

APPEALS COURT WEIGHS RESTORATION OF FELONS' RIGHTS

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ATLANTA --- Yraida Guanipa, a Miami consultant, stood outside the federal appeals court Wednesday morning in downtown Atlanta dressed in a bright orange scarf draped over a smart dark gray suit.

Guanipa has a master's degree and is working on a doctorate, achievements she's garnered since her release from prison in 2006.

Despite her academic successes and the creation of a business devoted to helping other families deal with the stain of incarceration, the shame and pain of the 11 years Guanipa served behind bars for drug-related charges persists.

That's because she can't vote.

Under a Florida process scrutinized Wednesday by a three-judge panel of the 11th U.S. Circuit Court of Appeals, Guanipa is one of hundreds of thousands of felons waiting to have their voting rights restored.

"This is another sentencing that is a timeless sentence," Guanipa, who was born in Venezuela, told The News Service of Florida. "Every time I talk to somebody about I cannot vote, it feels like I'm still incarcerated. It feels like I'm still doing part of the sentence."

Guanipa is among the plaintiffs in a lawsuit challenging the Florida Board of Executive Clemency's process for restoring the right to vote to felons like her who've completed their sentences and paid restitution. Gov. Rick Scott, aided by Attorney General Pam Bondi, initiated the revamped process shortly after taking office in 2011.

Lawyers for the plaintiffs are taking a novel approach to the case. They maintain that Florida's discretionary process violates the First Amendment, despite a dearth of cases anywhere in the country supporting that argument.

"This is a groundbreaking case. No court in the country before the district court in this case had ever ruled that the First Amendment prohibits arbitrary licensing of the right to vote to felons, the way Florida is engaged in its process right now," Jon Sherman, an attorney with the Fair Elections Center, which represents the plaintiffs, told reporters after Wednesday's hearing.

U.S. District Judge Mark Walker found that the state's arbitrary process violates the First Amendment and ordered the clemency board --- made up of Scott and the state Cabinet --- to come up with a set of "specific, neutral criteria" upon which to base their decisions.

But that victory was short-lived, when a separate three-judge panel of the 11th Circuit in April blocked a Walker order that would have required state officials to quickly overhaul Florida's process of restoring felons' rights. That panel decided 2-1 that "binding precedent" gives the governor "broad discretion to grant and deny clemency, even when the applicable regime lacks any standards."

The April ruling, however, did not end the state's appeal of Walker's ruling that the current restoration process is unconstitutional, prompting Wednesday's hearing.

Florida Solicitor General Amit Agarwal told Wednesday's panel --- comprised of Chief Judge Ed Carnes, Judge Elizabeth Branch and U.S. District Judge Darrin Gayles, who serves in Florida's Southern District and was assigned to the appeals court --- the state's clemency process is not facially unconstitutional.

"No case, state or federal, published or unpublished ... has ever held or even implied that clemency decisions or vote-restoration decisions in particular must be made pursuant to specific standards," Agarwal said.

Allowing Walker's decision to stick would have far-reaching "practical implications" ranging from state decisions about clemency to presidential pardons, Agarwal argued.

But Gayles seemed bothered that Florida's system puts it in a small class, joined only by Iowa and Kentucky.

"Would I be correct to say that at least 40 states restore rights automatically" for felons convicted of certain crimes, Gayles said, asking, "How many of the states employ no standards for this important decision?"

"We're not aware of any state that has clemency processes that are directed by neutral, non-discriminatory standards," Agarwal said.

But Gayles said that was because most states automatically restore felons' voting rights after a certain period of time has elapsed and/or certain conditions are met.

And the judge seemed to reject the argument that requiring more specific standards to restore voting rights would infringe on decisions about pardons.

Agarwal conceded "there are legitimate policy concerns" but said those decisions were best left up to "policy-making branches of state government."

The state requires felons to wait five or seven years to apply for rights restoration --- and years after that to complete the process. Since the process went into effect in 2011, the clemency board has restored rights to about 3,000 of the 30,000 felons who've applied, compared to more than 155,000 whose rights were restored under former Gov. Charlie Crist and about 70,000 who regained their voting rights under Crist's predecessor, Jeb Bush.

When asked why a "purely discretionary clemency system" would not violate the Constitution, Agarwal said clemency does not take rights away.

"That problem is caused by the criminal conviction, not by the absence of mercy," the solicitor general said.

That comment bothered Guanipa, who said she understood the case hinges on a constitutional matter.

"But I just wish the court would be a little more human and see the human part of this. It's a timeless sentencing, apart from your sentencing," she ruefully said.

Agarwal urged the panel to side with the state, arguing that “a convicted felon who has lost the right to vote ... does not and cannot have the right to vote under the First Amendment.”

But Sherman said the U.S. Supreme Court has repeatedly ruled that “arbitrary” licensing is unconstitutional.

Carnes appeared unconvinced by Sherman’s arguments, repeatedly interrupting the lawyer and pointing out that there was no basis for his First Amendment theory.

“You’re asking us to be the first court of appeal in the country to hold this?” a skeptical Carnes asked.

“Yes, your honor, that is true,” Sherman said.

And Carnes seemed bothered by the implications on presidential pardons.

“The point is, does the president have to have and follow standards. ... What’s the difference?” he asked.

Sherman said the right to vote would have to be “handled separately” from other rights being granted in a presidential pardon.

Branch, meanwhile, asked if the plaintiffs, who concede that the Constitution doesn’t require Florida to restore voting rights to felons, weren’t running the risk of forcing the state to do away with the clemency process altogether.

Sherman said the state had promised it would not do away with restoration of voting rights and pointed out that just a small number of felons have had their voting rights restored since the new policy went into effect seven years ago.

“You’re willing to throw the next couple of hundred under the bus?” Carnes demanded.

“That’s not our risk assessment,” Sherman replied.

Pressed by Carnes, Sherman refused to identify the criteria the state should use to develop standards he thought would meet constitutional muster.

That line of questioning prompted Branch to explore whether the plaintiffs were actually seeking automatic voter restoration by creating a checklist so someone “could sit in a dark room and start plugging in” data to determine whose rights would be restored.

Sherman said the district court had already rejected an attempt to have Florida adopt an “automatic” restoration of rights system.

“At the end of the day, there’s still unfettered discretion unless we impose automatic restoration,” Branch persisted.

After the hearing, Sherman told reporters a ruling against the plaintiffs would allow the clemency board to adopt “any manner of arbitrary basis for deciding” whether someone would get their voting rights restored.

“If we’re wrong, then the executive clemency board can restore people based on their eye color, their height, whether they’re attractive or not, whether they deem them intelligent or not, whether they’re fluent in English,” Sherman said. “And you would never learn of that, because they can make that determination in their own minds and never say as much, publicly. That’s the real harm in the system.”