



February 20, 2013

Mr. J. Gregory Grisham  
Chair, Ex-Felon Voting Rights Project Subcommittee  
Tennessee Advisory Committee to the U.S. Commission on Civil Rights  
Jackson Lewis, LLP  
999 Shady Grove Road, Suite 110  
Memphis, TN 38120

RE: Felony Disenfranchisement Laws and Policy in Tennessee

Dear Mr. Grisham:

We appreciate this opportunity to submit comments in support of your Ex-Felon Voting Rights Project Subcommittee's fact-finding efforts on whether the current felony disenfranchisement laws in Tennessee unfairly deny individuals the right to vote. I write today to urge reforms to expand voting rights to individuals for whom they were previously denied. Denial of voting rights to individuals who have completed their sentences is not only unjust and undemocratic, but it is counterproductive to the goal of increasing public safety.

I write on behalf of The Sentencing Project, a national nonprofit organization that works for a fair and effective U.S. criminal justice system. The Sentencing Project has long been engaged in research and advocacy regarding felony disenfranchisement. In this area, we have published broadly, engaged with public officials at both the state and federal levels, and presented testimony to executive, legislative, and judicial policymaking bodies.

### **Introduction**

The United States is one of the world's strictest nations when it comes to denying voting rights to people convicted of crimes. In 2010, 5.85 million Americans either serving a felony sentence or having previously been convicted of a felony were forced to sit out of state and federal elections.<sup>1</sup>

Felony disenfranchisement, which restricts voting rights for people found guilty of felony-level crimes, can be traced back to the nation's founding. But in recent decades, the dramatic

---

<sup>1</sup> Christopher Uggen, Sarah Shannon, and Jeff Manza, The Sentencing Project, "State-Level Estimates of Felon Disenfranchisement in the United States, 2010" (2012).

escalation of the criminal justice system has swelled the number of disenfranchised individuals to unprecedented levels. Since 1976, the U.S. has had a fivefold increase in the number of people denied the right to vote because of their criminal history. Today, approximately 2.5 percent of our nation's voting age population – 1 in every 40 adults – is disenfranchised. Given the vast racial disparities in the criminal justice system it is hardly surprising, but shocking nonetheless, to find that 1 of every 13 African Americans is disenfranchised – nearly 7.7 percent of voting age blacks, compared to less than 2 percent of non-blacks.<sup>2</sup>

The State of Tennessee is among the most punitive states in felon disenfranchisement. In 2010, over 340,000 individuals in Tennessee – 7 percent of the state's voting-age population – were denied the right to vote because of their criminal history.<sup>3</sup> Nearly 19 percent of African Americans in Tennessee were disenfranchised.<sup>4</sup> Of the nearly 248,000 disenfranchised ex-felons in Tennessee, only 2 percent had seen their voting rights restored.<sup>5</sup>

Felony disenfranchisement raises profound questions about democratic inclusion and racial justice. It is also counterproductive. Denying voting rights to persons with prior felony convictions weakens social networks and adversely impacts the capacity of high incarceration communities to participate fully in democratic institutions.

### **History of Felony Disenfranchisement in the South**

Following post-Civil War Reconstruction, white Democrats in the South sought to regain political power. Threatened by the newly enfranchised black population, the white establishment adopted poll taxes and literacy requirements to keep black Republican voters at bay. In addition, according to Professor Pippa Holloway of Middle Tennessee State University:

Between 1874 and 1882 a number of southern states amended their constitutions and revised their laws to disenfranchise for petty theft as part of a larger effort to disenfranchise African American voters and to restore the Democratic Party to political dominance in the region. These new laws were tools used by Democrats to prohibit Republicans from voting in some of the most tightly contested elections of this period.<sup>6</sup>

Disenfranchisement laws often imposed the loss of voting rights for offenses believed to be primarily committed by blacks. For example, party leaders in Mississippi called for disenfranchisement not for robbery or murder, but for crimes such as burglary, theft, and arson. In the words of one Mississippi jurist, blacks engaged in crime were “given rather to furtive offenses than to the robust crimes of the whites.”<sup>7</sup>

---

<sup>2</sup> Id.

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Pippa Holloway, “‘A Chicken-Stealer Shall Lose His Vote’: Disenfranchisement for Larceny in the South, 1874-1890,” 75, No. 4 J.S. Hist. 931, 931 (Nov. 2009).

<sup>7</sup> Andrew L. Shapiro, “Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy,” 103 Yale L.J. 537, 541 (Nov. 1993).

Such policies endured for over a century. Alabama’s disenfranchisement law for offenses of “moral turpitude” was not struck down until 1985, when the Supreme Court found it both intentionally and in effect discriminatory.<sup>8</sup> And while it is debatable whether felony disenfranchisement laws today are intended to reduce minority voting power, it is inescapable that this is their effect.

## Tennessee

Though Professor Holloway has found evidence of racially motivated felony disenfranchisement in Tennessee in the early 20th Century, she concedes that “Tennessee did not have the same historical commitment to black disenfranchisement that other southern states did.”<sup>9</sup> The state’s rival political factions, which sometimes benefitted from black votes in close races, had an incentive to maintain the franchise for African Americans.<sup>10</sup> Nevertheless, the impact of felony disenfranchisement on blacks in the State of Tennessee is now similar to that of its southern neighbors.

The State of Tennessee disenfranchises all individuals who have been convicted of felonies, or “infamous” crimes.<sup>11</sup> A person convicted of murder, rape, treason, or voter fraud is permanently barred from voting.<sup>12</sup> All others can have their rights restored if they are granted clemency, discharged from custody after serving the maximum sentence imposed, or granted a final discharge from supervision by relevant authorities.<sup>13</sup>

In 2006, Tennessee passed legislation that simplified what were previously the nation’s most complex and confusing disenfranchisement laws. Prior to 2006, eligibility and the process of restoration varied significantly based on the type of offense and the date of conviction. Under the new law, persons convicted of certain felonies after 1981 can apply for voting rights restoration directly with the Board of Probation and Parole upon sentence completion.<sup>14</sup>

Prior to 2006, individuals convicted of felonies were eligible to vote upon the completion of their sentences regardless of any outstanding financial obligations. The new law imposes two financial preconditions to re-enfranchisement. To regain the right to vote, an individual must have “paid all restitution to the victim or victims of the offense ordered by the court as part of the sentence,”<sup>15</sup> and be “current in all child support obligations.”<sup>16</sup>

---

<sup>8</sup> Marc Mauer, “Mass Imprisonment and the Disappearing Voters,” in *Invisible Punishment: The Collateral Consequences of Mass Imprisonment* 52 (Marc Mauer and Meda Chesney-Lind eds., 2002).

<sup>9</sup> Pippa Holloway, “Race and Partisanship in Criminal Disfranchisement Laws: Antecedents of the 2000 Election Controversy in Florida,” in *Freedom Rights: New Perspectives on the Civil Rights Movement* 277 (D. McGuire and J. Dittmer eds., 2011).

<sup>10</sup> *Id.*

<sup>11</sup> Tenn. Code Ann. § 2-19-143 and § 40-20-112.

<sup>12</sup> *Id.* § 40-29-204.

<sup>13</sup> *Id.* § 40-29-202(a)(1)–(3) (2006).

<sup>14</sup> Nicole D. Porter, “Expanding the Vote: State Felony Disenfranchisement Reform, 1997-2010,” October 2010.

<sup>15</sup> Tenn. Code Ann. § 40-29-202(b)

<sup>16</sup> *Id.* § 40-29-202(c).

Taken together, Tennessee’s felony disenfranchisement policies are among the strictest in the nation. Tennessee is one of just twelve states that deny voting rights not only to individuals incarcerated, on probation, or on parole, but also to ex-felons.<sup>17</sup> In 2010, there were 341,815 individuals in Tennessee who were disenfranchised because of their criminal history.<sup>18</sup> Of these, 247,808 had fully completed their sentences – “paid their debts to society” in common parlance – but were still denied their right to vote.<sup>19</sup> The felony disenfranchisement rate in Tennessee was 7.05 percent – sixth highest in the nation and nearly three times the national rate.<sup>20</sup>

Although a number of states require individuals to pay fines, fees, and restitution before restoring an individual’s right to vote, Tennessee “takes an unprecedented and unique approach by requiring that offenders pay not only all legal financial obligations but also be current on any outstanding child support obligations.”<sup>21</sup> While sound public policy argues that offenders should pay their financial obligations, such provisions in effect amount to an unconstitutional poll tax on low-income offenders.<sup>22</sup> As Sixth Circuit Court of Appeals Judge Karen Nelson Moore wrote in *Johnson v. Bredesen* – a case brought by three Tennessee residents challenging the state’s voter restoration law – “It is indisputable that the Plaintiffs are now unable to access the ballot box simply because they are too poor to pay.”<sup>23</sup>

Given racial disparities in the criminal justice system, disenfranchisement of African Americans in Tennessee is the logical consequence of the state’s punitive felony disenfranchisement policies. Thus, in 2010, 145,943 blacks were denied the right to vote – a disenfranchisement rate of 18.92 percent.<sup>24</sup> With nearly one of every five African Americans ineligible to vote, Tennessee now has the fourth highest African American disenfranchisement rate in the country, more than double the national rate.<sup>25</sup>

Some would assume that if African Americans are incarcerated at higher rates than other groups, this merely reflects greater involvement in crime, and is a natural, if perhaps unfortunate, consequence of that involvement. However, not all racial disparities are explained by greater involvement in crime. At every level of the criminal justice system, and at every stage from arrest to policing to prosecution to incarceration, we see a disproportionate impact on people of color -- particularly on black men. Research documents that race continues to play a role at each stage of the system in driving unwarranted disparities. Finally, of Tennessee’s 247,808 disenfranchised ex-felons, only 9558 – or 2.07 percent -- had seen their voting rights restored.<sup>26</sup>

---

<sup>17</sup> See Uggen, *supra*. (The others are Alabama, Arizona, Delaware, Iowa, Florida, Kentucky, Mississippi, Nebraska, Nevada, Virginia, and Wyoming.)

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Erika L. Wood and Neema Trivedi, “The Modern-Day Poll Tax: How Economic Sanctions Block Access to the Polls,” May-June 2007.

<sup>22</sup> *Johnson v. Bredesen*, 624 F.3d 742 (6th Cir. 2010) (Moore, J., dissenting).

<sup>23</sup> *Id.*

<sup>24</sup> Uggen, *supra*.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

## Strengthening Democracy and Making Communities Safer

Although the issue of felony disenfranchisement would raise questions about our democracy at any point in history, it is of particular concern today, given the dramatic increase in mass incarceration and racial disparities in the system.

As noted above, Tennessee requires ex-offenders to pay restitution and child support before their voting rights are restored – a burden that falls disproportionately on the poor. In the United States, financial penalties often attend criminal sentences; indeed restitution to victims, punitive fines, and court costs and fees may constitute appropriate sanctions. However, it is hard to imagine a good reason for tying the payment of such penalties to re-enfranchisement. Even less compelling is the link between satisfaction of all outstanding child support arrears – regardless of a person’s ability to pay – and restoration of the basic right to vote.

Supporters of Tennessee’s strict voting restoration rules argue that the state has a legitimate interest in encouraging payment of restitution and child support. This may very well be true, but it is unclear how requiring payment from a person who is unable to pay will make that payment forthcoming. By restoring voting rights to only those individuals who are affluent enough to satisfy their child support arrears, Tennessee has in effect established a poll tax. Wealthy ex-offenders can pay the “tax” and regain their voting rights while poor ex-offenders cannot. As Judge Moore wrote, “The attempt to incentivize payments that an individual is simply incapable of making by linking those payments to the right to vote . . . advances no purpose and embodies nothing more than an attempt to exercise unbridled power over a clearly powerless group.”<sup>27</sup>

Of course, poll taxes are explicitly prohibited by the Twenty-Fourth Amendment, which was enacted to prevent “the disenfranchisement of the poor.”<sup>28</sup> Though not a tax in a legal sense, Tennessee’s required payments for voting rights restoration operate in the same way. As Judge Moore explains in her *Bredesen* dissent:

[B]oth require an individual who desires to vote to pay a monetized sum as an absolute condition to casting a ballot in a federal election. This similarity is extremely relevant given that “[o]ne of the basic objections to the poll tax was that it exacted a price for the privilege of exercising the franchise” and that the primary motivation of the Amendment was “a general repugnance to the disenfranchisement of the poor occasioned by the failure to pay the tax.” The fact that [Tennessee] set the price for the privilege of voting as something besides a government-imposed per capita levy is not determinative. The statute sets a price nonetheless, and this is the exact evil that the Twenty-Fourth Amendment was meant to address. (Internal citations omitted.)<sup>29</sup>

Supporters also argue that the state has an interest in protecting the ballot box from individuals who refuse to follow the law. In the context of child support payments, this argument is weak. The mere inability to pay child support is not a crime, and failure to pay even when able is a

---

<sup>27</sup> Johnson v. Bredesen (Moore, J., dissenting).

<sup>28</sup> Harman v. Forssenius, 380 U.S. 528, 539 (1965).

<sup>29</sup> Johnson v. Bredesen (Moore, J., dissenting).

misdeemeanor insufficient to deny an individual suffrage, absent aggravating circumstances.<sup>30</sup> If the state cannot take away the franchise based on lapsed child support alone, it should not have the power to deny restoration of voting rights on that basis.

As Judge Moore concludes, if individuals “are otherwise eligible for the automatic restoration of the right to vote but are prevented from attaining that right because of their inability to pay a particular sum, the Tennessee statute effectively sets affluence as a voting qualification.”<sup>31</sup> Such a qualification is not only prohibited by the spirit of the Constitution, but it is antithetical to modern democracy.

Not only are the arguments for felony disenfranchisement weak, but such policies are counterproductive to the goal of promoting public safety. Regardless of an individual’s criminal conviction, a primary goal of our criminal justice system should be to reduce the likelihood that the person will commit another crime. Rather than instill in individuals a sense of obligation and responsibility, stripping persons with prior convictions of their voting rights sends the message that they are no longer fully citizens; that they are not welcome back in the community. People who do not feel like they are part of their community are less likely to be invested in efforts to strengthen it.

Finally, the scope of felony disenfranchisement laws does not befit our great democracy. In no other democracy are individuals convicted of certain crimes who have completed their sentences disenfranchised for life, as they are in Tennessee. People who have completed their sentences and reentered society are presumably working and paying taxes in communities throughout the state. These individuals, like other Tennesseans, should be accorded the basic rights of citizenship.

### **Recommended Reforms**

In recent years, a number of states have taken steps to reform felony disenfranchisement policies to expand voting rights to individuals for whom they were previously denied. In some cases, reforms came through legislative initiatives to remove voting restrictions, and in other cases change came through neighborhood-level efforts to educate and register people with felony convictions. For example, nine states, including several in the South, have either repealed or amended lifetime disenfranchisement laws. Two states expanded voting rights to persons under community supervision (i.e. probation and parole). Eight states eased the restoration process for persons seeking to have their right to vote restored after completing their sentence. Three states improved data and information sharing.<sup>32</sup>

---

<sup>30</sup> Id.

<sup>31</sup> Id.

<sup>32</sup> Porter, *supra*.

To ensure that basic rights are respected for all Tennesseans, regardless of their race, ethnicity, or socioeconomic status, we urge the state to adopt the following reforms to remove barriers to voting for ex-offenders and to move toward a policy of extending voting rights to all non-incarcerated people:

- Reconsider the utility of denying voting rights to individuals who have completed their sentences.
- Remove pecuniary barriers that require individuals to meet financial obligations prior to restoration of their voting rights.
- Provide assistance in the voter restoration process upon completion of sentence.
- Increase public education about the process of restoring voting rights and available resources to help those wishing to vote.
- Release data annually on the number of people applying for and being granted restoration of voting rights.

## **Conclusion**

A half century after our nation's civil rights movement, felony disenfranchisement policies combined with the skyrocketing expansion of the prison system means that increasing numbers of African Americans are losing their right to vote each day. Denial of voting rights to individuals who have completed their sentences is not only unjust and undemocratic, but it is counterproductive to the goal of increasing public safety. The State of Tennessee should consider means of bringing more of its citizens into the electoral process rather than excluding them through felony disenfranchisement.

Sincerely,

A handwritten signature in black ink that reads "Marc Mauer". The signature is written in a cursive, slightly slanted style.

Marc Mauer  
Executive Director