



June 24, 2013

The Honorable Robert F. McDonnell
Governor of Virginia
Patrick Henry Building, 3rd Floor
1111 East Broad Street
Richmond, VA 23219

Dear Governor McDonnell:

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The ACLU of Virginia is thankful that you have expedited the restoration of rights process for persons identified as having been convicted of non-violent crimes and have asked for the input on the process from various stakeholders including the ACLU. We appreciate being able to contribute to the discussion about how the new policy should be implemented.

The ACLU strongly favors a policy of automatically restoring the rights of all persons convicted of felonies once they have been released from probation or parole and without being conditioned on payment of fines, fees, and restitution. While the new policy you have proposed contains less subjective criteria than prior individual application procedures, so long as there is a discretionary list differentiating felonies and a requirement of payment of fines, fees, and restitution constituting a poll tax, we will continue to ask the Office of the Governor of the Commonwealth of Virginia and the General Assembly to remove these barriers to the fundamental right to vote.

With that said, we hope that the new restoration of rights policy for non-violent felons you plan to implement will result in thousands of newly enfranchised Virginia citizens. To that end, I am writing on behalf of the ACLU to encourage you to be as inclusive as possible in the policy you implement and to offer our recommendations regarding the offenses that should be included in the discretionary classification of non-violent for purposes of voting rights restoration.

The list of non-violent offenses for restoration of civil rights must be as expansive and inclusive as possible for your policy to be meaningful. As Attorney General Cuccinelli noted during the 2013 legislative session, "felony creep" is plaguing Virginia law by re-classifying misdemeanors to felonies and non-violent felonies to violent offenses. As a result, the statutory classification of violent crimes for purposes of sentencing and other law enforcement purposes is remarkably expansive and stricter than most other states. As a "tough-on-crime" advocate, you have undoubtedly taken notice of this dramatic shift and the unintended costs to

Virginia citizens. Nationally, seventy-five percent of disenfranchised citizens live in the community, but will suffer lifelong consequences of their felony convictions.¹

While the purpose of this letter is not to comment on the long list of offenses that are classified as violent for some purposes by Virginia law, it is pertinent to the policy discussion of when and for whom to restore voting rights that several of these offenses do not contain acts or intent of violence, and therefore, should not be considered violent offenses for the purposes of restoration of rights. Further, it is nearly undisputed that African Americans and members of other minority groups are arrested, prosecuted and incarcerated at rates that are disproportionate to the rates of white people who commit the same crimes. Thus, these individuals represent a significant portion of disenfranchised Virginians. Adopting a wide-ranging list of non-violent offenses for purposes of restoration of voting rights would mitigate the lifelong consequences of a felony conviction for individuals who have redeemed themselves and returned to live and work in society.

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Virginia's Racial Disparity

When national disenfranchisement data is broken down by race, it is clear that disparities in the criminal justice system are connected to disparities in political representation.² This is evident in Virginia where more than twenty percent of Virginia's African-American voting age population is disenfranchised---representing one of every five African-Americans.³ In contrast, the national disenfranchisement rate is one of every thirteen African-Americans of voting age, which is still four times greater than non-African Americans. The prejudicial overrepresentation of African Americans in the Virginia's criminal justice system, and as a result, a disproportionate percentage of the disenfranchised population, ought to be an important factor when formulating a list of non-violent offenses eligible for expedited restoration of rights.

For example, in a report recently released by the ACLU, African Americans are 2.8 times more likely than whites to be arrested for marijuana possession in Virginia.⁴ This statistic demonstrates the unfair prejudices of the current criminal justice system, and it is not limited to marijuana possession. The racial disparities are staggering for all drug offenses: despite the fact that whites engage in drug offenses at a higher rate than African-Americans, African-Americans are incarcerated on drug charges at a rate that is ten times greater than that of whites.⁵ Virginians

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

² *Id.*

³ *Id.*

⁴ *The War on Marijuana in Black & White: Billions of Dollars Wasted on Racially Biased Arrests*. American Civil Liberties Union (June 2013). Available at: <http://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel3.pdf>

⁵ Feller, Jaime. *Race, Drugs, and Law Enforcement in the United States*. Stanford Law and Policy Review (June 2009).

convicted of drug offenses other than simple possession are not currently able to regain their rights under the non-violent criteria.

Nationally, more than sixty percent of the people in prison are now racial and ethnic minorities.⁶ These trends have been intensified by the disproportionate impact of the war on drugs: two-thirds of all persons in prison for drug offenses are people of color.⁷ African-American males have a thirty-two percent chance of serving time in prison compared to only six percent for white males.⁸ In light of the damage done by the “war on drugs,” we recommend that all drug offenses be considered non-violent for the purposes of restoration of civil rights.

Further, because these alarming statistics demonstrate the racial disparity in the criminal justice system, the list of non-violent crimes for purposes of restoration of rights should extend beyond including all drug felonies. A broad list of non-violent crimes for restoration purposes would not lessen the criminal consequences of certain types of convictions or reduce sentences. It would, however, allow the maximum number of qualified and redeemed individuals who have fully repaid their debt to society to be able to reenter our communities and engage in civic life.

Felony Creep and Meaningful Reentry into Society

We are disappointed that the offenses of burglary and breaking and entering have been moved to the violent offense list since the new program was announced at your press conference. The legislative trend of re-classifying misdemeanors to felonies and, subsequently, re-classifying non-violent felonies to violent felonies has contributed to racial disparities in the criminal justice system, over incarceration in jails and prisons, and created endless collateral consequences for individuals after fully completing their sentences. Your Administration has focused on implementing reentry initiatives so that individuals may successfully reintegrate back into society and make Virginia safer. Studies demonstrate that when former felons are able to participate in society through voting, recidivism rates decline. Therefore, it is counterproductive to the goal of successful reentry and public safety to shorten the list of eligible non-violent felonies for the restoration of civil rights.

Virginia law allows individuals convicted of felonies to petition the circuit courts for a recommendation of restoration of civil rights in § 53.1-231.2, however the procedure excludes the felonies explicitly listed as violent under the sentencing guidelines in §17.1-805 (C) and §19.2-297.1, which lists the felonies considered violent under the “three-strike” rule.

Illogically, the petition process also excludes other types of felonies from the circuit court petition procedure despite the fact that such offenses are not classified as violent in the criminal sections of the Code for purposes of sentencing and

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⁶ Guerino P., Harrison P.M., & Sabol W. (2011). *Prisoners in 2010*. Washington D.C. Bureau of Justice Statistics. Available at: <http://www.sentencingproject.org/template/page.cfm?id=122>

⁷ Id.

⁸ *Facts About Prisons and Prisoners*. The Sentencing Project (2013). Available at: http://sentencingproject.org/doc/publications/publications/inc_factsAboutPrisons_Jan2013.pdf

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punishment: §18.2-248 (manufacturing, selling, giving, distributing, or possessing with intent to manufacture, sell, give, or distribute a controlled substance or an imitation controlled substance); §18.2-248.01 (transporting controlled substances into the Commonwealth), §18.2-248.1 (sale, gift, distribution or possession with intent to sell, give, or distribute marijuana), §18.2-255 (distribution of certain drugs to persons under 18), §18.2-255.2 (sale or manufacture of drugs on or near certain properties) or §18.2-258.02 (maintaining a fortified drug house), or (iii) convicted of a felony pursuant to §24.2-1016 (election fraud).

While the ACLU of Virginia supports restoring the rights of all people who have been released from probation or parole regardless of the nature of their crimes, we understand that is not likely a serious option for your consideration. At the same time, however, we also know that the choice of what felonies to include in your new “automatic” restoration of rights program is entirely within your absolute discretion. Accordingly, we strongly urge you to exercise your discretion to include the largest possible number of people within the ambit of your new “automatic” program, and we offer several options for your consideration.

The most expansive option would be to include on the list of persons eligible for automatic restoration of rights all persons who have not been convicted of “violent” crimes under §19.-297.1, Virginia’s three-strike rule. The General Assembly enacted the three-strike rule imposing life sentences on individuals convicted multiple times of violent felonies thereby deeming this type of conviction most egregious.

An alternative list of eligible persons could include all former felons who have not been convicted under §17.1-805 (C). This statute was the General Assembly’s attempt to list all violent felonies for sentencing purposes. It is noteworthy that the General Assembly excluded virtually all drug offenses from this statute, and it is compelling evidence that such offenses should not belong on the violent felony list for purposes of restoration of civil rights.

Moreover, a better list would include all former felons who have not been convicted under §17.1-805 (C) however, with additional exceptions based on important distinctions in the law. The Code separates ordinary burglary in § 18.2-89 as “break[ing] and enter[ing] the dwelling house of another in the nighttime with intent to commit a felony or any larceny therein,” a Class 3 felony, and burglary while armed with a deadly weapon at the time of entry, a Class 2 felony. Based on that distinction, ordinary burglary should be considered non-violent for purposes of restoration of civil rights.

Additionally, the Code also distinguishes between ordinary breaking and entering in § 18.2-90 through § 18.2-92, “break[ing] and enter[ing] a dwelling house while said dwelling is occupied, either in the day or nighttime, with the intent to commit any misdemeanor except assault and battery or trespass,” a Class 6 felony, and breaking and entering while armed with a deadly weapon, a Class 2 felony. The Code also draws the same distinction in § 18.2-90 and § 18.2-91, which cover breaking and entering with intent to commit felonies.


All three breaking and entering offenses are punishable as statutory burglary. Based on these distinctions, however, unarmed breaking and entering with the intent to commit larceny, assault and battery, other felonies, or misdemeanors should be considered non-violent felonies for purposes of restoration of civil rights (§ 18.2-92). Breaking and entering with intent to commit murder, rape, robbery or arson, and breaking and entering while armed with a deadly weapon would remain violent felonies.

Conclusion

The new policy you have announced has great potential to invoke meaningful change in hundreds of thousands of lives if it is implemented broadly. Accordingly, we strongly recommend that you adopt the most inclusive criteria for your new automatic restoration of rights program so it will restore the fundamental right to vote to the most people possible. Without an expansive list of eligible non-violent offenses for restoration of civil rights, disenfranchised Virginians will continue to live as second-class citizens---paying taxes, raising children, and working in our communities without a voice. Additionally, we ask that you ensure that the implementation of the new policy will remove the barriers endured by past applicants such as the cost of attaching certified court documents.

Again, we thank you for your leadership on the issue of restoration of civil rights and the hundreds of thousands of disenfranchised Virginians who may soon be able to exercise their fundamental right to vote. We look forward to the day when we can move beyond the limits imposed by the current language of the Virginia constitution to a time when the right to vote is automatically restored to all persons convicted of felonies immediately upon their release from prison.

Very Truly Yours,



Claire Guthrie Gastañaga
Executive Director

cc: Secretary of the Commonwealth, Janet Vestal Kelly
Deputy Secretary of the Commonwealth, Jennifer B. Aulgur

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