

## **MICHAEL MACKSON, ET. AL. V. UNITED STATES, P-990-06**

### **PETITIONERS' OBSERVATIONS TO THE RESPONSE OF THE UNITED STATES OF AMERICA**

Petitioners allege that the state of New Jersey's long-established practice of prohibiting felons who are on probation and/or parole from voting violates Articles I, II XX and XVII of the American Declaration of the Rights and Duties of Man ("American Declaration"). As previously noted New Jersey state law permits felony disenfranchisement pursuant to New Jersey Statute 19:4-1(8). In its response, the United States asks the Commission to declare the petition inadmissible for failure to exhaust remedies under federal law. Response of the Government of the United States of America to the Inter-American Commission on Human Rights Regarding Petition No.-990-06: Michael Mackson et. al. (April 7, 2010) ("U.S. Resp.") In support of its argument, the United States notes that petitioners have "overlook[ed] recent developments in federal voting rights jurisprudence" and "fundamentally misinterpreted the potential availability of federal remedies under the Voting Rights Act for claims of racial discrimination in felon disenfranchisement laws" U.S. Resp. at pp. 2, 3.

In their petition and Additional Information, petitioners explained how they had properly exhausted all adequate and effective remedies available to them domestically or why pursuing such remedies would have been futile. Nothing the United States elaborates in its response undermines these arguments. At the Commission's request, however, Petitioners will address the specific arguments on exhaustion raised by the Government of the United States and demonstrate that Petitioners have indeed met the requirements of the exhaustion rule.

#### **I. PETITIONERS HAVE EXHAUSTED ALL ADEQUATE AND EFFECTIVE DOMESTIC REMEDIES**

As this Commission has repeatedly observed "[w]hile a number of remedies [may] exist in the legal system of every country, the exhaustion rule does not require the invocation of remedies which are inadequate, ineffective and offer no possibility of success."<sup>1</sup> Thus, a petitioner need not pursue a "claim [that] would have no reasonable prospect of success in light of prevailing jurisprudence of the state's highest courts."<sup>2</sup> As discussed in their initial petition and again in their Additional Information, petitioners meet this standard.

In the United States, litigants may file suit in either state or federal court. Federal (or U.S.) courts have limited jurisdiction, and can hear only certain types of claims. Federal courts can only hear lawsuits that raise issues of federal statutory or constitutional law (also known as federal question jurisdiction). The only other type of lawsuit that federal courts can hear is disputes between citizens of different states --- also known as diversity jurisdiction. Federal courts do not have the authority to hear or interpret state law, unless a litigant argues that state law violates a federal statute or the U.S. Constitution.

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<sup>1</sup> See, IACHR, *Jessica Gonzales v. United States*, Pet. No. 1490-05, Report 52/07 (July 24, 2007).

<sup>2</sup> See, IACHR, *Tracey Lee Housel v. United States*, Pet. No. 129/02, Report 16/04 (February 27, 2004).

Petitioners in this case originally filed a lawsuit in a New Jersey state court. This lawsuit addressed purely issues of state law. Petitioners are African Americans and Latinos who reside in New Jersey, and who were convicted of felony offenses under New Jersey criminal law. All were subsequently released from prison and currently reside in New Jersey. As convicted felons, New Jersey law currently does not allow them to vote.

In a report issued by the New Jersey Attorney General on April 20, 1999, New Jersey has acknowledged its long and ugly history of racial profiling.<sup>3</sup> Indeed, New Jersey was sued by the U.S. government for this invidious practice. Both New Jersey and the U.S. Department of Justice found that New Jersey State police disproportionately targeted persons of color for investigation. This has resulted in a disproportionate number of African Americans and Latinos being prosecuted and subsequently convicted of felony offences.

The individual Petitioners --- joined by organizations that address the legal needs of African Americans and Latinos --- filed a lawsuit in New Jersey state court challenging New Jersey's felony disenfranchisement statute. The lawsuit argued that because African Americans and Latinos are disproportionately convicted of felony offenses because of unlawful racial profiling practices, New Jersey's felon disenfranchisement law has a greater impact on those minority communities. As a consequence of this law, African Americans and Latinos cannot participate as fully as non-minority citizens in New Jersey's political life.

No issues of federal law were raised in the litigation, only New Jersey State law. As such, if the suit had been filed in federal court it would have been subject to immediate dismissal as federal courts would not have had jurisdiction to hear the case.

Petitioners made a conscious strategic decision not to assert any claims under the United States Constitution or the Federal Voting Rights Act. Pursuing such claims would have been futile in the light of prevailing jurisprudence of the highest court in the United States: the U.S. Supreme Court. As previously explained, in *Richardson v. Ramirez*, the U.S. Supreme Court held unequivocally that the 14<sup>th</sup> Amendment to the U.S. Constitution granted to each state the authority to deny the vote to persons with felony convictions.<sup>4</sup> Subsequently, in *Washington v. Davis*, the U.S. Supreme Court denied constitutionally based discrimination claims brought against state entities on the basis of disparate impact.<sup>5</sup>

Thus, the *Richardson* opinion made it impossible for Petitioners in their domestic litigation to challenge felony disenfranchisement laws under the United States Constitution or the federal Voting Rights Act as they would need to have shown that the New Jersey Legislature in passing its disenfranchisement law intentionally set out to undermine the voting rights of the state's racial minority population. It was apparent that Petitioners could not show such invidious intent on the part of New Jersey law makers, and they also had no reason to believe the New Jersey Legislature was so motivated. Thus Petitioners' could rest their discrimination claims solely on a theory of disparate impact; a claim which the Supreme Court in *Washington* had eviscerated.

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<sup>3</sup> Office of the Attorney General of the State of New Jersey, Interim Report of the State Police Review Team Regarding Allegations of Racial Profiling (April 20, 1999), available at [http://www.state.nj.us/lps/intm\\_419.pdf](http://www.state.nj.us/lps/intm_419.pdf).

<sup>4</sup> See, *Richardson v. Ramirez*, 418 U.S. 24 (1972)

<sup>5</sup> See, *Washington v. Davis*, 426 U.S.229 (1976)

Therefore, Petitioners only possible avenue for redress for their claims of discrimination was a legal challenge under New Jersey law, in the hope that New Jersey courts, interpreting New Jersey law, would provide relief unavailable to them under federal law.

As previously explained, New Jersey courts denied Petitioners the relief they sought. On July 12, 2004, the trial court dismissed their suit and on November 2, 2005, the Appellate Division of the New Jersey Superior Court affirmed the dismissal. On March 16, 2006, the New Jersey Supreme Court, the state's highest court, declined to review the lower court's decision, leaving petitioners with no further avenue of redress for their discrimination claims under domestic law. Petitioners have exhausted all adequate and effective remedies and as such, their petition should be deemed admissible.

## **II. THERE IS NO ADEQUATE AND EFFECTIVE REMEDY AVAILABLE TO PETITIONERS UNDER FEDERAL LAW**

The crux of the United States' argument that Petitioners failed to exhaust domestic remedies is that Petitioners potentially had a federal remedy available to them for their discrimination claims under the federal Voting Rights Act yet failed to raise it in their domestic proceedings. As evidence of this potential avenue of redress, the United States argues that there is a split among U.S. court of appeals on whether the Voting Rights Act affords a remedy for discrimination claims premised on a disparate impact theory and because of this split, Petitioners could have raised a federal claim for relief under the Voting Rights Act in New Jersey state or federal courts. U.S. Resp. at 3.

In support of the United States cites to a recent Ninth Circuit Court of Appeal's decision in *Farrakhan v. Gregoire*, and argues that it has created a conflict among federal courts (as noted the First, Second and Eleventh Circuit Courts of Appeals had previously taken a contrary position) concerning the issue of whether state felony disenfranchisement statutes violate federal law and the U.S. Constitution. However, recent developments before the Ninth Circuit in the *Farrakhan* litigation show that there is no such conflict.<sup>6</sup>

On April 28, 2010, the Ninth Circuit Court of Appeals ordered that the decision in *Farrakhan* be reheard *en banc*. Importantly, the Ninth Circuit ordered that the panel opinion in *Farrakhan* cited by the United States "shall not be cited as precedent by or to any court of the Ninth Circuit." Thus, the Ninth Circuit has effectively wiped that opinion from the books, and there is now no conflict among U.S. courts of appeals.<sup>7</sup>

This Commission should also take note of another important development in the *Johnson v. Florida* case where the Eleventh Circuit Court of Appeals had rejected discrimination claims brought under the Voting Rights Act. In 2005, the U.S. Supreme Court declined to review that decision.<sup>8</sup> This is a significant factor in the exhaustion analysis; it means the U.S. Supreme Court has previously considered yet refused to decide the propriety of the very relief sought and denied Petitioners in their domestic proceedings. The Supreme Court's refusal to review the Eleventh Circuit's decision in

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<sup>6</sup> See, *Farrakhan v. Gregoire*, 590 F.3d 989 (9<sup>th</sup> Cir., 2010), *rehearing granted*, No. 06035669.

<sup>7</sup> *Id.*

<sup>8</sup> See, *Johnson v. Governor of the State of Florida*, 405 F.3d 1214 (11<sup>th</sup> Cir.) (*en banc*), *cert. denied sub nom. Johnson v. Bush*, 546 U.S. 1015 (2005).

*Johnson v. Florida* also lets stand all of the other federal appeals court decisions previously cited that took precisely the same position as the Eleventh Circuit. Thus, to date no U.S. court has found a federal claim to exist to vindicate allegations of impermissible racial discrimination based on state felon disenfranchisement laws.

### III. CONCLUSION

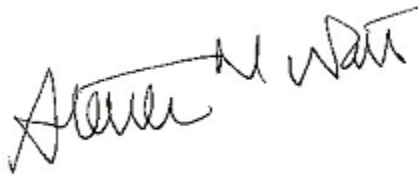
In this submission, their petition and Additional Information, Petitioners conclusively demonstrate that there is no adequate and effective remedy available to them domestically to pursue claims of impermissible racial discrimination as a consequence of felony disenfranchisement laws. United States' assertions aside, there is no conflict among the federal courts of appeals on this issue. All federal courts that have addressed the issue have found that felony disenfranchisement laws do not violate the U.S. Constitution or federal law. All of these holdings are unequivocal. Because federal courts are bound by the U.S. Supreme Court's decision in *Richardson* and *Washington*, if Petitioners had filed a lawsuit in federal court it would have been immediately dismissed. The litigation would have been futile. Accordingly, petitioners did not have to raise federal claims in their domestic litigation to meet the requirements of the exhaustion rule.

Likewise, Petitioners exhausted remedies available to them under state law when New Jersey's highest court refused to hear the Petitioner's case in 2006.

In sum, there is no other effective avenue of redress now available to Petitioners domestically to address the alleged violations of their right to vote, to be free from discrimination in the voting process and their right to rehabilitation, other than recourse before this Commission. Accordingly, this Commission should deem the petition admissible.

**Dated: May 20, 2010**

**Respectfully submitted:**



Steven M. Watt  
Senior Staff Attorney, ACLU Human Rights Program  
Ph: 212.519.7870 Cell: 917.294.8170  
E-mail: [swatt@aclu.org](mailto:swatt@aclu.org)

Professors Frank Askin and Penny Venetis  
Constitutional Litigation Clinic  
Rutgers School of Law  
125 Washington Street  
Newark, NJ 07102  
Ph: 973.353.5687  
E-mail: [faskin@kinoy.rutgers.edu](mailto:faskin@kinoy.rutgers.edu)