shift the burden of proof away from
18 the claimant. *Id.* at 335. Petitioners seem to cite this case for the proposition that they only
19 need to show “reasonable efforts” to gather evidence, but even if Petitioners introduce such
20

21 ⁶ The cited statutes govern an administrative process under which any voter (or the county prosecutor)
22 can file an administrative challenge to the voter registration of any other voter. RCW 29A.08.810-.850. If
23 Petitioners were correct, then presumably the burden of proof would also shift in such administrative challenges,
24 placing the burden on the *voter* to prove his or her qualification to vote. Given that voting is a constitutional right,
25 this result seems decidedly unlikely.

26 ⁷ Petitioners cite a case involving a bus accident for the proposition that parties should only rarely be
required to prove a negative. Motion at 6 (citing *Kiessling v. Northwest Greyhound Lines, Inc.*, 38 Wn.2d 289,
293, 229 P.2d 335 (1951)). Proving that somebody should be denied the constitutionally-protected right to vote is
significantly different than proving liability in a bus accident. The cited authority fails to support their contention
that they should not fully and consistently bear the burden of proving that a person should be denied the right to
vote.

1 evidence, questions would still remain at trial regarding the admissibility of that evidence and
2 of its sufficiency to satisfy their burden of proof.

3 Petitioners also cite a case regarding nonpayment on a contract for the proposition that
4 burden of proof should shift to the party with greater access to the relevant information.
5 Motion at 7 (citing *West Coast Credit Corp. v. Pedersen*, 64 Wn.2d 33, 35, 390 P.2d 551
6 (1964)). Petitioners offer no reason to believe that other parties to this lawsuit have any
7 greater access to information than they do regarding felony convictions or restorations of civil
8 rights. Sources of evidence on this subject include criminal history information, court files,
9 and records regarding pardons, executive clemency, or discharge. Petitioners may use civil
10 discovery or the public records act to obtain information. The information is no less available
11 to the Petitioners than to Intervenors or election administrators.

12 III. CONCLUSION

13 For these reasons, Secretary Reed respectfully opposes Petitioners' motion.

14 DATED this 20th day of April, 2005.

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