

THE HONORABLE ROBERT H. WHALEY

DANIEL J. JUDGE
Attorney General's Office
Criminal Justice Division
P.O. Box 40116
Olympia, WA 98504-0116
(360) 586-1445

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

AUG 21 2000

JAMES R. LARSEN, CLERK
DEPUTY
SPOKANE, WASHINGTON

JEFFREY T. EVEN
Attorney General's Office
General Legal Services
P.O. Box 40100
Olympia, WA 98504-0100
(360) 586-0728

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

MUHAMMAD S.
FARRAKHAN, (aka ERNEST S.
WALKER), et al.,

Plaintiffs,

v.

GARY LOCKE, et al.,

Defendants.

NO. CS-96-076-RHW

DEFENDANTS' REPLY
MEMORANDUM IN
SUPPORT OF SUMMARY
JUDGMENT AND
DISMISSAL

Defendants, by and through their attorneys, CHRISTINE O. GREGOIRE, Attorney General, and DANIEL J. JUDGE and JEFFREY T. EVEN, Assistant Attorneys General, submit the following Reply Memorandum in Support of Defendants' Motion for Summary Judgment.

//

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

I. ARGUMENT

A. Review of Plaintiffs' Vote Denial Claims Requires Review of Their Criminal Cases in State Court.

Plaintiffs ask this Court to find that they have been denied the right to vote on account of race regardless of their individual actions leading to their felony convictions and disenfranchisement. Plaintiffs ask this Court to ignore cause. They argue that their own criminal histories are irrelevant. They argue that their disenfranchisement occurs magically at the county auditor's office, even though there is no dispute that disenfranchisement follows directly from their felony convictions.

Although the Voting Rights Act does not require Plaintiffs to prove that the state intended to deny the right to vote on account of race, Plaintiffs must still prove: (1) that they were denied the right to vote; and (2) that the denial was based on race. Plaintiffs have proved neither of these elements, regardless of the issue of intent. They fail to demonstrate they have the right to vote. They fail to demonstrate their inability to vote occurred on account of race.

1. Plaintiffs' Convictions Caused Their Disenfranchisement.

Plaintiffs were disenfranchised because they were convicted of felonies. Upon entry of the judgment and sentence, they were disqualified from voting under Washington law. Had they attempted to vote at that point, they would have committed a felony, regardless of whether the ministerial process of removing their names from the rolls had been completed. RCW 29.85.240.

1 The mere fact that they are removed from the voter rolls (if they had been there
2 in the first place) does not preclude them from registering; their felony
3 convictions do, until their civil rights are restored. RCW 29.07.080.¹
4 Defendants agree that Plaintiffs' disenfranchisement was a collateral
5 consequence of their sentence, not part of their punishment. Nevertheless, there
6 is no dispute that Plaintiffs cannot vote because they are convicted felons, not
7 because of some other action by an election administrator.

8 **2. Plaintiffs' Disenfranchisements were not Caused by Race.**

9 Plaintiffs argue that this is a case about race, even though Plaintiffs
10 concede that their convictions have nothing to do with race. Plaintiffs cannot
11 escape arguments that their disenfranchisement is intertwined in their state
12 court criminal proceedings by simply arguing that they could not advance a
13 voting rights claim in state court. This case is not about race simply because
14 Plaintiffs say so. Plaintiffs were not required to make to make voting rights
15 challenges in response to their felony prosecutions. However, if Plaintiffs, in
16 their criminal proceedings, had arguments or issues pertaining to race available
17 to them, they could have challenged their prosecution at trial, on appeal, or their
18 judgment and sentence in a post-conviction proceeding if they were

19
20
21 ¹ Restoration of their civil rights is governed by statutes relating to the
22 criminal justice system, not the administration of elections. RCW 9.94A.220.

1 discriminated against based upon their race during the course of their
2 prosecution.²

3 Plaintiffs were faced with a choice in presenting their summary judgment
4 motion. They could either have alleged (1) that the statistical evidence upon
5 which they rely establishes that their criminal convictions are based on race,
6 and therefore that they have been denied the vote based on race; or (2) that
7 although their convictions cannot be challenged, the collateral effect of those
8 convictions somehow amounts to a denial of the right to vote based on race.
9 None of the Plaintiffs alleged that their arrests, convictions, or sentences were
10 the product of race when presented with the opportunity to do, whether at trial,
11 on appeal, or on collateral review. Defendants' Statement of Material Facts, ¶¶
12 6-53. Plaintiffs therefore clearly could not pursue the first option. See
13 Defendants' Memorandum in Support of Summary Judgment at 6-15.

14 _____
15 ² See, e.g., State v. Barber, 118 Wn.2d 335, 346, 823 P.2d 1068 (1992)
16 (“racial incongruity, i.e., a person of any race (“racial incongruity, i.e., a person
17 of any race being allegedly ‘out of place’ in a particular geographic area, should
18 never constitute a finding of reasonable suspicion of criminal behavior.”); State
19 v. Lasdon, 86 Wn. App. 822, 828 n. 4, 939 P.2d 223 (1997), reversed on other
20 grounds, 138 Wn. 2d 343 (1999) (“This is not to say that our citizenry and our
21 courts do not evince concern where our laws are applied in an intentionally
22 discriminating manner in violation of equal protection.”).

1 This leaves Plaintiffs with the second argument.
2 That theory, quickly leads to a logical absurdity, because they challenge felon
3 disenfranchisement without challenging the validity of the underlying felony
4 convictions. See Heck v. Humphrey, 512 U.S. 477, 486-87 (1994).
5 Disenfranchisement due to felony conviction obviously results directly from the
6 conviction itself, much as a person's reflection results directly from standing in
7 front of a mirror.³ Plaintiffs' attempt to challenge the consequence without
8 challenging the conviction is akin to blaming the mirror. Plaintiffs, of
9 necessity, argue that statistical disparities might provide a basis for challenging
10 the collateral consequence, disenfranchisement, while leaving the conviction
11 alone. Outside of the equal protection claim presented in Hunter, it is difficult
12 to imagine a world in which the allegation of statistical disparities would
13 support a claim of denial of the right to vote based on race, but would not
14 support a claim of an entitlement to release from prison. Nevertheless, this is
15 precisely the result Plaintiffs propose.

16 //

17 //

18

19 ³ RCW 29.10.097 (upon receipt of notice of conviction, county auditor
20 "shall" cancel registration); RCW 29.07.080 (auditor cannot register a person to
21 vote unless the person attests that he or she is not deprived of civil rights due to
22 felony conviction).

1 **3. In Response to *Rooker-Feldman* Arguments, Plaintiffs Attempt**
 2 **to Present a Vote Dilution Claim Already Dismissed by this**
 3 **Court.**

4 By not contending that their individual convictions resulted from racial
 5 discrimination, Plaintiffs present a vote dilution claim. See Plaintiffs'
 6 Responsive Memorandum at 10 ("Plaintiffs are instead challenging the
 7 proscribed effect of Washington's felon disenfranchisement law as applied to
 8 minorities." (emphasis added)). They are forced to contend that Washington's
 9 disenfranchisement laws result in a condition in which political processes are
 10 "not equally open to participation by members of a class of citizens. . . in that
 11 its members have less opportunity than other members of the electorate to
 12 participate in the political process" 42 U.S.C. § 1973(b) (emphasis
 13 added).⁴ This argument, however, is based upon the alleged effect of a
 14 particular law on the entire group of which Plaintiffs are members, not a theory
 15 that they individually have been denied the right to vote based on race. It is, in
 16 other words, an argument based on vote dilution, an argument that this Court

17 ⁴ Plaintiffs quote this statutory language in an abridged form in their
 18 Response Memorandum, in a manner that obscures the error in their argument.
 19 Section 1973(b) does not provide that a Plaintiff states a cause of action under
 20 an effects test by showing an effect on the Plaintiff; clearly the statute requires
 21 an effect upon the group. In other words, the effects test supports a vote
 22 dilution theory, not a vote denial theory. 42 U.S.C. § 1973(b).

1 has already dismissed. Farrakhan v. Locke, 987 F. Supp. 1304, 1313 (E.D.
2 Wash. 1997).

3 Plaintiffs base their claim entirely upon the results test stated in §
4 1973(b). Congress modified § 1973(b) in 1982 to allow vote dilution claims
5 without proof of intent. United States v. Marengo County Commission, 731
6 F.2d 1546, 1563 (11th Cir. 1984). Congress viewed this as necessary in light of
7 the Supreme Court's decision in Mobile v. Bolden. Thornburg v. Gingles, 478
8 U.S. 30, 43 (1986) (citing Mobile v. Bolden, 446 U.S. 55 (1980)). Here,
9 Plaintiffs state a vote dilution claim under § 1973(b) not a vote denial claim.

10 **B. Plaintiffs Fail to Meet Their Burden in Response to Defendants'**
11 **Motion for Summary Judgment.**

12 Simply because Plaintiffs have presented a claim under the Voting Rights
13 Act does not mean that they have met their burden for summary judgment
14 purposes to sustain such a claim. Despite Plaintiffs' disputes with Defendants
15 over the VRA's legislative history and felon disenfranchisement, there is no
16 dispute that felon disenfranchisement laws were not the focus of attention in
17 1965 or when the VRA was amended in 1982. This point is best exemplified by
18 this Court's observations that the seven Senate factors do not fit well within the
19 framework of Plaintiffs' claim which challenges Washington's felon
20 disenfranchisement laws. Farrakhan, 987 F. Supp. at 1311-12. Plaintiffs'
21 individual cases eliminate all likelihood that their disenfranchisement resulted
22 on account of race, with no dispute by Plaintiffs in this regard.

1 **1. Plaintiffs Lack the Right to Vote.**

2 Plaintiffs do not avoid summary judgment by relying on the Supreme
3 Court's holding in Chisom v. Roemer, 501 U.S. 380, 395-96 (1991) because
4 they still must establish a voting rights claim protected under the VRA. This
5 case does not pertain to whether judicial elections fall under the ambit of the
6 VRA. Regardless of the amendments to the VRA, a voting rights claim is still
7 dependent on the showing of a resulting "denial or abridgement of the right of
8 any citizen of the United States to vote on account of race." 42 U.S.C. §1973(a)
9 (emphasis added). This language does not purport to modify the underlying
10 right to vote. Congress has never granted convicted felons the right to vote.
11 See, e.g., 42 U.S.C. § 1973gg-6(a)(3). Thus, this case is clearly distinguishable
12 from Chisom and the numerous cases cited by Plaintiffs (see Plaintiffs'
13 Memorandum at 11) because the underlying right to vote was not at issue in
14 those cases.

15 Plaintiffs fail to demonstrate a right that has been violated in support of
16 their claim. Any equal protection claim under Hunter v. Underwood, 471 U.S.
17 222 (1985), has already been dismissed. They are convicted felons who lack
18 the right to vote under Richardson v. Ramirez, 418 U.S. 24 (1974). Their
19 convictions were not based on race. Any vote dilution theory has already been
20 dismissed. In summary, Plaintiffs have no recognized right to assert in this
21 proceeding. Plaintiffs attempt to dodge this argument by challenging the
22

1 district court's reasoning in Wesley v. Collins, 605 F. Supp. 802, 813 (1995)
2 (regarding a felon's choice to commit a crime) and comparing themselves to
3 those not allowed to vote because they choose not to learn to read or those
4 challenging a re-districting scheme because of where they choose to live.
5 Plaintiffs' Memorandum at 16. Those comparisons are not well-taken because
6 the choices by the illiterate person and by the re-districting challenger do not
7 deprive them of the right to vote; Plaintiffs cannot say that about their choices.
8 Furthermore, Plaintiffs' choices are directly relevant to their claims which
9 include allegations of "less opportunity" under § 1973(b). Plaintiffs cannot
10 complain about opportunities they have squandered by the felonies they
11 committed. Plaintiffs also attempt to dodge this argument by accusing
12 Defendants of circular reasoning. However, even if Plaintiffs could present a
13 claim under § 1973(b), they ignore the language of § 1973(a) (referred to in
14 subsection (b)), which requires a showing of the denial of the right to vote as an
15 element of the claim. Here, Plaintiffs do not show cause; they do not show
16 effect. Their presence in this case is merely symbolic because they are
17 convicted and disenfranchised felons who happen to be African American,
18 Hispanic, or Native American.

19 **2. Plaintiffs' Equal Protection Claims Under *Hunter* Have Been**
20 **Dismissed.**

21 Although Plaintiffs correctly point out that Plaintiffs in Hunter were not
22 challenging their judgment and sentence, Plaintiffs do not present Hunter facts

1 in this case.⁵ This Court has dismissed Plaintiffs' equal protection claim under
2 Hunter. They concede that Washington did not intend to discriminate against
3 African Americans, Native Americans, or Hispanics by enactment of
4 Washington's felon disenfranchisement laws. Plaintiffs' Memorandum in
5 Support of Summary Judgment at 14. They fail to support their allegations with
6 evidence, circumstantial or otherwise, that that the felon disenfranchisement
7 laws were directed at any racial group.

8 Plaintiffs do not present Hunter facts regarding Native Americans by
9 pointing to language regarding "Indians not taxed." Plaintiffs' point to a phrase
10 that was removed from the state constitution decades ago as purported evidence
11 of a scheme to disenfranchise Native Americans based on race. Plaintiffs'
12 Responsive Memorandum at 18. An examination of the historical and
13 constitutional context in which the drafters of the constitution used the phrase
14 _____

15 ⁵ This Court has already dismissed Plaintiffs' equal protection claim for
16 this reason. Farrakhan, 987 F. Supp. at 1314. Other courts have rejected claims
17 under Hunter where proof of racially discriminatory animus in enacting
18 legislation was missing. See e.g., U.S. v. Armstrong, 517 U.S. 456, 467 (1996);
19 Wesley, 791 F.2d at 1262. Furthermore, Plaintiffs provide no proof of racially
20 discriminatory animus during the subsequent occasions in which Washington's
21 disenfranchisement laws were modified. See Irby v. Fitz-Hugh, 693 F. Supp.
22 424, 432-33 (E.D. Va. 1988).

1 “Indians not taxed” reveals no race-based impediment to voting. Instead, the
2 phrase merely reflected the legal status of some Native Americans at the time.

3 The federal constitution, both in its original terms and as amended
4 following the civil war, use the phrase “Indians not taxed” in describing the
5 population of each state to be included in apportionment of Congress. Const.
6 Art. I, § 2, cl. 3; Const. Amend. XIV. Similar phrasing appeared in the federal
7 legislation making Washington, North Dakota, South Dakota, and Montana
8 states in 1889. See 25 U.S. Statutes at Large c. 180 p. 676 (“The constitutions
9 shall be republican in form, and make no distinction in civil or political rights
10 on account of race or color, except as to Indians not taxed, . . .”). The phrase
11 “Indians not taxed” merely recognized that at that time some Native Americans
12 were not taxed by the states in which they resided. Dillon v. United States, 792
13 F.2d 849, 852 n. 1 (9th Cir. 1986). This reflected a distinction at the time
14 between those Native Americans “who had become integrated into the body
15 politic and those who retained a segregated tribal status.” Anderson v. O’Brien,
16 84 Wn.2d 64, 86, 524 P.2d 390 (1974) (Hale, C.J., dissenting). This distinction
17 “constitutionally had to end with the advent of universal American and state
18 citizenship for all Indians born within the United States.” Id.⁶ The use of the
19

20
21 ⁶ Washington voters removed the reference to “Indians not taxed” in
22 1974, by Amendment 63. The explanatory statement that appeared in the voter

1 phrase "Indians not taxed" in 1889 simply reflected the fact, as it then
 2 prevailed, that some Native Americans were a part of the polity, and therefore
 3 part of the voting base, while others lived separately pursuant to treaty with the
 4 federal government. This was based on individual choice, not racism.

5 To the contrary, as Dr. Taylor testifies, Washington was one of the first
 6 states to enact state civil rights legislation prohibiting discrimination against
 7 individuals based on race in public place. Defendants' Exhibit 47, Taylor
 8 Affidavit at 10; see Laws of Washington, 1889-90, p.524 (see copy attached as
 9 Exhibit 68).

10 Plaintiffs present no evidence or argument regarding the enactment or
 11 modification to Washington's felon disenfranchisement laws after the
 12 constitutional convention, including the amendments to Art. 6, § 3 in 1988.
 13 Wash. Const. Amend. 83 (1988); see also Laws of 1992 c. 7 §31; Laws of 1965
 14 c. 9 §29.01.080 (defining infamous crime).

15 3. Felons Are Not a Protected Class Under the VRA.

16 Plaintiffs' response to Defendants evidence of efforts to promote political
 17 participation by minorities reveals a fundamental flaw in Plaintiffs' argument.
 18 While racial and ethnic minority groups are protected class under the VRA,
 19 felons are not.

20 _____
 21 pamphlet for that amendment explained that the language was already obsolete.
 22 Exhibit 69, 1974 Washington Voters Pamphlet.

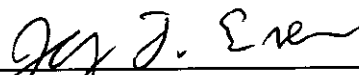
1 Plaintiffs concede that the state and its officials have shown an admirable
 2 respect for the voting rights of minorities and have attempted to promote those
 3 rights. Plaintiffs' Response Memorandum at 18-19. They then complain that
 4 "Washington State is only concerned about equality of access to [the] political
 5 process by minorities who have not been convicted of felonies." *Id.* at 19.
 6 Plaintiffs thereby purport to base their claim on discrimination only against a
 7 smaller group that is not protected by the VRA—minorities who are also felons.
 8 This amounts to an argument that Plaintiffs are denied the right to vote *because*
 9 *they are felons*, rather than because of their race or ethnicity. This is, at long
 10 last, what Defendants have been saying all along.

11 II. CONCLUSION

12 For all of the foregoing reasons and for the reasons set forth in
 13 Defendants' memoranda already submitted, Defendants respectfully request
 14 that this Court grant their Motion for Summary Judgment, deny Plaintiffs'
 15 motion for summary judgment, and dismiss Plaintiffs' claim with prejudice.

16 RESPECTFULLY SUBMITTED this 18th day of August, 2000.

17 CHRISTINE O. GREGOIRE
 18 Attorney General

19 
 20 DANIEL J. JUDGE, WSBA #17392
 21 Assistant Attorney General
 22 JEFFREY T. EVEN, WSBA #20367
 Assistant Attorney General