STATE OF TENNESSEE
OFFICE OF THE ATTORNEY GENERAL

February 25, 2020

Opinion No. 20-02

Restoration of Voting Rights

Question

Would a law restoring the voting rights of convicted felons who have entered into a payment plan for restitution, child support, and court costs be constitutionally suspect if it also provided for the revocation of those restored voting rights when a convicted felon fails to abide by the terms of the payment plan?

Opinion

Based on existing precedent from the Sixth Circuit Court of Appeals, the legislature may require, as a condition of the restoration of the voting rights of a convicted felon, that the convicted felon enter into a payment plan for satisfying existing financial obligations. And the principles on which that precedent rests suggest that the legislature may restore convicted felons' voting rights only provisionally, subject to subsequent revocation for failure to pay in accordance with the payment plan. An argument can be made that subsequent revocation for failure to pay need not take indigency to account in order to pass constitutional muster, but no court has directly addressed that question. Nor has any court squarely addressed what procedural protections would be required for a subsequent revocation for failure to abide by the terms of a payment plan. Because those questions remain unresolved, a statutory scheme that (1) explicitly makes the restoration of voting rights provisional and conditional on adherence to the terms of the payment plan, (2) accounts for indigency, and (3) allows convicted felons facing subsequent revocation of restored voting rights for failure to abide by the payment plan to prove their indigency and good faith to a neutral court would be on firmer constitutional footing than a statute that did not include those provisions.

ANALYSIS

In Tennessee, an individual convicted of a felony is "immediately disqualified from exercising the right of suffrage." Tenn. Code Ann. § 40-20-112; see id. § 2-2-102; see also Richardson v. Ramirez, 418 U.S. 24, 54 (1974) (holding that a State may, consistent with the Constitution, revoke the right of convicted felons to vote). Convicted felons who have been disenfranchised in Tennessee may apply to have their voting rights reinstated only after receiving (1) a pardon; (2) a discharge from custody after serving the maximum sentence imposed by the court; or (3) a certificate of final discharge from the board of parole or an equivalent federal, state, or county authority. Tenn. Code Ann. § 40-29-202(a).

Subsections 40-29-202(b) and 202(c) impose three additional preconditions to the restoration of convicted felons' voting rights. Convicted felons who have met the subsection

202(a) requirements are eligible for re-enfranchisement only if they have also (1) "paid all restitution to the victim or victims of the offense ordered by the court as part of the sentence"; (2) "paid all court costs assessed against the person at the conclusion of the person's trial," except when the court made a finding of indigency; and (3) remained "current in all child support obligations." Tenn. Code Ann. § 40-29-202(b), (c). In other words, under current law, a convicted felon must satisfy these financial obligations in full before re-enfranchisement.

In *Johnson v. Bredesen*, the Sixth Circuit held the financial-obligation preconditions to re-enfranchisement in subsections 202(b) and (c) to be constitutional. 624 F.3d 742 (6th Cir. 2010).[1] The full-payment preconditions in effect at that time were challenged as violative of the Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment and the Twenty-Fourth Amendment to the U.S. Constitution and the Ex Post Facto Clauses of both the U.S. and the Tennessee Constitutions. The preconditions were upheld under deferential rational-basis review because "Tennessee possesses valid interests in promoting payment of child support, requiring criminals to fulfill their sentences, and encouraging compliance with court orders," and the requirement that convicted felons pay these obligations as a precondition to re-enfranchisement directly advanced those interests. *Id.* at 747; *see also Harvey v. Brewer*, 605 F.3d 1067, 1079 (9th Cir. 2010) (O'Connor, J.) ("We have little trouble concluding that [a State] has a rational basis for restoring voting rights only to those felons who have completed the terms of their sentences, which includes the payment of any fines or restitution orders.").

You have asked whether, instead of requiring *payment in full* of outstanding obligations for restitution, court costs, and child support *before* re-enfranchisement, the General Assembly may require a felon seeking re-enfranchisement to enter into a payment plan to satisfy any such outstanding financial obligations by making periodic payments *after* restoration of the voting rights. The requirement of a payment plan as a precondition to re-enfranchisement would likely be constitutional under the reasoning of *Johnson*. As the Sixth Circuit explained, a State "may, within the bounds of the Constitution, strip convicted felons of their voting rights." *Johnson*, 624 F.3d at 746. Accordingly, any conditions on the reinstatement of those rights would be subject only to deferential, rational-basis review because convicted felons, "[h]aving lost their voting rights," "lack any fundamental interest to assert." *Id.* Thus, under *Johnson*, a requirement that convicted felons seeking re-enfranchisement enter into a payment plan to fulfill their existing financial obligations would be subject only to rational-basis review and is likely to survive that deferential review because the payment-plan requirement advances the same state interests as does the full-payment precondition, which was upheld in *Johnson*.

But a statute that allows for a payment plan and then also provides that failure to abide by the terms of the payment plan would result in forfeiture or revocation of the restored voting rights could raise some constitutional concerns, depending on the specifics of the provision.

[1]At the time, subsection 202(b) required a convicted felon seeking re-enfranchisement to have fulfilled only all existing restitution obligations and did not require the full payment of court-imposed court costs. *See* Tenn. Code Ann. § 40-20-202(b) (2008). In 2010, during the *Johnson* litigation, the Tennessee General Assembly added full payment of those financial obligations as a precondition to eligibility for re-enfranchisement except when the court had determined the felon to be indigent. 2010 Tenn. Pub. Acts, ch. 1115, § 1.

First, application of the deferential rational-basis standard in *Johnson* is premised on the principle that a convicted felon who has lost the right to vote does not have any fundamental right to assert when bringing a constitutional challenge. *See Johnson*, 624 F.3d at 749 (noting that the "restoration of a civil right to which Plaintiffs have no legal claim" requires "only rational basis review"). But once a felon's right to vote has been *fully* restored, there may be a question whether a subsequent revocation of that right is subject to the rational-basis review applied to restoration in *Johnson* or is subject to the more stringent scrutiny that would normally apply to the revocation of voting rights. *See Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("[A] citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."). Thus, the way in which any new legislation circumscribes the voting rights that are restored may make a difference in the outcome of a constitutional challenge.

For that reason, other States that have adopted a payment-plan approach, such as Washington, have specified that the right to vote is only "provisionally restored" as long as the felons' financial obligations remain outstanding. Wash. Rev. Code Ann. § 29A.08.520(1). And that provisional right may be revoked by the sentencing court for failure to comply with the payment plan. *Id.* § 29A.08.520(2). A provisional restoration of the right to vote—subject to the condition that the convicted felon abide by the terms of the payment plan—supports the idea that any subsequent revocation for failure to pay is not a new disability imposed on the individual but is merely a continuation of the original disenfranchisement resulting from the felony conviction. That, in turn, makes it more likely that any subsequent revocation of the provisional right to vote would not be subject to strict scrutiny should the constitutionality of the revocation be challenged. Thus, at a minimum, the restored right should expressly be made provisional and conditional on adherence to the payment plan.

Second, a felon's ability to pay could have constitutional implications for a statutory provision allowing for revocation for failure to abide by a payment plan. The Sixth Circuit in *Johnson* upheld the constitutionality of Tennessee's re-enfranchisement statute as applied to all convicted felons who have not fulfilled their financial obligations, including indigent individuals unable to pay. *See* 624 F.3d at 748. Because "wealth-based classifications do not discriminate against a suspect class," any distinction among individuals based on their ability to pay would be subject only to rational-basis review. *Id.* at 746. Accordingly, under *Johnson*, convicted felons who are unable to pay their financial obligations could be rendered ineligible for re-enfranchisement to the same degree as convicted felons who are able to—but do not—pay. *See Jones v. DeSantis*, 410 F. Supp. 3d 1284, 1300 (N.D. Fla. 2019) (noting *Johnson* "upheld a requirement to pay restitution and unrelated child-support obligations, even as applied to felons unable to pay"), *aff'd per curiam*, No. 19-14551, --- F.3d ----, 2020 WL 829347 (11th Cir. Feb. 19, 2020); *Madison v. State*, 163 P.3d 757 (Wash. 2007) (en banc) (upholding, without a majority opinion, a requirement to pay fines, costs, and restitutions, even as to convicted felons who are unable to pay those obligations).

Thus, under *Johnson*, a statute providing for the revocation of provisional voting rights for failure to abide by a payment plan would not necessarily need to take into account—as the Washington statute does—whether a convicted felon's failure to meet the obligations of the payment plan was the result of inability to pay as opposed to a willful failure to pay. However, some courts have suggested, contrary to *Johnson*, that a distinction between willful failure to pay

and indigency could be material to the constitutional inquiry and that such distinctions would be subject to heightened scrutiny, not deferential rational-basis review. *See, e.g.*, *Jones*, No. 19-14551, 2020 WL 829347, at *21 ("[O]nce a state provides an avenue to ending the punishment of disenfranchisement . . . it must do so consonant with the principles of equal protection and may not erect a wealth barrier absent a justification sufficient to overcome heightened scrutiny."); (*Harvey*, 605 F.3d at 1080 (noting that "[p]erhaps withholding voting rights from those who are truly unable to pay their criminal fines due to indigency would not pass this rational basis test" but not addressing the question "because no plaintiff in th[e] case ha[d] alleged that he [was] indigent"); *see also Bearden v. Georgia*, 461 U.S. 660, 666 (1983) (inquiring "whether, and under what circumstances, a defendant's indigent status may be considered in the decision whether to revoke probation"). Thus, legislation that requires a court to take into account ability to pay before ordering a revocation for failure to adhere to a payment plan could be more likely to withstand a constitutional challenge.

Third, as a general matter, appropriate due process protections should be provided before a subsequent revocation for non-adherence to a payment plan is imposed. *See Matthews v. Eldridge*, 424 U.S. 319, 335 (1976) (identifying the factors to consider whether appropriate due process protections have been provided). A statutory scheme that accounts for indigency and allows re-enfranchised felons facing revocation for failure to pay to prove actual indigency and good faith to a neutral court would be on firmer constitutional footing than a statute that provides for revocation for failure to comply with a payment plan without distinguishing willful failure to pay from a failure to pay because of indigency.

In sum, based on existing precedent from the Sixth Circuit Court of Appeals, the legislature may require, as a condition of the restoration of the voting rights of convicted felons, that a convicted felon enter into a payment plan for satisfying existing financial obligations. The principles on which that precedent rests suggest that the legislature may restore convicted felons' voting rights only provisionally, subject to subsequent revocation for failure to pay in accordance with the payment plan. An argument can be made that subsequent revocation for failure to pay need not take indigency to account in order to pass constitutional muster, but no court has directly addressed that question. Nor has any court squarely addressed what procedural protections would be required for a subsequent revocation for failure to abide by the terms of a payment plan. Because those questions remain unresolved, a statutory scheme that (1) explicitly makes the restoration of voting rights provisional and conditional on adherence to the terms of the payment plan, (2) accounts for indigency, and (3) allows convicted felons facing subsequent revocation of restored voting rights for failure to abide by the payment plan to prove their indigency and good faith to a neutral court would be on firmer constitutional footing than a statute that did not include those provisions.

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