

ORIGINAL

Judge Robert H. Whaley

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U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

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

Plaintiffs,

v.

GARY LOCKE, et al.,

Defendants.

NO. CS-96-076-RHW

**DEFENDANTS'
MEMORANDUM OF
AUTHORITIES IN
SUPPORT OF MOTION FOR
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 memorandum in support of their Motion for Summary Judgment and Dismissal.

I. STATEMENT OF THE CASE

Plaintiffs bring this matter as a civil rights claim under the Civil Rights Act, 42 U.S.C. § 1983 and other federal statutes. They allege that the disenfranchisement of minorities who are serving judgments and sentences in Washington correctional facilities in Washington State violates 42 U.S.C. §1971 and the Voting Rights Act (VRA), 42 U.S.C. § 1973. This matter is before the

1 Court on Plaintiffs' Fourth Amended Complaint in which Plaintiffs allege that
2 they are denied the right to vote based on their race, in violation of the Voting
3 Rights Act. Defendants filed an answer and an amended answer with affirmative
4 defenses. In November 1997, this Court dismissed Plaintiffs constitutional
5 claims and Plaintiffs' claims that they are denied the right to vote under a vote
6 dilution theory. However, this Court allowed Plaintiffs to proceed under a vote
7 denial theory. Farrakhan v. Locke, et al., 987 F.Supp. 1304, 1312, 1313 (E.D.
8 Wash. 1997).

9 Defendants attach to this memorandum their statement of material facts
10 which will not be restated here. However, Defendants will discuss these facts in
11 connection with their legal arguments set forth below.

12 Under Washington's Constitution, a person convicted of an "infamous
13 crime" is ineligible to vote. Wash. Const. Art. VI, §§ 1 and 3. Washington
14 statute further defines an "infamous crime" as "punishable by death in the state
15 penitentiary or imprisonment in a state correctional facility." RCW 29.01.080.
16 Throughout its history, the state of Washington has maintained laws that have
17 disenfranchised convicted felons. See State v. Collins, 69 Wash. 268, 270-72,
18 124 P. 903 (1912); Territorial Law of 1866 (Rem. & Bal. Code, § 4755).
19 Additionally, Washington has provided for other limitations based on the lack of
20 qualification to vote. See, e.g., Wash. Const. art. III, § 25, art. II, § 7; RCW
21 42.04.020 (A person must be an elector to run for public office); RCW 2.36.070
22 (A person must be eligible to vote to serve on a jury); RCW 11.36.010 (A
23 convicted felon may not serve as a personal representative in a probate matter).

24 Washington has provided for restoration of voting rights of ex-felons. If
25 he has been convicted of a crime after July 1, 1984, a convicted felon may seek
26 restoration of these rights through entry of a final discharge by the sentencing

1 court. RCW 9.94A.220. In some cases, convicted felons may petition to have
2 their record expunged. RCW 9.94A.220. For crimes committed prior to July 1,
3 1984, the Revised Code of Washington allows offenders to restore their right of
4 elective franchise. See RCW 9.96.050 (A person released on parole may obtain a
5 certificate of discharge from the Indeterminate Sentencing Review Board
6 (ISRB)); RCW 9.92.066 (A person given probation or a suspended sentence may
7 have his civil rights restored by the sentencing court); RCW 9.95.240 (A person
8 who has successfully completed probation may request the sentencing court to
9 withdraw a plea or verdict of guilty, which releases the person from the
10 impairments of his judgment and sentence).¹ Plaintiffs make no allegation that
11 they have exhausted any of these available state remedies.

12 Plaintiffs are convicted felons who are serving out judgments and
13 sentences entered in the Washington superior courts. Because they are all
14 convicted felons under judgments and sentences that have not been completed,
15 none of the Plaintiffs are eligible to vote under Washington law. None of
16 Plaintiffs' convictions have been invalidated by appeal or collateral challenge
17 either in state or federal court.

18 //

19 //

20 //

21 _____
22 ¹ Under RCW 29.07.080, an applicant for voter registration must state: "I
23 am not presently denied my civil rights as a result of being convicted of a felony."
24 This statute would address any discrepancy in Washington law that distinguishes
25 voting rights as political, but not civil rights. See State v. Collins, 69 Wash. 268,
26 271, 124 Pac. 903 (1912).

II. QUESTIONS PRESENTED

1
2 A. Does this Court lack subject matter jurisdiction to review, under the
3 Voting Rights Act, the valid state court judgments and sentences that preclude
4 Plaintiffs from voting under Washington law?

5 B. Are Plaintiffs' claims under the Voting Rights Act that they have
6 been denied the vote based on race barred under res judicata and collateral
7 estoppel where valid state judgments and sentences preclude Plaintiffs from
8 voting under Washington law?

9 C. Do Plaintiffs fail to demonstrate that they have the right to vote
10 where they have been convicted under valid felony judgments and sentences and
11 therefore are disenfranchised under Washington law?

12 D. Do Plaintiffs fail to demonstrate that they were disenfranchised
13 because of their race where they were convicted of felonies in cases where race
14 was not even raised as any defense to or argument against felony conviction?

15 E. Do Plaintiffs fail to demonstrate that under the totality of the
16 circumstances they are denied the right to vote based on race?

17 **III. STANDARD OF REVIEW**

18 Fed. R. Civ. P. 12(h)(3) provides: "Whenever it appears by suggestion of
19 the parties or otherwise that the Court lacks jurisdiction of the subject matter, the
20 Court shall dismiss the action."

21 Judgment in favor of the moving party is appropriate when, viewing the
22 evidence and inferences arising therefrom in the light most favorable to the
23 nonmoving party, there are no genuine issues of material fact in dispute and the
24 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c);
25 Semegem v. Weindner, 780 F.2d 727 (9th Cir. 1985).

1 The party seeking summary judgment bears the initial burden of
 2 demonstrating the absence of a genuine issue of material fact. Celotex Corp. v.
 3 Catrett, 477 U.S. 317, 324 (1986). There is no requirement that the moving party
 4 negate elements of the non-movant's case. Lujan v. National Wildlife
 5 Federation, 497 U.S. 871 (1990). Once the moving party has met its burden, the
 6 non-movant must then produce concrete evidence, without merely relying on
 7 allegations in the pleadings, that there remain genuine factual issues. Anderson v.
 8 Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

9 The Civil Rights Act is not merely a "font of tort law." Parratt v. Taylor,
 10 451 U.S. 527, 544 (1981), overruled in part on other grounds, Daniels v.
 11 Williams, 474 U.S. 327, 330-31 (1986). Instead, the court must scrutinize the
 12 particular harm complained of in light of specifically enumerated rights and
 13 privileges. Baker v. McCollan, 443 U.S. 137, 140 (1979). Thus, the court's
 14 scrutiny of a 42 U.S.C. § 1983 action must be as follows:

15 [I]n any § 1983 action the initial inquiry must focus on whether the
 16 two essential elements to a § 1983 claim are present: (1) whether
 17 the conduct complained of was committed by a person acting under
 18 the color of state law; and (2) whether this conduct deprives the
 person of the rights, privileges, or immunities secured by the
 constitutional laws of the United States.

19 Parratt, 451 U.S. at 535 (1981).

20 Therefore, unless the Plaintiffs can establish that a right of constitutional or
 21 other federal significance has been violated, they are not entitled to relief under
 22 42 U.S.C. § 1983.

23 IV. SUMMARY OF THE ARGUMENT

24 This Court should grant defendants' motion for summary judgment and
 25 dismiss this matter with prejudice. The right to vote by felony offenders has
 26 never been part of our nation's legal tradition. This Court should not transform

1 plaintiffs from disenfranchised felons into voters because of this action. The
2 record fails to support Plaintiffs' contention that they have been denied the vote
3 based on race. Plaintiffs fail to demonstrate that they have the right to vote which
4 is subject to the protections of the Voting Rights Act. Plaintiffs have all been
5 convicted under valid judgments and sentences in Washington State; the superior
6 courts have not restored their civil rights. Plaintiffs may not use their claims in
7 this action to review the Washington superior court's continued supervision of
8 them under Washington law.

9 Plaintiffs fail to demonstrate that Washington's disenfranchisement law
10 violates their rights under the Voting Rights Act. Washington's
11 disenfranchisement law is neutral on its face. An offender is disenfranchised
12 when the judgment and sentence is entered. The offender may register to vote
13 after he has completed the requirements of his or her judgment and sentence and
14 the superior court has entered a certificate of discharge. Despite plaintiffs'
15 allegations of disproportionality of conviction of African American, Hispanic, or
16 Native American offenders, the alleged disproportionality is not relevant to any
17 of plaintiffs' claims in this matter and should be excluded. Furthermore,
18 Washington's rich history of promoting voting rights belies plaintiffs' claims that
19 the totality of the circumstances warrants the return of their voting rights by this
20 Court.

21 V. ARGUMENT

22 A. **This Court Lacks Subject Matter Jurisdiction Because Plaintiffs Seek 23 This Court's Review of the State Judgments and Sentences That 24 Caused Their Disenfranchisement Under Washington Law.**

25 "Where federal relief can only be predicated on a conviction that the state
26 court was wrong, it is difficult to conceive the federal proceeding as, in
substance, anything other than a prohibited appeal of the state court judgment."

1 Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25 (1987) (Marshall, J., concurring).
2 Here, Plaintiffs contend without evidence their state judgments and sentences
3 were wrong because they were based on race.

4 The federal courts have established the Rooker-Feldman doctrine, named
5 after two U.S. Supreme Court cases decided 60 years apart, which precludes a
6 federal court from entertaining and reviewing claims adjudicated in state courts
7 or to evaluate any constitutional claims that are inextricably intertwined with the
8 state court's decision. See District of Columbia Court of Appeals v. Feldman,
9 460 U.S. 462, 482 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 416
10 (1923).²

11 Rooker-Feldman is theoretically derived from 28 U.S.C. § 1257 which
12 states that “[f]inal judgments or decrees rendered by the highest court of a state in
13 which a decision could be had, may be reviewed by the Supreme Court” Id.

14 A district court engages in impermissible appellate review when it
15 entertains a claim that the litigants did not argue in the state court, but is
16 inextricably intertwined in the state court judgment. Feldman, 460 U.S. at 483 n.
17 16, 103 S.Ct. at 1316 n. 16. In order to determine whether a claim is inextricably
18 intertwined with a state court claim, the federal court must analyze whether the
19 relief requested in the federal action would effectively reverse the state court
20

21 ² The United States Supreme Court declined to apply Rooker-Feldman to a
22 Voting Rights Act claim brought by the United States where Defendants’
23 arguments under this doctrine were based on an earlier state court action in which
24 the United States was not a party. The Supreme Court did not hold, however,
25 that the Voting Rights Act was not subject to Rooker-Feldman. See Johnson v.
26 DeGrandy, 512 U.S. 997, 1005-06 (1994).

1 decision or void its ruling. Bechtold v. City of Rosemount, 104 F.3d 1062, 1065
2 (8th Cir. 1997).

3 The Ninth Circuit applied the Rooker-Feldman doctrine in an analogous
4 case in Hucke v. Oregon, 992 F.2d 950 (9th Cir. 1993), by refusing to consider a
5 bankruptcy petitioner's arguments that the revocation of his probation violated
6 the Bankruptcy Code and Oregon law. Hucke was a bankruptcy petitioner who
7 was also under a judgment and sentence for rape. The judgment and sentence
8 was entered following plea where the court required Hucke to pay a \$20,000
9 compensatory fine to the victim, retaining jurisdiction to impose the thirty-six
10 month suspended sentence. Instead of making any payments as ordered by the
11 court, he filed a petition for bankruptcy under Chapter 13 of the Bankruptcy
12 Code. Following confirmation of his bankruptcy plan, the state court notified
13 him that he was in violation of his parole and subsequently revoked his parole.
14 Hucke, 992 F.2d at 953.

15 After the Bankruptcy Court and the District Court voided the state judge's
16 revocation order, the Ninth Circuit reversed the lower court and reinstated the
17 state judge's revocation order. The Ninth Circuit Court emphasized that the state
18 court's decision was not a collection effort in violation of the bankruptcy stay
19 because: "(1) Hucke had no monetary obligation under the new judgment, and
20 alternatively, (2) the resentencing was a proper effort on the part of Judge Haas to
21 fashion a remedy that would serve the purposes of probation. Therefore, the
22 revocation was a continuation of a criminal proceeding and not subject to the
23 provisions of the bankruptcy stay." Hucke, 992 F.2d at 954. After reversing the
24 bankruptcy stay of the revocation order, the Ninth Circuit rejected Hucke's
25 arguments that the revocation order violated state law. Id. ("neither this court nor
26 the district court is authorized to consider this issue; the Supreme Court of the

1 United States is the only federal court authorized to consider appeals of state
2 court decisions, and then only on federal issues.”).

3 The federal courts have clearly applied the principles of Rooker-Feldman
4 to civil rights cases brought in federal court. “While 42 U.S.C. §1983 creates a
5 civil cause of action against public officials for violating a person’s constitutional
6 rights, that cause of action is constrained by the jurisdictional principles of
7 Rooker-Feldman.” Young v. Murphy, 90 F.3d 1225, 1230 (7th Cir. 1996). “The
8 fundamental and appropriate question to ask is whether the injury alleged by the
9 federal plaintiff resulted from the state court judgment itself or is distinct from
10 that judgment.” Id.

11 In Young, a decedent’s estate alleged due process (improper notice and
12 burden of proof during the proceeding) violations against government officials
13 based on the defendants’ involvement in state competency proceedings. The
14 Seventh Circuit affirmed the dismissal of the due process claim under Rooker -
15 Feldman, reasoning as follows:

16 Young [the attorney for decedent’s estate] would suggest that his
17 suit is neither the appeal of, nor a collateral attack upon, the earlier
18 incompetency proceeding. But attacking the effects of that
19 judgment is exactly what he is doing. Wellman’s [the decedent’s]
20 injury resulted from the the state court judgment of incompetency
21 and not from the alleged denial of due process. Had he prevailed in
22 the May 8 hearing (where Wellman was declared incompetent and a
23 guardian appointed), despite the alleged due process errors, he
24 would have had no injury and no constitutional claim to bring before
25 the district court.

21 Id. at 1231.

22 The court in Young noted that the decedent had options in response to the
23 judgment, including a motion to vacate the judgment an appeal. Id. at 1231-32.

24 In Dale v. Moore, 121 F.3d 624 (11th Cir. 1997), the court rejected a
25 challenge by a successful Florida bar applicant that the Florida Bar Board of
26

1 Examiners “discriminated against by hindering or precluding his admission to the
2 Florida Bar on account of an alleged disability.” Dale, 121 F.3d at 625.
3 Therefore he alleged his rights were violated under the Americans with
4 Disabilities Act. The Eleventh Circuit affirmed the district court’s order of
5 dismissal, reasoning that the claim was inextricably intertwined in the bar
6 application process, a state court decision, because “[r]esolution of Dale’s ADA
7 claim would require the federal district court to review the application of these
8 rules to the particular factual circumstances of Dale’s case.” Id. at 627. The
9 court also rejected Dale’s contention that the ADA provided an independent
10 source of federal jurisdiction because unlike the federal habeas corpus statutes,
11 for example, “the ADA does not have an independent source of federal court
12 jurisdiction that overrides the application of the Rooker-Feldman doctrine.” Id.
13 at 627-28 (and cases cited therein).

14 This Court lacks subject matter jurisdiction under the Rooker-Feldman
15 doctrine. Plaintiffs allege they have been denied the right to vote based on their
16 race. See, e.g., Fourth Amended Compl. ¶ 15. In response to Defendants’
17 dismissal motion, this Court dismissed Plaintiffs’ allegations of vote dilution
18 under the Voting Rights Act. Farrakhan, 987 F.Supp. at 1313. However, this
19 Court allowed Plaintiffs to proceed on the theory that, as African Americans,
20 Hispanics, or Native Americans, they are more likely to be prosecuted, convicted,
21 and disenfranchised than if they were white. Id., at 1312, 1313. Consequently,
22 the Fourth Amended Complaint presents only vote denial claims, not vote
23 dilution claims.

24 Plaintiffs’ voting rights claims in this Court are inextricably intertwined
25 with their state court proceedings that culminated in their judgments and
26 sentences. Wash. Const. Art. VI, §3. Plaintiffs’ allegations are clearly based on

1 the premise that their convictions were wrong; they seek to invalidate their
2 judgment through this action. See Fourth Amended Compl. § IX, X. Plaintiffs
3 allege that their convictions (the only thing causing their disenfranchisement)
4 were based upon their race. Plaintiffs will attempt to support their claims with
5 allegations or studies that the Washington court system is biased against African
6 Americans, Hispanics, and Native Americans. See Fourth Amended Compl. ¶
7 16-22. See Fourth Amended Compl. ¶¶ 15, 30, 32, 35.

8 Plaintiffs also extend their challenge in this Court to post-judgment
9 proceedings they have never brought in state court. Washington superior courts
10 retain jurisdiction over criminal proceedings to enter certificates of discharge
11 when the offender has completed the requirements of his sentence, including
12 legal financial obligations. Plaintiffs allege that state court judgments should be
13 invalidated in a more automatic fashion to clear the way for Plaintiffs to vote.
14 They allege the superior court should grant certificates of discharge without
15 requiring the full payment of legal financial obligations. See Fourth Amended
16 Compl. ¶¶ 22-28, 34, 35, 37. Clearly, their allegations are based on the premise
17 that the continued life of the state court judgments and the continued absence of a
18 certificate of discharge is wrongful.

19 The Voting Rights Act, however, contains no explicit authority that allows
20 the federal court to review state court judgments. Like the Americans With
21 Disabilities Act or the Civil Rights Act, the Voting Rights Act “does not have an
22 independent source of federal court jurisdiction that overrides the application of
23 the Rooker-Feldman doctrine.” Dale v. Moore, 121 F.3d 624, 627-28 (11th Cir.
24 1997). Therefore, this Court lacks subject matter jurisdiction.

25 **B. Plaintiffs Are Barred Under Res Judicata And Collateral Estoppel**
26 **Principles.**

1 Res judicata not only bars claims which were litigated but also those
2 claims which should have been but were not litigated in the prior action:

3 Claim preclusion refers to the effect of a judgment in foreclosing
4 litigation of a matter that never has been litigated, because of a
determination that it should have been advanced in an earlier suit.

5 Migra v. Warren City School Dist. Bd. Of Ed., 465 U.S. 75, 77 n.1 (1984).

6 The Ninth Circuit has recently reiterated that "Claim preclusion refers to
7 the effect of a judgment in foreclosing litigation of a matter that never has been
8 litigated, because of a determination that it should have been advanced in an
9 earlier suit." Feminist Women's Health Center v. Codispoti, 63 F.3d 863, 867
10 (9th Cir. 1995).

11 Congress has authorized the federal courts to give the same "full faith and
12 credit" to judicial proceedings of the states "as they have by law or usage in the
13 courts of such State, Territory or Possession from which they are taken." 28 U.S.C.
14 § 1738 (1982). The Supreme Court has interpreted this provision to mean that
15 federal courts must give such preclusive effect to state judgments as would the
16 state courts. See, e.g., Marrese v. American Acad. of Orthopaedic Surgeons, 470
17 U.S. 373, 380-81 (1985). So long as a party against whom preclusion is urged has
18 had a full and fair opportunity to litigate his claims, 28 U.S.C. § 1738 requires
19 federal courts to give the same preclusive effect to state court judgments that
20 those judgments would be given in the courts of the state from which the
21 judgment emerged. Kremer v. Chemical Construction Corp., 456 U.S. 461, 481-
22 82 (1982)(In determining the extent to which state court judgments are entitled to
23 the preclusive effect in the federal arena, the court must look to the relevant state
24 law standards of res judicata and collateral estoppel).

25 A plaintiff may not bring a 42 U.S.C. §1983 claim after having lost an
26 action involving the same subject matter:

1 It is now established that where the federal constitutional claim is
2 based on the same asserted wrong as was the subject of a state
3 action, and where the parties are the same, *res judicata* will bar the
4 federal constitutional claims whether it was asserted in state court or
5 not, for the reason that state judgment on the merits serves not only
6 to bar every claim that was reasserted in state court but also to
7 preclude the assertion of every legal theory or ground for recovery
8 that might have been raised in support of the granting of the desired
9 relief. "Appellant is not permitted to fragment a single cause of
10 action and to litigate piecemeal the issues which could have been
11 resolved in one action."

12 Scoggin v. Schrunk, 522 F.2d 436, 437 (9th Cir. 1975), cert. denied 423 U.S.
13 1066 (1976). See also Sanchez v. City of Santa Ana, 936 F.2d 1027, 1035 (9th
14 Cir. 1990), cert. denied, 502 U.S. 957 (1991) (in accord, precluding plaintiff from
15 bringing a 42 U.S.C. §1985 claim after having failed to raise it in a prior
16 proceeding).

17 "Collateral estoppel, or issue preclusion, prevents the relitigation of all
18 issues of fact or law that were actually litigated and necessarily decided in a prior
19 proceeding." Robi v. Five Platters, Inc., 838 F.2d 318, 322 (9th Cir.1988). In
20 Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326 (1979), the Supreme
21 Court explained the distinction between *res judicata* and collateral estoppel as
22 follows:

23 Under the doctrine of *res judicata*, a judgment on the merits in a
24 prior suit bars a second suit involving the same parties or their
25 privies based on the same cause of action. Under the doctrine of
26 collateral estoppel, on the other hand, the second action is upon a
different cause of action and the judgment in the prior suit precludes
relitigation of issues actually litigated and necessary to the outcome
of the first action.

Id., n. 5.

The United States Supreme Court applied *res judicata* and collateral
estoppel principles in rejecting a civil rights challenge to a conviction that had
not been invalidated in Heck v. Humphrey, 512 U.S. 477 (1994). In Heck, the

1 plaintiff alleged that his conviction and 15-year sentence for voluntary
 2 manslaughter for the killing of his wife violated his civil rights. Heck brought
 3 the action in federal district court while his appeal was pending. The Supreme
 4 Court barred his civil rights claim because he had not invalidated his conviction
 5 through direct appeal, state collateral review, or federal habeas corpus. Heck,
 6 512 U.S. at 486-87. The court reasoned:

7 A claim of damages bearing that relationship to a conviction or a
 8 sentence that has *not* been so invalidated is not cognizable under
 9 §1983. Thus, when a state prisoner seeks damages in a §1983 suit,
 10 the district court must consider whether a judgment in favor of of the
 11 plaintiff would necessarily imply the invalidity of his conviction or
 12 sentence; if it would, the complaint must be dismissed unless the
 13 plaintiff can demonstrate that the conviction or sentence has already
 14 been invalidated. But if the district court determines that the
 15 plaintiff's action, even if successful, will *not* demonstrate the
 16 invalidity of any outstanding criminal judgment against the plaintiff,
 17 the action must be allowed to proceed, in the absence of some other
 18 bar to the suit.

19 Id. (emphasis in original) (footnotes omitted).³

20 In Frank v. Mangum, 237 U.S. 309, 333-334 (1915), the Supreme Court, in
 21 affirming denial of a petition for a writ of habeas corpus, said in part: "It is a
 22 fundamental principle of jurisprudence, arising from the very nature of courts of
 23 justice and objects for which they are established, that a question of fact or of law
 24 distinctly put in issue and directly determined by a court of competent jurisdiction
 25 cannot afterwards be disputed between the same parties The principle is as
 26 applicable to the decisions of criminal courts as to those of civil jurisdiction." The
 last sentence was quoted with approval in Emich Motors v. General Motors, 340

3 ³ The Court in Heck cited its holding in Rooker and other cases to
 exemplify that the "Court has long expressed similar concerns for finality and
 consistency and has generally declined to expand opportunities for collateral
 attack. . . ." Heck, 512 U.S. at 485-86.

1 U.S. 558, 568 (1951), where it was held that a "prior criminal conviction may work
2 an estoppel in favor of the Government in a subsequent civil proceeding".

3 Here, the principles of res judicata, collateral estoppel, and the Supreme
4 Court's holding in Heck preclude Plaintiffs' claims. Plaintiffs' allegations are
5 clearly based on the premise that their convictions were wrong; they seek to
6 invalidate the effect of their judgment through this action. See Fourth Amended
7 Compl. § IX, X. Plaintiffs repeatedly allege that their convictions (the only thing
8 causing their disenfranchisement) were based upon their race. See Fourth
9 Amended Compl. ¶¶ 15, 30, 32, 35. To the contrary, their convictions and hence
10 their respective disenfranchisements were caused by the entry of their judgments
11 and sentences. Plaintiffs had the panoply of rights available to them under the
12 Sixth Amendment, including trial, the requirement of proof beyond a reasonable
13 doubt, appeal, collateral review, and habeas corpus review. Each plaintiff has
14 been convicted of one or more felonies. Furthermore, none of Plaintiffs' criminal
15 procedural records indicate that any plaintiff challenged his conviction on appeal
16 or in collateral review based on allegations of racial discrimination.

17 Plaintiffs also further allege the superior court should grant certificates of
18 discharge without requiring the full payment of legal financial obligations. See
19 Fourth Amended Compl. ¶¶ 22-28, 34, 35, 37. This component of their claim is
20 also barred under Heck, 512 U.S. at 486-87 ("extending its holding to "allegedly
21 unconstitutional conviction or imprisonment, or for other harm caused by actions
22 whose unlawfulness would render a conviction or sentence invalid ...")
23 (emphasis added).

24 **C. Plaintiffs Do Not Retain The Right To Vote Because They Are**
25 **Convicted Felons Whose Rights Have Been Lost By Their Valid**
26 **Felony Convictions In State Court.**

1 "Lawful incarceration brings about the necessary withdrawal or limitation
2 of many privileges and rights, a retraction justified by the considerations
3 underlying our penal system." Sandin v. Conner, 515 U.S. 472, 485 (1995)
4 (quoting Jones v. North Carolina Prisoners Labor Union, 433 U.S. 119, 125
5 (1977), quoting Price v. Johnston, 334 U.S. 266, 285 (1948)(internal quotations
6 omitted)). As recognized by this Court in the order of service for this matter, the
7 Constitution permits states to disenfranchise persons convicted of "participation
8 in rebellion, or other crimes." U.S. Const., Amend XIV. Accordingly, a state
9 may disenfranchise convicted felons. Richardson v. Ramirez, 418 U.S. 24, 55-56
10 (1974); Franklin v. Murphy, 745 F.2d 1221, 1231 (9th Cir. 1984).

11 Plaintiffs bring these claims under 42 U.S.C. §§ 1971 and 1973. 42 U.S.C.
12 §1971 protects the right to vote of "[a]ll citizens who are otherwise qualified by
13 law to vote." Id. 42 U.S.C. §1973(a) protects against "denial or abridgment of
14 the right of any citizen of the United States to vote on account of race or color."
15 Id. 42 U.S.C. §1973(b), which provides for a violation of subsection (a) based
16 on the totality of the circumstances, protects "members of a class of citizens
17 protected by subsection (a)." Id. The language of these statutes protects voting
18 rights. Neither of these statutes aid an individual who lacks the underlying right
19 to vote.

20 Throughout our country's history, felon disenfranchisement has been the
21 norm; states allowing felons to vote have been the exception. Clearly, our
22 country's legal traditions have not encompassed the right of felons to vote. See
23 Harmelin v. Michigan, 501 U.S. 957, 982-83 (1991) (quoting Chief Justice
24 Spencer from Barker v. People, 20 Johns. *459 (NY Sup. Ct. 1823) ("The
25 disenfranchisement of a citizen,' he said, 'is not an unusual punishment; it was
26 the consequence of treason, and of infamous crimes, and it was altogether

1 discretionary in the legislature to extend that punishment to other offenses.");
2 see also, Romer v. Evans, 517 U.S. 620, 634 (1996) (the United States Supreme
3 Court referred to its holding in Richardson, allowing states to disenfranchise
4 felons, as "unexceptionable.") (citing Davis v. Beason, 133 U.S. 333 (1890)).
5 More recently courts have continued to reject all claims that voting rights extend
6 to convicted felons. Jones v. Edgar, 3 F.Supp. 2d 979, 980 (C.D. Ill 1998) ("This
7 court finds no decision from any court holding that the disenfranchisement of
8 felons is invalid.") See also Fischer v. Governor, 749 A 2d. 321 (New Hamp.
9 S.Ct. 2000).

10 The Second Circuit discussed the rationale behind the state's authority to
11 disenfranchise:

12 The early exclusion of felons from the elective franchise by many
13 states could well have rested on Locke's concept, so influential at the
14 time, that by entering into society every man "authorizes the society,
15 or which is all one, the legislature thereof, to make laws for him as the
16 public good of the society shall require, to the execution whereof his
17 own assistance (as to his own decrees) is due." A man who breaks the
18 law he has authorized his agent to make for his own governance could
19 fairly have been thought to have abandoned the right to participate in
20 further administering the compact. On a theoretical plane, it can
21 scarcely be deemed unreasonable for a state to decide that perpetrators
22 of serious crimes shall not take part in electing the legislators who
make the laws, the executives who enforce these, the prosecutors who
must try them for further violations, or the judges who are to consider
their cases. This is especially so when account is taken of the heavy
incidence of recidivism and the heavy prevalence of organized crime.

23 Green v. Board of Elections of City of New York, 380 F.2d 445, 451 (2d Cir.
24 1967), cert. denied, 389 U.S. 1048 (1968). See also Fischer, 749 A 2d. at 329-30.

25 The United States Supreme Court upheld a California law that
26 disenfranchised convicted felons in Richardson v. Ramirez, 418 U.S. 24 (1974).

1 In that case, the Supreme Court reviewed the law of the state of California which
2 precluded felons from voting. In Richardson, the three plaintiffs had completed
3 the service of their respective sentences and paroles. After they were denied
4 registration for voting, they brought a petition for writ of mandamus under
5 California law to compel their county officials to allow them to register.
6 Richardson, 418 U.S. at 26. The California Constitution provided that "[l]aws
7 shall be made' to exclude from voting persons convicted of bribery, perjury,
8 forgery, malfeasance in office, 'or other high crimes.'" Id (citing Cal. Const. Art.
9 XX, §11). The California Supreme Court held that, as applied to ex-felons whose
10 terms of incarceration and parole had expired, the California Constitution and the
11 Elections Code violated the Equal Protection Clause of the Fourteenth
12 Amendment. Id. at 27.

13 Upon writ of certiorari, the Supreme Court disagreed and reversed. The
14 Court settled any issue that states could permissibly disenfranchise convicted
15 felons, even after they completed the requirements of their judgment and
16 sentence. After reviewing extensively several state disenfranchisement statutes
17 and their legislative histories, and the language and history of Section 2 of the
18 Fourteenth Amendment, the Richardson court concluded that Section 2 of the
19 Fourteenth Amendment expressly allows states to deny the elective franchise to
20 convicted felons, including those who have completed their sentence and parole.
21 Richardson, 418 U.S. at 53-56.

22 In 1985, the United State Supreme Court decided Hunter v. Underwood,
23 471 U.S. 222 (1985). In Hunter, the Court reviewed claims by individuals who
24 were not allowed to register to vote because they convicted of presenting
25 worthless checks, considered a misdemeanor in Alabama. 471 U.S. at 223-24.
26 The Supreme Court conducted a thorough review of the legislative history behind

1 the Alabama provisions at issue. This included recorded statements by White
2 legislators that it was their intention to purposefully disenfranchise Blacks by
3 these laws. Id. at 226-31. The Court also noted that under Alabama
4 disenfranchisement statutes, "Blacks are by even most modest estimates at least
5 1.7 times as likely as Whites to suffer disenfranchisement" under the specific
6 Alabama law at issue. Id. at 227. In response, the state of Alabama admitted
7 discriminatory intent, but only to the extent that the statute sought to
8 disenfranchise poor Whites, as well as poor Blacks. Id. at 230-31.

9 The Supreme Court struck down the Alabama statute on equal protection
10 grounds, not under the Voting Rights Act. In doing so, the Court re-affirmed its
11 holding in Richardson that convicted felons do not have the right to vote.
12 However, the Court concluded that Section 2 of the Fourteenth Amendment did
13 not allow states to purposefully discriminate against Blacks when enacting its
14 disenfranchisement statute.

15 Here, Plaintiffs allege that under the Voting Rights Act, they have been
16 denied the right to vote based on their race. Defendants disagree. Plaintiffs do
17 not have the right to vote because they are convicted felons. Under the Supreme
18 Court's holding in Richardson and under Washington law, they are not
19 "otherwise qualified" under §1971. They are not denied the right to vote based
20 on race under §1973. There is no dispute that all plaintiffs are disenfranchised
21 because of their felony convictions. The record fails to support their contention
22 that their convictions were based on race. Furthermore, their valid conviction
23 precludes them from arguing their convictions were based on race. There is no
24 dispute that Washington's disenfranchisement law is constitutional in light of the
25 Supreme Court's decision in Hunter; this Court has dismissed Plaintiffs' equal
26 protection and all of Plaintiffs' other constitutional claims. Before Plaintiffs may

1 bring this action under 42 U.S.C. §§ 1971 or 1973, they must have the underlying
2 right to vote. Plaintiffs do not because they are convicted felons who are
3 disenfranchised under a lawful statute.

4 **D. Plaintiffs Fail To Demonstrate They Were Denied The Right To Vote**
5 **Based On Their Race Because The Record In This Case Does Not**
6 **Warrant The Reversal Of Washington Law By Judicial Fiat.**

7 **1. Introduction.**

8 The Voting Rights Act of 1965 was "designed primarily to enforce the
9 15th Amendment to the Constitution of the United States and . . . also designed to
10 enforce the 14th amendment and article I, section 4." House Report (Judiciary
11 Committee) N. 439, 89th Cong., 1st Sess. (June 1, 1965) ("1965 House Report"),
12 reprinted in 1965 U.S. Code Cong. 7 Admin News 2437 et seq. This Act was
13 designed to address various exclusionary practices (e.g., literacy tests) in certain
14 regions of the nation (referred to as covered jurisdictions) that were designed to
15 prevent Blacks from voting. The 1965 Act referred to such tests or devices as:

16 any requirement that a person as a prerequisite for voting or
17 registration for voting (1) demonstrate the ability to read, write,
18 understand or interpret any matter, (2) demonstrate any educational
19 achievement or his knowledge of any particular subject, (3) possess
20 good moral character, or (4) prove his qualifications by the voucher
21 of registered voters or members of any other class.

22 42 U.S.C. § 1973b[c].

23 As this Court observed in its decision on Defendants' motion for dismissal,
24 "Congress created the VRA to put an end to the [several southern] states'
25 'unremitting and ingenious defiance of the Constitution.'" Farrakhan, 987 F.
26 Supp. at 1309 (quoting South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966)).

Outside covered areas, the 1965 Act barred application of tests or devices
that had "been used . . . for the purpose or with the effect of denying or abridging
the right of any citizen of the United States to vote on account of race or color, . . .

1 ." 42 U.S.C. § 1973a[b] (emphasis added). Despite Congress' broader use of
2 language to include situations where the "effect" was present, it was not the intent
3 of Congress for the 1965 Act to apply to felony disenfranchisement, as evidenced
4 in the 1965 Senate Report:

5 The third type of test or device covered is any requirement of good
6 moral character. This definition would not result in the proscription
7 of the frequent requirement of States and political subdivisions that
8 an applicant for voting or registration for voting be free of
9 conviction of a felony or mental disability. It applies where lack of
10 good moral character is defined in terms of conviction of lesser
11 crimes.

12 1965 Senate Report, reprinted in 1965 U.S.C.C.A.N., p. 2562 (emphasis added).

13 A similar exemption was described in the 1965 House Report. See 1965
14 House Report, reprinted in 1965 U.S. House Code. Cong. & Admin. News at
15 2457 (subsection 4[c](3) "does not proscribe a requirement of a State or any
16 political subdivision of a State that an applicant for voting or registration for
17 voting be free of conviction of a felony or mental disability"). Similar statements
18 were made on the floor of the Senate. See 111 Cong. Rec. 8366 (April 23, 1965)
19 (statement of Sen. Joseph Tydings).

20 Since the passage of the VRA, Congress has re-affirmed its approval of the
21 disenfranchisement of felons in the National Voter Registration Act of 1993 by
22 specifically listing the conviction of a felony as one of a limited group of reasons
23 justifying the cancellation of a voter's registration . 42 U.S.C. §1973gg-6(a)(3).
24 Congress thereby explicitly approved of felon disenfranchisement within a statute
25 enacted to remedy racial discrimination in voting. 42 U.S.C. §1973gg(a)(3).

26 Congress amended the Voting Rights Act in 1982 to provide for the
following:

(a) No voting qualification or prerequisite to voting or
standard, practice, or procedure shall be imposed or applied by any
State or political subdivision in a manner which results in a denial or

1 abridgement of the right of any citizen of the United States to vote
2 on account of race or color, or in contravention of the guarantees set
3 forth in section 1973b(f)(2) of this title [addressing membership in
4 language minority groups protected by the Act], as provided in
5 subsection (b) of this section.

6 (b) A violation of subsection (a) of this section is established
7 if, based on the totality of the circumstances, it is shown that the
8 political processes leading to nomination or election in the State or
9 political subdivision are not equally open to participation by
10 members of a class of citizens protected by subsection (a) of this
11 section in that its members have less opportunity than other
12 members of the electorate to participate in the political process and
13 to elect representatives of their choice. The extent to which
14 members of a protected class have been elected to office in the State
15 or political subdivision is one circumstance which may be
16 considered. Provided, That nothing in this section establishes a right
17 to have members of a protected class elected in numbers equal to
18 their proportion of the population.

19 42 U.S.C. § 1973 (emphasis added).

20 The 1982 amendments were designed to legislatively overturn the Supreme
21 Court's decision in City of Mobile v. Bolden, 446 U.S. 55 (1980) (requiring proof
22 of discriminatory intent as prima facie evidence). See Voting Rights Act
23 Amendments of 1982, Senate report (Judiciary Committee), No. 97-417 (May
24 1982) ("1982 Senate Report"), pp. 2, 18-19, reprinted in 1982 U.S.C.C.A.N., pp.
25 179, 195-96. There is no indication in any record of legislative history that
26 Congress intended that its 1982 amendments would be applied to incarcerated
felons. See, e.g., 1982 Senate Report at 27, reprinted in 1982 U.S.C.C.A.N., p.
204; Extension of the Voting Rights Act, Hearings before the Subcommittee on
Civil and Constitutional Rights of the Committee on the Judiciary, House of
Representatives, 97th Cong., 1st Sess. (May 6, 7, 13, 19, 20, 27, 28, June 3, 5, 12,
16, 17, 18, 23, 24, 25, and July 13, 1981) (1981 House Hearings); Hearings
Before the Subcommittee on the Constitution of the Committee of the Judiciary,
United States Senate, 97th Cong., 2d Sess. (January 27, 28, February 1, 2, 4, 11,
12, 25, and March 1, 1982) (1982 Senate Hearings).

1 The Senate Judiciary Committee Report that accompanied the 1982
2 amendments to the VRA set forth the following non-exclusive factors that may
3 be taken into account in determining whether a violation under Section 2 has
4 occurred:

5 1. the extent of any history of official discrimination in the
6 state or political subdivision that touched the right of the members of
7 the minority group to register, to vote, or otherwise participate in the
8 democratic process;

9 2. the extent to which voting in the elections of the state or
10 political subdivision is racially polarized;

11 3. the extent to which the state or political subdivision has
12 used unusually large election districts, majority vote requirements,
13 anti single-shot provisions, or other voting practices or procedures
14 that may enhance the opportunity for discrimination against the
15 minority group;

16 4. if there is a candidate slating process, whether the
17 members of the minority group have been denied access to that
18 process;

19 5. the extent to which members of the minority group in the
20 state or political subdivision bear the effects of discrimination in
21 such areas as education, employment and health, which hinder their
22 ability to participate effectively in the political process;

23 6. whether political campaigns have been characterized by
24 overt or subtle racial appeals; [7.] the extent to which members of
25 the minority group have been elected to public office in the
26 jurisdiction;

Additional factors that in some cases have had probative value as
part of plaintiffs' evidence to establish a violation are:

[7.] whether there is a significant lack of responsiveness on
the part of elected officials to the particularized needs of the
members of the minority group.

[8.] whether the policy underlying the state or political
subdivision's use of such voting qualification, prerequisite to voting,
or standard, practice, or procedure is tenuous.

Farrakhan, 987 F. Supp. At 1311 (quoting S. Rep. No. 97-417, 97th Cong., 2d
Sess.28-29 (1982), reprinted in 1982 U.S.C.C.A.N. (vol. 2) 177, 206-07).

1 In light of the Senate factors discussed above, the record in this case fails
 2 to demonstrate that Plaintiffs' rights are violated under the Voting Rights Act.
 3 Washington enjoys a rich history in which it has promoted voters' rights. It has
 4 maintained no history as a state targeted for violations of the Voting Rights Act.
 5 Plaintiffs' allegations of disproportionality do not support their claims. The
 6 record in this case belies any assertion by Plaintiffs that Washington's
 7 disenfranchisement law has had any significant impact on voting in the state as
 8 discussed in the factors outlined above.

9 **2. Plaintiffs' Allegations of Disproportionality Are Insufficient.**

10 The Ninth Circuit Court of Appeals rejected a plaintiff's voting rights
 11 claim in Smith v. Salt River, 109 F. 3d 586 (9th Cir. 1997). In Salt River,
 12 plaintiffs challenged a local water district requirement that electors own real
 13 property within the boundaries of the district because of statistical
 14 disproportionality of minority voters within the district. The court reviewed
 15 decisions from other circuits rejecting claims based on statistical
 16 disproportionality⁴ and affirmed the district court's order of dismissal. Salt
 17
 18

19 ⁴ See Ortiz v. City of Philadelphia Office of the City Comm'rs, 28 F.3d
 20 306, 315 (3d Cir. 1994) (rejecting the contention that Pennsylvania's voter-purge
 21 statute violated §2 simply because more minority voters than whites were
 22 inactive voters); Irby v. Virginia State Bd. of Elections, 889 F.2d 1352, 1358-59
 23 (4th Cir. 1989); Salas v. Southwest Texas Junior College Dist., 964 F.2d 1542,
 24 1556 (5th Cir. 1992) (rejecting challenge to at-large voting system based
 25 exclusively on a statistical difference between Hispanic and white voter turnout);
 26 Wesley v. Collins, 791 F.2d 1255, 1262 (6th Cir. 1986) (rejecting challenge to

1 River, 109 F. 3d at 594-95. The court applied the seven Senate factors. Salt
2 River, 109 F.3d at 595 (“These cases stand for the proposition that a bare
3 statistical showing of disproportionate *impact* on a racial minority does not
4 satisfy the § 2 ‘results’ inquiry.”).

5 Plaintiff’s theory that the Voting Rights Act is violated because of
6 statistical disparity sits uncomfortably beside the federal court’s unwillingness to
7 intervene in habeas corpus cases based on the same alleged disparity. The federal
8 courts have repeatedly denied racial discrimination claims by minority
9 defendants in capital cases who have argued that they have been targeted because
10 of their race and have sought to prove their allegations by use of statistical
11 evidence of disparity in imposition of the death penalty. See, e.g. McClesky v.
12 Kemp, 481 U.S. 279 (1987). In McClesky, the Supreme Court held that
13 statistical evidence of racial disparities in imposition of the death penalty is
14 insufficient to further a habeas claim under the Eighth or Fourteenth
15 Amendments. Id. at 297-98. The Court held that the defendant must prove that
16 the sentences in his or her case acted in a discriminatory manner, or that the state
17 enacted or maintained the death penalty statute because of its racially
18 discriminatory effect. Id. A number of Ninth Circuit cases have followed
19 McClesky. See, e.g., Carriger v. Lewis, 971 F.2d 329, 334 (9th Cir. 1992), cert.
20 denied, 507 U.S. 992, 113 S.Ct. 1600 (1993); Richmond v. Lewis, 948 F.2d
21 1473, 1490-91 (9th Cir. 1992).

22 Here, Plaintiffs assert racial bias; they allege their disenfranchisement is a
23 product of a biased system in Washington State. Again, this argument fails

24 _____
25 Tennessee’s felon disenfranchisement law that rested primarily on the statistical
26 difference between minority and white felony-conviction rates).

1 because this Court lacks jurisdiction under the Voting Rights Act to review
2 Plaintiffs judgments and sentences on these grounds. Even if this Court had such
3 jurisdiction in this matter, Plaintiffs' claim of bias would fail. Although a
4 criminal defendant's right of due process includes an unbiased judge, Haupt v.
5 Dillard, 17 F.3d 285, 287 (9th Cir. 1994), review of such habeas claims has been
6 limited. Federal courts do not hold supervisory authority over state judges. See
7 Ford v. Kerby, 39 F.3d 1462, 1479-80 (10th Cir. 1994).

8 A Federal Court hearing a bias challenge in a habeas corpus proceeding
9 will presume the honesty and integrity of adjudication. See Withrow v. Larkin,
10 421 U.S. 35, 47 (1975). Actual bias must be demonstrated. Paradis v. Arave, 20
11 F.3d 950, 958 (9th Cir. 1994). The mere appearance of bias is insufficient. See
12 Tyson v. Trigg, 50 F.3d 436, 422 (7th Cir. 1995).

13 As the United States Supreme Court recognized in Liteky v. U.S., 510 U.S.
14 540 (1994), claims of judicial bias are rarely presented and rarely successful. A
15 claim of racial bias against a judge must offer evidence of discriminatory intent
16 which is not provided by a mere recitation of judicial rulings. Hence v. Smith, 37
17 F. Supp.2d 970, 979 (E.D. Mich. 1999).

18 The federal courts in habeas cases have also granted similar deference to
19 the decision to prosecute based on the following reasons:

20 In order to dispel the presumption that the prosecutor has not
21 violated equal protection, a criminal defendant must present clear
22 evidence to the contrary . . . Judicial deference to the decisions of
23 those executive officers rests in part on an assessment of the relative
24 competence of prosecutors and courts. Such factors as the strength
25 of the case, the prosecution's general deterrence value, the
Government's enforcement priorities, and the case's relationship to
the Government's overall enforcement plan are not readily
susceptible to the kind of analysis the courts are competent to
undertake. It also stems from a concern not to unnecessarily impair
the performance of a core executive constitutional function.

26 United States v. Armstrong, 517 U.S. 456, 465 (1996).

1 In Armstrong, the United States Supreme Court considered whether
2 criminal defendants could proceed upon criminal discovery under the theory that
3 the prosecutors were racially selective in the cases they prosecuted. The
4 defendants argued that disparate numbers of prosecutions against Blacks for
5 crack cocaine possession entitled them to review prosecutor files to further
6 develop their theory. An en banc panel of the Ninth Circuit held that the
7 defendants could proceed to discovery upon this theory without evidence that the
8 government failed to prosecute others who were similarly situated to the
9 defendant. United States v. Armstrong, 48 F.3d 1508, 1516 (9th Cir. 1995) (en
10 banc). The Supreme Court reversed, citing a majority rule among the circuit
11 courts that, "[t]o establish a discriminatory effect in a race case, the claimant
12 must show that similarly situated individuals of a different race were not
13 prosecuted." Armstrong, 517 U.S. at 469 (citing e.g., United States v. Parham,
14 16 F.3d 844, 846-47 (8th Cir. 1994); United States v. Fares, 978 F.2d 52, 59-60
15 (2d Cir. 1992); C.E. Carlson, Inc. v. S.E.C., 859 F.2d 1429, 1437-38 (10th Cir.
16 1988)).

17 Federal courts have upheld state disenfranchisement laws against
18 challenges made under the Voting Rights Act. For example, the Sixth Circuit
19 Court of Appeals held that disenfranchisement did not violate the VRA or equal
20 protection in Wesley v. Collins, 791 F.2d 1255 (6th Cir. 1986). In Wesley, a
21 convicted black felon and a public interest law project brought suit challenging
22 Tennessee's disenfranchisement statute. The court rejected the VRA claim,
23 reasoning, in part, as follows:

24 It is well-settled, however, that a showing of disproportionate racial
25 impact alone does not establish a per se violation of the Voting
26 Rights Act. . . . When the Tennessee law here in issue is viewed in
the context of the totality of the circumstances," it is apparent that
the challenged legislation does not violate the Voting Rights Act. . .

1 . Moreover, the existence of other social and political factors
2 present in this case leads to the inescapable conclusion that the
3 Voting Rights Act was not violated. Chief among those factors was
4 the state's legitimate and compelling rationale for enacting the
5 statute here in issue. It is undisputed that a state may
6 constitutionally disenfranchise felons, and that the right of felons to
7 vote is not fundamental. Thus, the courts have consistently
8 recognized that states may, pursuant to Section 2 of the Fourteenth
9 Amendment, disenfranchise persons convicted of "participation in
10 rebellion, or other crimes."

11 Id. at 1262-63 (citations and footnotes omitted).

12 The court in Wesley also affirmed dismissal of plaintiffs' claim under the
13 Fourteenth and Fifteenth Amendments because "plaintiffs were unable to present
14 evidence that proved or inferred a discriminatory intent on the part of the
15 Tennessee legislature." Id. at 1262 (footnote omitted).

16 Defendants respectfully challenge this Court's criticisms of the Court of
17 Appeals' decision in Wesley. See Farrakhan, 987 F.Supp. at 1312-13. This Court
18 criticized Wesley on two grounds: (1) Wesley was inconsistent with the Ninth
19 Circuit's decision in Dillenburg v. Kramer, 469 F.2d 1222 (9th Cir. 1972), which
20 criticized the rationale behind voter disenfranchisement; and (2) Wesley held that
21 plaintiffs' misconduct prevents them from arguing discrimination based on race
22 in light of the Supreme Court's decision in Hunter. Defendants disagree with
23 these criticisms because the Supreme Court (2 years after Dillenburg) laid to rest
24 any questions about the state's authority to disenfranchise convicted felons based
25 solely on the express authority in Section 2 of the Fourteenth Amendment.
26 Defendants also disagree that Hunter trumps the decision in Wesley because
Hunter was an equal protection case, not a voting rights case. Hunter does not
preclude states from disenfranchising convicted felons; Hunter affords convicted
felons no additional rights in that regard. Hunter precludes states like Alabama
from enacting disenfranchisement laws that are targeted against African

1 Americans or other groups under the Equal Protection Clause. Here, this Court
2 has already resolved this issue by dismissing Plaintiffs' claims under Hunter and
3 the Equal Protection Clause. Farrakhan, 987 F.Supp. at 1313-14.

4 More recent decisions add weight to the courts reasoning in Wesley. The
5 Ninth Circuit relied upon Wesley for the proposition that statistical
6 disproportionality is insufficient to support a voting rights claim. Salt River, 109
7 F.3d. at 594-95. The court in Jones relied upon Wesley for its conclusion that
8 there is no connection between felon disenfranchisement and racial
9 discrimination. Jones, 3 F.Supp. 2d. at 981. The New Hampshire Supreme Court
10 also concluded that felon disenfranchisement serves a reasonable
11 nondiscriminatory purpose. Fischer, 749 A. 2d. at 329-30.

12 Here, even if they maintained voting rights subject to the protections of the
13 Voting Rights Act, Plaintiffs fail to demonstrate viable claims under 42 U.S.C. §§
14 1971, 1973. Under the totality of the circumstances, they are not denied the right
15 to vote based on race under either statute. The Washington law applies to all
16 felons; it is color blind. There is no support in the record for any argument by
17 Plaintiffs that the statute was enacted for racially discriminatory purposes, as in
18 Hunter. There is no support in the record for any argument by Plaintiffs that they
19 have been denied the right to vote based on race.

20 Plaintiff's allegations of disproportionality of Hispanic, African American,
21 and Native American offenders sentenced to Washington's correctional system
22 are insufficient. This Court has dismissed Plaintiff's claim of vote dilution.
23 Plaintiffs fail to present any evidence demonstrating that they were denied the
24 right to vote based on their race. All plaintiffs were disenfranchised following
25 the entry of valid judgments and sentences, despite their allegations they were
26

1 denied the vote based on race. *Exhibits* 1-36, passim. Therefore, plaintiffs'
2 claims of statistical bias have no relevance to their claims in this matter.⁵

3 **3. Washington State has Historically Provided its Citizens Having**
4 **the Right to Vote Equal Opportunity to Participate in the**
5 **Political Process.**

6 Even if Plaintiffs' claims under the Voting Rights Act were not barred and
7 were properly before the Court, their claims would also fail in light of the Senate
8 factors. The record in this case fails to demonstrate a history within the State of
9 Washington of racial discrimination in voting. Neither Washington State nor any
10

11 ⁵ An effect on political opportunity must be proven by actual evidence; it
12 cannot merely be surmised from apparently disproportional statistics. Statistical
13 evidence regarding the criminal justice system does not, by itself, establish that
14 members of minority groups "have less opportunity than other members of the
15 electorate to participate in the political process to elect representatives of their
16 choice." 42 USC § 1973(b). In order to establish that nexus, Plaintiffs must
17 demonstrate an actual effect on election results. The record is devoid of such
18 evidence. According to at least one scholarly report, changing the pool of
19 registered voters is unlikely in itself to change the results of elections. R.
20 Wolfinger and S. Rosenstone, Who Votes? 80-88 (1980). As both Secretary
21 Munro and Representative Al Swift noted in a Congressional hearing on the
22 National Voter Registration Act in 1993, those with a partisan orientation often
23 assume that any change in voter registration processes was designed to harm their
24 cause. Exhibit 58, Attachment A at 20-21 (testimony of Secretary Munro). Such
25 perceptions are no substitute for actual evidence that electoral opportunity has
26 been diminished on the basis of race.

1 of its political subdivisions have ever been a "covered jurisdiction"⁶ under the
2 Voting Rights Act. To the contrary, the State's leadership in voter accessibility
3 has been stellar, as evidenced by the state's 1970 voting rights review and the
4 state's more recent promotion of motor voter procedures. The record does not
5 demonstrate efforts within this State to use unusually large voter districts⁷ or
6 other tactics to enhance opportunities for discrimination against minority groups.
7 For example, Washington law does not include a majority vote requirement that
8 requires a run-off election if the winner receives less than 50 percent of the vote.
9 See RCW 29.27.100. The record does not demonstrate denial of African
10 Americans, Native Americans, or Hispanics to a candidate slating process.
11 Washington State uses an open primary system, followed by a general election.
12 See RCW 29.15.020; and .030. The record does not demonstrate that African
13 Americans, Native Americans, or Hispanics are hindered in their ability to
14 participate in the electoral process because of discrimination in employment,
15 education, and health. The record does not demonstrate that past elections have
16 been characterized by overt or subtle racial appeals. The record does not
17 demonstrate a lack of responsiveness by Washington officials to the needs of
18 minority groups. See e.g., *Exhibits 58, 59, 60* (Declarations of Munro, Whiting,
19 and Cochran).

20 Washington's disenfranchisement laws date back to territorial days. See
21 Territorial Law of 1866 (Rem. & Bal. Code, §4755). Washington's laws predate
22

23 ⁶ See 42 U.S.C. §1973b(b) (referring to geographical areas that have used
24 voting procedures or other devices found by the Attorney General to deny
25 individuals access to voting based on race).

26 ⁷ See RCW 44.07C (describing voter districts by census blocks).

1 even the Civil War amendments. Plaintiffs' equal protection challenges against
2 the statute have already been dismissed. There is no record that these laws were
3 intended to disenfranchise African Americans, Native Americans, or Hispanics.
4 There is no record that these statutes were devised as a pretext to racial
5 discrimination. Jones, 3 F.Supp. 2d. at 981(noting the absence of any "taint of
6 historical rooted discrimination.") There is no record that these laws have been
7 part of some master plan on the part of Washington officials to keep African
8 Americans, Native Americans, or Hispanics from voting, as identified by the
9 Supreme Court as subject to challenge under the VRA in Katzenbach. Instead,
10 the record only demonstrates that Washington's disenfranchisement laws have
11 been a permissible exercise of state power under Section 2 of the Fourteenth
12 Amendment, validated by the Supreme Court in Richardson, and further re-
13 affirmed by Congress under the National Voter Registration Act. See 42 U.S.C.
14 § 1973 gg-6(a)(3).

15 The record in this case demonstrates Washington's progressive historical
16 record in the voting arena; Washington has not been hostile territory to members
17 of minority groups. As Dr. Taylor testifies, Washington passed a civil rights
18 measure restricting discrimination in public places as early as 1890. The
19 Washington territory extended suffrage to Black voters in 1870. Washington has
20 not enacted Jim Crow laws or other forms of de jure segregation. African-
21 American political candidates have found success in Washington State which
22 began with William Owens Bush's election to the Legislature in 1890, spanning
23 to the well-supported statewide political campaigns by Ron Sims for the Senate
24
25
26

1 in 1994 and by Norm Rice for the Governor's Office in 1996.⁸ *Exhibit 47,*
2 *Declartion of Taylor.*

3 Washington's history in making the vote accessible to all of its citizens has
4 been well documented, particularly in the last 30 years. In 1970, Secretary of
5 State Ludlow Kramer chaired a panel to review and make recommendations for
6 changes on state voting practices, including practices that would open up
7 participation by members of minority groups. These included centralization of
8 voting records at the county level, removal of obsolete statutory language
9 regarding literacy tests, computerizing voting records, and removal of improper
10 language regarding Native Americans from the State Constitution. *See Exhibit*
11 *59, Whiting Declaration.* Since 1970, the State expanded voter accessibility by
12 making voting registration available in state precincts and state offices.

13 Since 1981, Secretary of State Ralph Munro has made voter accessibility a
14 top priority. In 1984, voter registration was expanded to more state offices.

15
16 ⁸ Ron Sims is currently the King County Executive. Norm Rice was
17 formerly the mayor of Seattle. Other members of minority groups serve in
18 prominent elective or prominent positions in Washington State. These
19 individuals include Gary Locke, the nation's first Asian Governor. Charles Z.
20 Smith serves on the Washington State Supreme Court, elected state-wide, and is
21 African American. Ricardo S. Martinez is a United States Magistrate Judge for
22 the Western District of Washington. Franklin D. Burgess and Jack Tanner are
23 United States District Judges for the Western District of Washington. State
24 Representative John Lovick is an African-American State Representative elected
25 from a district where African-Americans comprise 1.2 percent of the population.
26 *See Exhibit 50, Supplemental Declaration of Bob Terwilliger.*

1 Upon Mr. Munro's recommendation, Washington passed a motor law in 1990,
2 five years before federal motor legislation took effect, allowing for voter
3 registration at the Department of Motor Vehicles. With the assistance of
4 Washington State Congressional Representative Al Swift, Mr. Munro testified
5 before Congress and urged the passing of the National Voter Registration Act.
6 The measure called for registration at motor vehicle locations, registration by
7 mail (something already done in Washington), and registration through certain
8 state agencies. Mr. Munro testifies that one of his reasons for supporting the
9 passage of NVRA "is to reach out to members of under represented groups in
10 this society and encourage them to participate in the democratic process."
11 *Exhibit 58, Munro Declaration.* During Mr. Munro's tenure, Washington has
12 expanded absentee ballot availability and voting by mail. Secretary Munro has
13 sought to increase accessibility of polling places to the handicapped. Washington
14 State provides the voter registration materials available in several different
15 languages. The State Voters' Pamphlet is available in Spanish, Chinese, Braille,
16 and cassette tape. Finally, Secretary Munro's administration has included a
17 minority outreach program, which has included work with various racial and
18 ethnic communities, including targeted media communication. The purpose of
19 this program has been to facilitate voter registration and participation amongst
20 these groups. Id.

21 Washington's responsiveness as a state is further evidenced by the State's
22 implementation of the Washington State Minority and Justice Commission,
23 which began in 1990, was renewed in 1995, and has been approved again for five
24 more years this year. The Commission's purpose is to determine whether bias
25 exists in the state of Washington, taking steps to address it, and taking steps to
26 prevent bias where it does not exist. See Exhibit 55, 1998 Report, Minority and

1 Justice Commission. The Commission has undertaken its work by
2 commissioning studies, making the results of the studies available to the legal
3 community and the public as a whole, by implementing corrective action, and by
4 providing training and education to court personnel regarding matters pertaining
5 to minority groups. See Exhibit 55, 1998 Report, Minority and Justice
6 Commission; and Exhibit 63, Declaration of Judge Kenneth Kato.

7 The Commission directed that the study on bail practices in King County
8 occur. The study was completed by Dr. George Bridges in 1997. See Exhibit 56,
9 Report by Dr. Bridges. Implementation of corrective action continues with
10 ongoing education in light of the study and revision of Wash. Crim. Rule (CrR)
11 3.2(b), which is ongoing. See Exhibit 63, Declaration of Kato. Another study
12 under the Commission included review of felony drug case processing in King,
13 Pierce, and Yakima Counties. See Exhibit 57, Final Report, December 1999,
14 "The Impact of Race and Ethnicity on Charging and Sentencing Processes."

15 Plaintiffs' claim under the Voting Rights Act is general, based on
16 statewide information. It is limited in theory to vote denial; Plaintiffs' vote
17 dilution claim has been dismissed. Although Plaintiffs allege that felony
18 conviction and subsequent disenfranchisement amongst African Americans,
19 Native Americans, and Hispanics are occurring in disproportionate numbers, this
20 contention does not demonstrate that Plaintiffs were denied the vote based on
21 race. In addition, Defendants are not aware of data demonstrating that felon
22 disenfranchisement dramatically changes the landscape of registered voters. For
23 example, county auditors report that from a two-month period in 1999, felony
24 judgments and sentences resulted in cancellation of voter registrations of only 20
25 percent of the convictions. Exhibits 11, 42, 43, 44, 45, and 46 (Declarations of
26 Bruce, Cochran, Flynn, Reed, Terwilliger, and Varney). The discovery returned

1 by Plaintiffs demonstrates that Plaintiffs did not participate in the democratic
2 process. Plaintiffs were either not registered in Washington or they did not vote.
3 *Exhibits* 18, 22, 30, and 40 (Plaintiffs' Interrogatory Answers). Plaintiffs have
4 provided no data showing any specific impacts resulting from felon
5 disenfranchisement apart from statistics of statewide applicability. The studies
6 do not extend to particular districts or areas. Plaintiffs themselves were
7 convicted in different counties throughout the State. The studies discussed in this
8 case do not demonstrate a benefit gained by any candidate or candidates as a
9 result of disenfranchisement. The studies themselves do not even extend to
10 discussion of disenfranchisement, except for the study conducted by Marc Mauer,
11 which is based on general statewide numbers.

12 There is no dispute in this case that the discussion of relationship between
13 disenfranchisement and its relationship to disproportionality amongst convicted
14 felons is a novel topic for discussion or study. Although the Supreme Court
15 recognized the existence of such studies in relation to capital punishment cases in
16 McClesky, the Court recognized the limited values of such studies because of the
17 many variables associated with any case in which an accused is charged, tried,
18 convicted, and sentenced. Here, Plaintiffs, who allege their convictions are based
19 on race, present nothing from their respective criminal records to support their
20 contentions. In addition, they make no connection between their cases and the
21 statistical data regarding disproportionality, except to present it as general
22 evidence or background information regarding our culture. Defendants' other
23 arguments aside, this is insufficient and Plaintiffs' claims must fail.

24 Nevertheless, Defendants point out that Washington has not turned a deaf
25 ear to these issues. Although Washington State has not flung wide the prison
26 doors, the state has established the mechanism for these issues to be reviewed in

1 their proper forums. If a criminal defendant believes he has been convicted based
2 upon race, he may challenge his conviction on appeal or in collateral review
3 provided his allegations of discrimination are based on more than mere
4 speculation or conjecture. In addition, Washington State has the means to further
5 examine these issues through the Minority and Justice Commission for research,
6 remedial and preventative action, and for training and educational purposes.
7 Finally, these matters may be brought before the Legislature.

8 **4. Plaintiffs' Challenge Regarding Washington's Reinstatement**
9 **Procedures Fail.**

10 Plaintiffs also challenge the process for reinstatement of civil rights in
11 Washington. They allege that Washington State violates 42 U.S.C. § 1971
12 because it is "vague, unclear, and unduly burdensome." Fourth Amended
13 Compl. ¶ 37. Mr. Farrakhan alleges that because he is not restored his civil rights
14 upon "a good faith effort" to pay his legal financial obligations under a payment
15 plan, he "is being denied the right to vote on his previous condition of servitude
16 pursuant to and in violation of 42 U.S.C. § 1971." *Id.*, ¶ 35. These claims must
17 also fail.

18 Once again, Plaintiffs do not have the right to vote because they are
19 convicted felons who have been excluded from the elective franchise. Once
20 again, the determination regarding whether civil rights should be restored lies
21 with the superior court (which this court lacks jurisdiction to review) when the
22 offender has completed the requirements of his sentence. See RCW 9.94A.220.
23 Therefore, an offender in Washington must satisfy all requirements of his
24 sentence before he may seek reinstatement, including community service, post
25 release supervision, and payment of legal financial obligations. After doing so,
26 the offender may then return to the superior court to request a certificate of

1 discharge. Id. To the best of Defendants' knowledge, this is not an issue that
2 Mr. Farrakhan has ever challenged; this is not an issue that has been addressed by
3 the Washington appellate courts in a published decision.

4 Plaintiffs' claims also fail because they have no right to an automatic
5 process that restores their right to vote when certain "good faith" payments have
6 been made. As the Supreme Court pointed out in Richardson, states may exclude
7 a convicted felon from the elective franchise for life. Richardson, 418 U.S. at 56.
8 The financial requirements are no less part of the judgment and sentence than the
9 period of incarceration; the financial requirements are no less judgments, once
10 established. See Wash. Crim. R. (CrR) 7.3 (pertaining to criminal judgments)
11 ("The court may order that its sentence include special conditions or
12 requirements, including a specified schedule for the payment of a fine, restitution,
13 or other costs, or the performance of community service.")⁹ A significant
14 portion of Mr. Farrakhan's judgments and sentences include his required

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16 ⁹ See RCW 10.73.160 ("if it appears to the satisfaction of the sentencing
17 court that payment of the amount due (of costs) will impose manifest hardship on
18 the defendant, . . . the sentencing court may remit all or part of the amount due in
19 costs, or modify the method of payment under RCW 10.01.170."); RCW
20 10.01.160 (precluding the court from ordering costs the defendant is unable to
21 pay, requiring the court to consider the defendant's financial circumstances, and
22 allowing the defendant who is not in contumacious default to petition to petition
23 the sentencing court to remit costs or a portion of costs). Regarding restitution,
24 however, the superior court may not reduce the total amount of restitution
25 because the offender may lack the ability to pay the total amount. See RCW
26 9.94A.140(1), .142(1).

1 restitution payments for his theft convictions. Therefore, Washington does not
2 violate the voting rights of the Plaintiffs by requiring satisfaction of all
3 requirements of the judgment and sentence, including financial requirements,
4 before restoring voting rights under RCW 9.94A.220. Plaintiffs are not only
5 improperly asking this Court to review Plaintiffs' judgment and sentence; their
6 argument impliedly asks this Court to adopt a policy that restitution obligations
7 are somehow less a part (or no part at all) of a judgment and sentence that a
8 prisoner might serve. Washington law and policy is clearly to the contrary.

9 In addition, Plaintiffs' rights are not violated by having to go back to
10 court.¹⁰ Moreover, the superior court need not have a separate process specially
11 designed for requests for reinstatement. The superior court can review a
12 contested or uncontested request for reinstatement upon a simple motion. Wash.
13 Crim. R. (CrR) 8.2 provides that motions to the court in criminal cases are made
14 to the superior court under the procedures set forth in Wash. Civ. R. (CR) 7(b).
15 Under Rule 7, the motion need only be in writing, setting forth the reasons for the
16 motion, the relief being requested, and it must specify the documentary evidence
17 relied upon by the moving party. *Id.* The moving party must give at least five
18 days notice to the non-moving party. CR 6(d). The moving party can serve the

19 _____
20 ¹⁰ Defendants are not required to provide Plaintiffs who have been released
21 from prison meaningful access to the courts. See Bounds v. Smith, 430 U.S. 817
22 (1977); Lewis v. Casey, 518 U.S. 343 (1996). If Plaintiffs have been released
23 from prison, they have the ability to go to the county law library and to file, mail,
24 or otherwise serve documents in support of their motion pertaining to
25 reinstatement. The courthouse is as open to Plaintiffs upon their release from
26 prison as it is to anyone else.

1 non-moving party by mail. CR 5(b)(1); CR 6(e). Each county may include
2 additional requirements in its local rules. These procedures are not unduly
3 burdensome.

4 In addition, the Department of Corrections has further simplified
5 procedures by having developed form pleadings to be used when the Department
6 requests the court to enter a certificate of discharge. Department Directive
7 requires the community corrections officer to complete the reinstatement forms.
8 These forms are then submitted to the prosecutor, who then forwards the forms to
9 the court for entry. In these cases, the parties are in agreement; the court would
10 be entering the discharge by stipulation.

11 **VI. CONCLUSION**

12 For all of the foregoing reasons, Defendants respectfully request that this
13 Court grant their Motion for Summary Judgement and dismiss Plaintiffs' claim
14 with prejudice.

15 RESPECTFULLY SUBMITTED this 31 day of July, 2000.

16 CHRISTINE O. GREGOIRE
17 Attorney General

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