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The Disenfranchisement of Ex-Felons in Florida: A Brief History

Sarah A. Lewis

No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.
Wesberry v. Sanders, 376 U.S. 1 (1964)

In the United States, felony disenfranchisement affects more than 6 million people (Florida's 1.5 Million, 2018). Disenfranchisement laws differ from state to state, with the State of Florida having one of the harshest disenfranchisement schemes in the country (Sweeney et al., 2015). In Florida, felons are permanently disenfranchised regardless of the type of felony committed. Felons have the opportunity to regain their voting rights. However, the process is onerous and few regain their voting rights (ibid). The result is that almost 1.7 million people are disenfranchised in Florida (Order on Cross-Motion, 2018). This equates to 10% of Florida's voting population and 27% of the national disenfranchised population (ibid; The Sentencing Project, 2016). African-Americans are particularly hard hit with more than 20% of Florida's African-American voting age population disenfranchised (Order on Cross-Motion, 2018).



This paper will explore the origins of Florida's felony disenfranchisement laws in the period from 1865 to 1968. The first part of this paper will review the Thirteenth Amendment to the U.S. Constitution, which ended slavery, and the Florida Black Code, which sought to return freedmen to a slavery-like status. The second part of the paper will explore Florida's reaction to the passage of the Reconstruction Act of 1867, which conditioned reentrance into the Union on the writing of new state constitutions by former Confederate

states extending the right to vote to all males regardless of race, and ratification of the Fourteenth Amendment to the U.S. Constitution. The third part will explore the felony disenfranchisement provisions of the 1868 Florida Constitution and the persistence and effect of those provisions in the 1968 Florida Constitution.

1865 to 1866

In 1865, the Thirteenth Amendment to the U.S. Constitution, the first of the so-called “Reconstruction Amendments,” was passed by Congress and ratified by the requisite number of states. The Thirteenth Amendment abolished slavery and involuntary servitude except as punishment for a crime.

In 1866, the Florida legislature passed a series of laws collectively referred to as “the Black Code.” Passage of the Black Code was a reaction to the Thirteen Amendment and the end of slavery (Richardson, 1969). The Black Code sought to put freedmen back into a slavery-like status for crimes committed (ibid). For example, if a former slave could not prove he was gainfully employed, he could be arrested for the crime of vagrancy (Shofner, 1977). In such circumstances, they could post bond as a guarantee of good behavior (ibid). However, if they could not post bond, their punishment could include pillory, whipping, prison, or being sold to the highest bidder for up to 12 months’ labor (ibid). Vagrancy laws also could be used if a former slave violated a contract (ibid). The former slave could be found in violation of a contract for willful disobedience, wanton impudence, disrespect to his employer, failure to perform assigned work, or abandonment of the premises (ibid). For those found violating a contract, the punishment could include whipping, pillory, imprisonment, or being sold for up to

12 months’ labor (Richardson, 1969). In addition, former slaves unable to pay fines or court costs associated with various crimes under the Black Code could be punished by being sold to the highest bidder for labor for a period of time (Shofner, 1977). On June 13, 1866, Congress passed the Fourteenth Amendment to the U.S. Constitution, the second Reconstruction Amendment. The Fourteenth Amendment extended the right of citizenship to former slaves. On December 6, 1866, Florida rejected the Fourteenth Amendment as did nine other former Confederate states (Wood, 2016).

1867 to 1868

On March 2, 1867, Congress passed the First Reconstruction Act, which conditioned reentrance to the Union by former Confederate states on two things (Reconstruction Act, 1867). First, former Confederate states had to approve new constitutions granting the right to vote to all adult males, including African-Americans (ibid). Second, such states had to ratify the Fourteenth Amendment (ibid). Florida reacted to the First Reconstruction Act by ratifying the Fourteenth Amendment and adopting its 1868 Constitution (Wood, 2016). Although the 1868 Constitution extended the right to vote to all males regardless of race, the 1868 Constitution also provided for the automatic disenfranchisement of felons. Echoing the sentiments of the Black Code, the disenfranchisement provisions contained in the 1868 Florida Constitution sought to reduce the number of African-American voters (ibid). Anyone who was convicted of bribery, perjury, larceny, or an infamous crime could be disenfranchised (Holloway, 2014). These are the same crimes recognized and expanded by Florida through the Black Code (Wood, 2016). Petty larceny crimes such as

stealing a gold button, a case of oranges, hogs, oats, six fish worth 12 cents, or a cow hide could result in the denial of the right to vote (Holloway, 2014). Not surprisingly, larceny charges increased prior to elections (ibid).

1968 to Present

On November 5, 1968, Florida ratified its 1968 Constitution, which is still in effect today. Mirroring the 1868 Constitution, the 1968 Constitution provides for the automatic disenfranchisement of felons. Drafters of the 1968 Florida Constitution articulated no independent, nondiscriminatory reason for maintaining the felony disenfranchisement provisions of the 1868 Florida Constitution (Brennan Center for Justice, 2006). Regardless, the U.S. Court of Appeals for the Eleventh Circuit held in *Johnson v. Bush* that reenactment in the 1968 Florida Constitution of the felony disenfranchisement provisions cleansed the discriminatory intent of the disenfranchisement scheme of the 1868 Florida Constitution (353 F.3d 1287, 1339 (11th Cir. 2003)). However, when observing the data, the disparate impact of felony disenfranchisement on African-Americans in Florida is clear. Although African-Americans make up 16% of Florida's voting population, over 20% of those who have lost the right to vote through felony disenfranchisement in Florida are African-American (Wood, 2016). In the State of Florida, each gubernatorial administration² has the



power to craft its own clemency rules whereby ex-felons may regain their voting rights. This has real impact on the ease or difficulty by which ex-felons in Florida may regain their voting rights. For example, from 2007 to 2010, Governor Charlie Crist restored the voting rights of 155,315 ex-felons; whereas, since 2011, Governor Rick Scott has restored the voting rights of only 2,488 ex-felons (Order on Cross-Motion, 2018). This is because the restoration process under Governor Scott is much more onerous than the restoration process under Governor Crist. Under Governor Crist, the voting rights of people convicted of committing certain felonies were automatically restored upon completion of their sentences. Under Governor Scott, ex-felons must wait five or seven years after completion of their sentences, satisfaction of any conditions of supervision or probation, and payment of any restitution prior to application for the restoration of their voting rights. The waiting period depends on the offence committed with the clock resetting if the individual is even arrested for any further offence, even

² In the United States, there are three branches of government on the federal level: the executive (the President), the legislature (the U.S. Congress), and the judiciary (federal courts). Each of the 50 states that comprise the United States also has three branches of government: the executive (the Governor), the legislature (the Statehouse), and the judiciary (state courts). In Florida,

the Governor serves a four year term. At the end of the term, Florida voters vote on candidates for Governor. A "gubernatorial administration" means the elected Governor's administration for the four year term for which he or she was elected.

a misdemeanor and even if charges are never filed. Those required to wait seven years must also go through a hearing process. The current wait time for such a hearing is 9.2 years (Mitchell, 2017).

The constitutionality of Governor Scott's voting restoration process is currently being litigated. A federal judge in the Northern District of Florida found that Governor Scott's restoration process violates the First and Fourteenth Amendments to the U.S. Constitution (Order on Cross-Motion, 2018). The Scott administration has appealed to the Eleventh Circuit, arguing that the clemency board, comprised of the Governor and three cabinet members, has unfettered discretion in making clemency decisions, including whether to restore voting rights (Defendant-Appellants' Motion, 2018). The Eleventh Circuit heard oral arguments on July 25, 2018. However, a decision from the Court will likely not be issued until after the midterm elections to be held in the United States on November 6, 2018 (Kirkland, 2018).

On the ballot in Florida is Amendment 4 to the Florida Constitution. Amendment 4 would automatically restore voting rights to felons who have completed their sentences (Bazelon, 2018). However, those convicted of murder or sex crimes would have to apply for restoration of voting rights (ibid). Floridians will vote on Amendment 4 on November 6, 2018. For the Amendment to pass and become part of the Florida Constitution, 60% of voters must vote yes (ibid).

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