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The State of South Carolina



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April 12, 1993

J. Lynn McCants
Executive Director
State Election Commission
Post Office Box 5987
Columbia, S.C. 29250

Dear Mr. McCants:

Your letter to Attorney General Medlock has been referred to me. You have inquired if a person who has been arrested but not yet tried and convicted and is awaiting trial in a jail or local detention facility has the right to vote.

Article II, §7 of the South Carolina Constitution states that

[t]he General Assembly shall establish dis-
qualifications for voting by reason of ...
conviction of serious crime ... persons who
are confined in any penal institution under
the judgment of a court shall not be entitled
to vote. (Emphasis Added)

S.C. Code Ann. §7-5-120 (Supp 1992) provides qualifications for registration and sets out which persons are disqualified. This statute provides in part that

[e]very citizen of this State and the United States who:

* * *

- (4) Applies for registration; must be registered; provided that:

request letter

- (a) Persons who are mentally incompetent or confined in any public prison; and
- (b) Persons convicted of a felony or offenses against the election laws are disqualified from being registered or voting, unless the disqualification has been removed by service of the sentence, including probation and parole time unless sooner pardoned.

The clear language of the Constitution only authorizes persons to be disenfranchised who have been "confined in [a] ... penal institution" following a conviction. The statute speaks in subsection 4(a) of disenfranchising persons who are "confined in any public prison" and in 4(b) persons who have been "convicted of a felony or offenses against the election laws". A person is only "confined" in a prison when he is actually convicted of a crime. In a 1965 opinion of this Office former Attorney General McLeod stated that "... one is 'convicted' of a disqualifying offense within the meaning of the constitutional and statutory provisions when there is a verdict of guilty and sentence thereon ...". 1965 Atty Gen. Op. 241. Therefore, the language of (4) (a) is not inconsistent with the provisions of the Constitution and a person must be convicted in order to be disenfranchised, not simply in a jail or detention center.

Insofar as Section (4)(a) could conceivably be interpreted as disenfranchising any person not convicted but presently residing in a prison pending disposition of that person's arrest or trial, that interpretation must fail for several reasons. First and foremost the state constitutional provision must control and that provision authorizes disenfranchisement only after conviction.¹ Second, a person may only be disenfranchised upon a conviction of a crime. S.C. Code Ann. §7-3-20 (C) (2) (c) (1976); S.C. Code Ann. §7-3-60 (Supp. 1992). A person who had only been arrested and not

¹ See, 16 C.J.S., Constitutional Law, §61, "... a state statute is unconstitutional and invalid if it is in conflict with the constitution of the state ...".

convicted would not have been disenfranchised.² Third, it would be inequitable to disenfranchise a person awaiting a trial or sentencing inside a jail or pre-trial facility and not a similarly situated person who is not awaiting such trial or sentencing in a jail. The person not in a jail but living at his home would be allowed to vote. See, O'Brien v. Skinner, 414 U.S. 524, 38 L.Ed.2d 702, 94 S.Ct. 740 (1974).

The provision of Subsection 4(a) appears to track the language of the previous constitutional and statutory provisions regarding voter disenfranchisement. In the South Carolina Constitution of 1895, Article II, §6 the Constitution set out various categories of persons who would be disqualified from registering or voting. The provision first delineated various disqualifying crimes and then specifically disqualified "[p]ersons who are idiots, insane, paupers supported at the public expense, and persons confined in public prison." (Emphasis Added) The statutes tracked this language and required a person to indicate whether he was "... an idiot, insane, a pauper supported at public expense or confined to any public prison." [S.C. Code Ann. §23-68 (3) (1962)] (Emphasis Added) In 1971 the Constitution was changed to its present provision that disenfranchises a person confined under judgment of a court. Although the statutory language of 7-5-120 was amended, Section (4) (a) continued to retain the language of "confined in public prison".

When it was proposed that the Constitution of 1895 be amended, a committee was formed to recommend various changes to the Constitution. Most, if not all, of the changes proposed by the committee were incorporated into our present Constitution. The changes proposed by the committee regarding disqualification to vote were incorporated into the present Constitution. The committee explained its changes regarding disqualification of persons confined in prison as follows:

[t]he committee feels that persons should be restricted from voting only if confined to a prison by a court order. This simply is a protection for a person who is being held in jail, but without having been before a court.

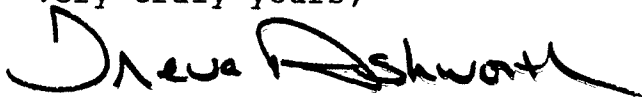
"Final Report Of The Committee To Make A Study Of The South Carolina Constitution of 1895", p. 27.

² 25 Am.Jur.2d Elections, §94 "In most jurisdictions a conviction in a judicial proceeding is necessary in order to disenfranchise a voter..."

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It would, therefore, be the conclusion of this Office that a person who is in a jail or pre-trial facility and who has not been convicted of any crime is not disenfranchised and should be allowed to register and vote.

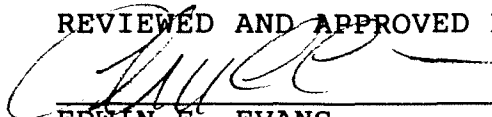
Very truly yours,



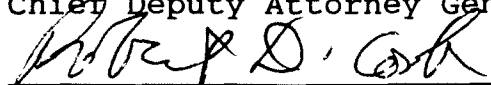
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