STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

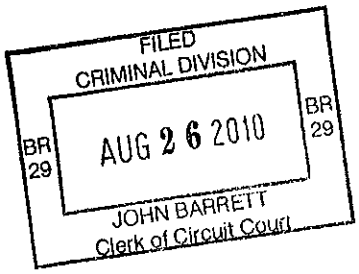
STATE OF WISCONSIN,

Plaintiff,

vs.

MICHAEL S. HENDERSON,

Defendant.



ORDER
Case No. 10CF001101

and

STATE OF WISCONSIN,

Plaintiff,

vs.

OLANDO MACLIN,

Defendant.

ORDER
Case No. 10CF001950

This case comes before the court on the defendants' motions to dismiss. At the hearing on this motion on August 20, 2010, I adjourned the cases to September 9, 2010 at which time I promised to deliver my decision. In the course of mulling over the motions, I have encountered some issues that I believe it prudent to discuss with the parties[1] before deciding the motion. Accordingly, I am ordering that the September 9, 2010 court date be converted to another hearing date and that the parties be prepared to discuss the following issues on the record:

1. At the August 20, 2010 hearing, I was inclined to find that the terms "on

[1] One of the parties in these consolidated cases, Olando Maclin, failed to appear on the last court date and therefore his case is in bench warrant status. However, his case raises the same issues as Mr. Henderson's and he is represented by the same attorney who represents Mr. Henderson. Therefore, I will continue to consider the cases together, in anticipation of Mr. Maclin's return to court.

account of race" found in 42 U.S.C. § 1973(2)(a) were ambiguous, and therefore, in order to discern the meaning of those terms, that it was appropriate to consider the legislative history of the Voting Rights Act. I have been pondering, however, whether those terms disambiguated by subsection (2)(b). Subsection (2)(b) provides:

> A violation of subsection (a) ... is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class or citizens protected by subsection (a) ... in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

2. Is it a correct assessment of *Wesley v. Collins*, 791 F.2d 1255, 1259-61 (6th Cir.1986) that the decision does not hold that the Voting Rights Act was not intended to reach felon disenfranchisement? That although the court ultimately upheld the Tennessee felon disenfranchisement law, it did so only after applying the totality of circumstances test found in section (2)(b)?

3. If in this case the court invites the submission of evidence under the totality of circumstances test, can the court treat the proceeding akin to a summary judgment motion, *i.e.*, a decision as a matter of law based on undisputed facts? If, on the other hand, there is a dispute of fact or reasonable inference from fact, are the defendants entitled to a trial on their Voting Rights Act defense? If so, are they entitled to a jury trial?

4. If the court invites the submission of evidence under the totality of the circumstances test, should the court be persuaded by federal precedent which suggests that evidence (assuming there is such evidence) of a statistical disparity among African-American voters disenfranchised by a felony conviction and other voters so disenfranchised is insufficient by itself to establish a Voting Rights Act violation? *See*

Farrakhan v. Gregoire, 590 F.3d 989, 1011-1012 (9th Cir. 2010), *en banc rehearing granted,* 603 F3d 1072 (9th Cir. 2010), *citing Smith v. Salt River Project Agricultural Improvement and Power District,* 109 F.3d 586, 595 (9th Cir.1997).

5. If the court follows the precedent cited in the previous paragraph, can the defendants make an offer of proof of any evidence that suggests that felon disenfranchisement laws deny the vote to African-Americans on account of race, other than evidence of statistical racial disparities among those convicted of felonies (of which the only evidence presented so far that even comes close is suggested by the incomplete and undocumented contentions of the Sentencing Project set forth at page 44 of the Defense Brief in Chief, filed on June 29, 2010)?

6. If it is the defendants' contention that African-Americans are convicted of felonies disproportionately because they are treated disparately at other stages of the criminal justice process – at, say, search or arrest or charging or pretrial detention or the like – are the defendants prepared to enlist an expert who can conduct the kind of multivariable analysis necessary to demonstrate that these other disparate outcomes are the result of race and not factors independent of race? *See Farrakahn,* 590 F.3d at 1012.

For the foregoing reasons, IT IS FURTHER ORDERED THAT:

1. The September 9, 2010 decision date is converted to a hearing.
2. On September 9, 2010, the court will hear further argument on the issues identified in this order, and any other pertinent issues raised by the parties.
3. If it is inconvenient for counsel to attend in person on September 9, 2010, counsel should contact the clerk and select a more convenient date. Mr. Henderson, however, must appear in person on September 9, 2010 so that

he may be officially informed of the new court date.

4. If the parties wish to submit additional argument or authorities in writing, they must be filed on or before September 7, 2010, or, if an alternative date is selected pursuant to paragraph 3 of this order, then the submissions must be filed no later than 3 business days before the hearing date.

Richard J Sankovitz

Richard J. Sankovitz
Circuit Court Judge

Dated: 8.26.2010