OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-76

TITLE NELL HUNTER, ET AL., ETC., Appellants V.
VICTOR UNDERWOOD AND CARMEN EDWARDS, ETC.

PLACE Washington, D. C.

DATE February 26, 1985

PAGES 1 thru 40

ALDERSON REPORTING

(202) 628-9300

IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - x

NELL HUNTER, ET AL., ETC., :

Appellants :

V. : No. 84-76

VICTOR UNDERWOOD AND :
CARMEN EDWARDS, ETC. :

- - - - - - - - - - - - - - - - x

Washington, D.C.

Tuesday, February 26, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:06 o'clock a.m.

APPEARANCES:

JAMES S. WARD, ESQ., Special Assistant Attorney General of Alabama, Birmingham, Alabama; on behalf of the Appellants.

WILSON EDWARD STILL, JR., ESQ., Birmingham, Alabama; on behalf of the Appellees.

ALDERSON REPORTING COMPANY, INC.
20 F ST., N.W., WASHINGTON, D.C. 20001 (202) 628-9300

CONTENTS

PROCEEDINGS

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Hunter against Underwood, et al.

Mr. Ward, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF JAMES S. WARD, ESQ.

ON BEHALF OF THE APPELLANTS

MR. WARD: Mr. Chief Justice, and may it please the Court:

In May of 1978, Carmen Edward, a Black female, was told that she could not register to vote because she had been convicted of the crime of issuing a worthless check which under state law is one involved moral turpitude. That decision to refuse her her vote was based upon the Constitution of 1901 and Section 182 which allows the disfranchisement of voters for conviction of a crime involving moral turpitude. That specific crime is not on the list.

The statutory offense for which she was committed, issuing a worthless check, did not become a statutory crime until 1971.

So, the justification for his disfranchisement would fit under the provision of the constitutional provision of 1901 which allows disfranchisement for those who commit any crime involving moral turpitude.

A month later in June of 1978, Mrs. Edwards, along with a while male, Mr. Underwood, filed a complaint in the District Court alleging that Section 182 violated various rights guaranteed by the United States Constitution. That complaint was later amended to include five causes of action. Three of the causes of action were disposed of in pre-trial.

The case was tried on the cause of action that specific crimes had been added to Section 182 with the intent to disfranchise blacks and that the statute has had that effect presently.

QUESTION: Mr. Ward, do you know, does any other state than Alabama disinfranchise any category of non-felons?

MR. WARD: Presently?

QUESTION: Yes.

MR. WARD: Your Honor, I do not know. There are non-felons disfranchised for commission of various election offenses which may or may not be a felony. But, I am not aware of any specific state that allows blanketly at least that. I am sure there are some states that allow disfranchisement for misdemeanors depending on how the statute is written. If the state court would define a misdemeanor as being an infamous crime and the provision of law in that state allowed for that to happen, then I think, yes.

The District Court held that there was a failure on the part of the Appellees to show that 182 was passed with the intent to disfranchise blacks and also that even if that had been shown there was a permissible motive for Section 182 and, therefore, under Palmer and Michael M. the statute was allowed to stand.

On Appeal the court below ruled as a matter of law that intent to disfranchise blacks have been shown by the inclusion of the certain crimes, those crimes being misdemeanors and crimes involving moral turpitude and that the Appellants here have failed to prove that there was a permissible motive.

It is the Appellants' contention now before this Court that Section 182 must be viewed and analyzed as it exists now, not as it existed 84 years ago when it was passed.

Today the effect of Section 182 is as follows: The only crimes for which one can be disfranchised in our state are ones involving moral turpitude or which are a felony. No one can be disfranchised for the conviction of a misdemeanor in and of itself. It has to be a misdemeanor involving moral turpitude or a felony. All crimes on the list which do not involve moral turpitude are no longer good crimes in our state. By various court decisions or decision of this Court, they have been stricken. So, you are dealing now with a statute which, as it presently

works, includes within its proscriptions those who have been convicted of a felony or one convicted of a moral turpitude crime and makes no distinction as to whether it is a misdemeanor or not. If the crime involves moral turpitude, that is the disfranchising fractor. That is the occurrence that allows the state to disfranchise, not its punishment as opposed to a felony or a misdemeanor.

We feel it is --

QUESTION: Mr. Ward --

MR. WARD: Yes, Your Honor.

QUESTION: -- do you concede that the statute presently has a discriminatory effect?

MR. WARD: No, ma'am. I would be very blind and naive and try to come up and stand before this Court and say that race was not a factor in the enactment of Section 182; that race did not play a part in the decisions of those people who were at the constitutional convention of 1901 and I won't do that.

My point is that the effect of the statute today could be and probably is based on reasons that are legitimate reasons that the state can consider. If the difference in treatment is the result of those committing moral turpitude crimes or others or a certain class or group committing more felonies than others, then the answer to your question, Your Honor, is the effect or the numbers would not have

anything to do with race.

If crimes were selected because there was proof that more than one group committed those crimes as opposed to another group, the answer to your question may be different. The point is those crimes now viable all involve moral turiptude and to us the issue is whether the state 84 years later can have in operation a provision of law that disfranchises felons and moral turpitude offenders regardless of what the punishment is.

I believe that analysis is consistent with this Court's decisions in some such cases as Doyle, Arlington, and in Davis.

The important factor there was to look at whether there could be a justification for the continued validity of a decision. In all those cases -- In each one of those cases, there is an immediate decision. A decision was made, it was challenged, and the parties knew immediately that that decision would be allowed to continue or would have to stop.

Therefore, the factors that were considered in trying to determine whether that decision was valid or not were all there presently.

In this case, there is a difference. We have the inexorable problem of the passage of time. This Act was not challenged until some 77 years after it was passed

and here it is 84 years later. And, I read nothing in any of those cases, in the Doyle case, in the Arlington case, or Washington versus Davis that says this Court or any court can't consider the present-day factors or the present-day justifications for something in trying to determine whether the state would have a legitimate or valid motive for the passage of the complained of Act.

The Court allows --

MR. WARD: Mr. Ward, I suppose your opposition could make this same argument. I am asking you, I guess. Could they make the same argument with respect to felons as to moral turpitude misdemeanors?

MR. WARD: Your Honor, they do not make it. They say that the state has a right to disfranchise those who commit crimes and are defining crime as a felony.

The way I read this Court's opinion in the Richardson case, there is -- the state would have the authority to disfranchise all felons which this statute does.

The question becomes, well, does the fact that there was a racial motive involved in its passage, although it applies to all felons, would that make a difference. The way I read Richardson it would not; that the second section of the Fourteenth Amendment allows the states to disfranchise felons -- and I am going to argue in a minute, if it please the Court, that it is not limited just to

felons -- but in the Richardson case that the section section of the Fourteenth Amendment could not be -- Excuse me. That the first section of the Fourteenth Amendment could not limit what was affirmatively given to the states by the second.

So, the answer to your question, Your Honor, is no, I don't think they could say that.

QUESTION: Before you get too deeply into your argument, what is a crime of moral turpitude? I mean, where do you look for the definition of that in --

MR. WARD: In our state, Your Honor, you look at several places. The first place you look is to the afforded court decisions. Most crimes which involve moral turpitude in our state are the subject of a court opinion and Appellate Court opinion, either the Court of Criminal Appeals or the Supreme Court, or a subject of opinion from the State Attorney General's office.

The testimony at trial showed that the registrars, in determining whether a crime involved moral turpitude or not, would either consult the Attorney General's opinions, the case law, of if that did not help them, they would seek the advice of the local district attorney or the state's attorney.

QUESTION: There is no one statutory frame of reference such as a list that is --

MR. WARD: No, sir, there is not, although there are cases which put out a list, but there is no list within the statute itself.

QUESTION: Nobody denies that this particular -- that check offense was a moral turpitude crime?

MR. WARD: No, sir, that is agreed upon by everyone.

QUESTION: What about drunken driving just out of curiosity?

MR. WARD: No, sir.

QUESTION: It is not?

MR. WARD: Would not nor can you lose your right to vote for drunken driving.

It is suggested then that if you look at the present state of affairs and the present justifications that Section 182 would be allowed to operate and should not be stricken down.

In saying that I would point out to the Court that it has on other occasions, and I am referring now specifically to the Doyle case, which would involve the case of challenged conduct, First Amendment conduct, asks what is the cause and if the cause is not based on the unconstitutional problem but the cause was based on something else, then the decision should be allowed to stand.

And, in Doyle this Court lists some of those things,

where a confusion is obtained which is invalid. Later on it can be cured by an intervening time, so the cause of the confusion therefore is not what it was when it started. Or if an arrest is made and that arrest is bad and a confession given, things can occur in the meantime where a second confession would be valid and, therefore, the cause of the confession, therefore, would be not be the initial taint.

If it is argued or assumed that there is some taint involved in the initial enactment of Section 182, we say that that taint, if any, has been cured because of, first of all, what the statute now says, and, secondly, because of the interest in the state pursuant to various -- to the Tenth Amendment and to the Fourteenth Amendment to conduct their affairs in this area.

Perhaps stated another way, if North Dakota today or Wyoming passed a law which said that we will disfranchise those that commit moral turpitude crimes, would that be lawful, would that be within the exercise of the Tenth Amendment power or would it not?

The fact that Alabama, the start of Alabama's, the root of Alabama's provision was 84 years ago should not treat that state differently today whereas other states under the same circumstances today could pass it.

QUESTION: Mr. Ward, doesn't that argument

assume -- this is sort of the same thought Justice Blackmun was asking you about -- that there are other states which would pass a statute like this for a non-racial purpose and I don't know if there are any such states.

MR. WARD: Your Honor, I don't either but that is assuming that the state would not have that right. I would feel quite strong in saying that the state would have a right to pass a law, fair on its face, applied in a fair manner that made moral turpitude a difference in whether one would vote; that the Tenth Amendment would give the state that right and the Fourteenth Amendment would.

QUESTION: Do you think they could do it if they defined moral turpitude to include all traffic offenses?

MR. WARD: No, sir. I think --

QUESTION: Why not? You just think they want to insist on obedience of the law, traffic laws are important too.

MR. WARD: Well, they are --

QUESTION: A lot of people are killed on the highways.

MR. WARD: Well, perhaps if that specific finding was made. That, again, is perhaps a decision best left to the states.

The point I am making is that should this state in this case be denuded of the ability to impose restrictions

on the franchise. The way the statute operates today other states would have the right to make those kinds of decisions. I can't predict that if North Dakota did that and if it reached this Court what this Court would do, but it may could and if it could, then I would think that this state, Alabama, would have that same right.

Assuming that, and you must that the state has a right to disfranchise those who commit moral turpitude crimes, one wonders where that authority comes from. It comes first from the Tenth Amendment, that the state has the right and a wide discretion of the rights to set qualifications for voters and to determine who is eligible to vote.

As a matter of fact, in the Lassiter case, which was cited by this Court in the Richardson case, it states specifically that previous criminal record is a fact the state may take into account in determining whether someone is qualified to vote.

We would submit to the Court that that kind of a previous criminal record which included a conviction of a crime involving a moral turpitude type crime would be a factor that the state could take into account and should be able to take into account pursuant to those powers and duties left to it by the Constitution.

If the Court is to say that per se a state does

not have the right to disfranchise those who commit moral turpitude crimes without a showing that there is some other violation of the federal Constitution, they would be destroying in my opinion what the Tenth Amendment says and if the Tenth Amendment allows the states to control these types of matters and they can do so, then the states should be allowed to.

Secondly, this Court's opinion in the Richardson case, as is well know, the second section of the Fourteenth Amendment allows the state to disfranchise for participation in rebellion or other crime. It affirmatively sanctions that and does not put the penalty provision of the rest of the provision on the state if disfranchisement is based on participation of rebellion or other crime.

This Court in reviewing the legislative history of Section 2, I feel, was careful to point out that there was little debate on what this section meant, that the interest of everyone was on another provision and that section means what it says, other crime. Therefore, other crime could include the conviction of crimes other than a felony.

I again turn to Lassiter because the Court in discussing the eventual holding of Richardson was cited Lassiter and specifically cited the language from Lassiter that allows the state to take into account in determining qualifications of voters previous criminal record.

The analysis then is that the Fourteenth Amendment either, one, would allow disfranchisement for other crime and escape the penalties of the first section or that because the Fourteenth Amendment, the second section of the Fourteenth Amendment talks about other crimes, there has been created to the state a special area, a unique area, if you will, in dealing with voting. The importance of saying rebellion or other crime in an amendment that was passed to help protect that very right, that is voting, seems to me to suggest that there is a special area of protection for the states and if the Court was not to accept that other crime means all crimes of any kind, then I would suggest that it would mean that in judging a statute based on the disfranchisement of crimes other than a felony, a lesser standard, a less strict standard that is used in voting cases on a general basis be used; that a strict scrutiny test not be used, but a rational basis test be used.

Now, there are some Appellate Court decision that adopt that view. I could not find any decision from this Court that adopted that view.

We would urge that it would be consistent if the language of Section 2 and the citation to cases which talk about the states being able to decide what the qualifications are for voters and cite a Tenth Amendment case that at least this area, this area of voting has left a little more special

special impact, a little more uniqueness to the states, a little broader latitude, if you will, in dealing with these problems. That is not to say that the first section of the Fourteenth Amendment doesn't apply at all, but it would apply on a less level than a strict scrutiny will.

QUESTION: Why isn't it that you haven't mentioned the Fifteenth Amendment?

MR. WARD: Why, Your Honor?

QUESTION: Yes.

MR. WARD: Well --

QUESTION: It is alleged. It is in the complaint.

MR. WARD: Yes, sir.

QUESTION: It is in the case. Why do you say the First and Fourteenth?

MR. WARD: Well, the argument, Your Honor, would be the same if now the effect of what is happening with Section 182 is on a basis other than race, is on a basis of any other bad attention. I do not see that as being a prohibition of that Amendment.

QUESTION: The Fifteenth Amendment says no discrimination of any kind by anybody. Isn't that what the Fifteenth says?

MR. WARD: I believe it says based on race, does it not, Your Honor?

QUESTION: That is what I mean.

MR. WARD: Okay. But, there could be a discriminatio based on something other than race and not be any problems with that amendment.

What I am saying is that if the difference in treatment here is because of a classification involved with moral turpitude crimes as opposed to race, then the Fifteenth Amendment would not apply.

I agree with Your Honor that if it is shown that the vote is abridged because of race --

QUESTION: I haven't taken any position on that. I just want to know why you have left it out of the argument. Do you agree that the Fifteenth Amendment applies?

MR. WARD: Do I agree that the Fifteenth Amendment --

QUESTION: Yes.

MR. WARD: I didn't hear the last part of your question, sir.

QUESTION: Do you agree that the Fifteenth Amendment controls this case?

MR. WARD: No, sir.

QUESTION: Well, why don't you argue it?

MR. WARD: Well, I argued it, I thought, in that the arguments I do make -- that is if there is a permissible reason for what is happening now with the section that would pass constitutional muster under the Fourteenth or the Fifteent

That because, if you will, of what is happening now is not race, it is something else. It is the interest of the state in disfranchising those who are convicted of moral turpitude crime and, therefore, the Fifteenth Amendment would not be involved.

QUESTION: May I ask you one other question about your approach -- looking at just today's -- what if the evidence showed for the first 30 years or whatever period it might be that the statute or the constitutional provision did abridge the right to vote on account of race and flatly violated the Fifteenth Amendment for the first 20 or 30 years of this effect. Would it be your view that it was invalid during that period and then by reason of passage of time it kind of blossomed into something that became valid? Is that how it goes?

MR. WARD: Your Honor, both the passage of time and changes in the Amendment itself. Section 182 today does not read the same way as it did then. It reads the same way, but there have been crimes taken out of its sphere. Therefore, the crimes that have been taken out of its sphere, plus the passage of time, yes, sir, would allow it to have some effect to that.

QUESTION: Does your analysis in effect acknowledge that it was invalid for a short -- during its original effectiv period or you say we just don't even have to consider that

at all?

MR. WARD: Well, my analysis is I cannot get up here and say race did not play a part in it.

QUESTION: I understand that. But, in your brief you took a little different position. You said that it wasn't invalid originally because it had an additional purpose, to disinfranchise poor whites as well as blacks. I am just wondering whether you -- what is your present position with respect to the validity of this constitutional provision during the first 10 or 15 years of its life? What do you say about that? In your brief you argue it was always constitutional. I don't know whether you are still arguing that or not.

MR. WARD: I would still have to argue that, but I would have to say that again, because of the passage of time, that argument loses some of its strength.

If I may, I would like to reserve -- unless there are questions from the Court -- reserve what time I have left.

QUESTION: Mr. Ward, I did have one more question. The Court of Appeals also indicated, I think in a footnote, that the statute was under-inclusive because sometimes that apparently it would be characterized at least by the Court of Appeals as crimes of moral turpitude are not included such as mailing pornography and so forth. Is that accurate?

MR. WARD: No, ma'am, it is not accurate for two reasons, Your Honor. First of all, that mailing by -- I can't remember, whatever it is, was not even a crime then. It became a crime in 1967.

Secondly, the argument goes we weren't trying to disfranchise all misdemeanors. We are just trying to disfranchise felons and moral turpitude offenders, misdemeanors or not.

So, the under-inclusive argument, to me, does not apply and misunderstands what we are trying to say. We aren't trying to say that the state can select 18 misdemeano and not select 18 others. And, the 18 they did not select were more serious than the ones that they did not.

What we are saying is the threshold question is conviction of a felony or a crime involving moral turpitude and then it is that, the moral part of it which is important, not if the penalty is one day or ten days.

And, I think that analysis for that reason -- the felonies -- if you were to say a statute that disqualifies all felonies, there are some of those which is some states are not serious at all and in some states, of course, are. I think some states, if you pick some wool or something, you can be sent off as a felon. So, the fact that it is all felons, that same argument could apply there, that some felons -- or crimes which are felons are just so unserious

as compared to others it is an under-inclusiveness type thing there.

QUESTION: Could I ask you one other question. You suggest that we should look at the law at it presently stands and that the past is largely irrelevant. What about the finding or the statement, observation of the Court of Appeals, that this discriminatory effect persists today?

MR. WARD: Well, sir, that was based on a finding which was challenged at trial. That finding was based on statistics --

QUESTION: Well, what if I accept it though?

MR. WARD: Sir?

QUESTION: What if that observation of the Court of Appeals is to be accepted?

MR. WARD: That --

QUESTION: Yes. That the law which was passed was a discriminatory intent, had a discriminatory effect and that it still does? What if we accept that? What happens to your argument?

MR. WARD: Well, if you accept that, if it still does have that effect, then I would suggest that there could be shown that there are reasons other than the selection of the crime that causes the effect.

QUESTION: Well, that is a different argument. That is a different argument. I thought your argument had

been that as of today this statute should be accepted as having a neutral non-discriminatory purpose and impact.

MR. WARD: Purpose.

QUESTION: You said if North Dakota or Wyoming or some states who were not involved in those days passed this same statute now, you think it would be sustained.

MR. WARD: Yes, sir.

QUESTION: Well, you think Alabama may continue it if it has a discriminatory impact today?

MR. WARD: Your Honor, if it was passed again in the same manner, if this Court strikes it down and it is passed again in the same manner and it shows it still impacts against blacks, then proof would have to be adduced as to why and I think some things could be shown as to perhaps why. But, that --

QUESTION: Well, should we judge the case on the basis that this observation of the Court of Appeals is correct? Is it supported by the record?

MR. WARD: I don't believe it is, no, sir.

QUESTION: You don't believe it is, but --

MR. WARD: If the state would have the right to disfranchise those who commit crimes involving moral turpitude and that is the reason why there is an impact, then, yes, you could.

QUESTION: Thank you.

CHIEF JUSTICE BURGER: Mr. Still?

ORAL ARGUMENT OF WILSON EDWARD STILL, JR., ESQ.

ON BEHALF OF THE APPELLEES

MR. STILL: Mr. Chief Justice, and may it please the Court:

When John Knox opened the 1901 Constitutional Convention, he stated its purpose very clearly. He said, and what is it we want to do while it is within the limits imposed by the federal Constitution to establish white supremac in this state. He went on to say that they wanted to establish white supremacy by law rather than by force and violence.

Historians, including the two who testified in this case, one for the Plaintiffs and one for the Defendant, are unanimous that the 1901 Alabama Constitution succeeded in meeting this goal of establishing white supremacy by law.

The Appellants' brief even said that the entire Suffrage Article had the intention to disfranchise poor whites as well as blacks.

Suffrage was one of the principal issues of the 1901 Constitutional Convention. Every time the issue came up, the debate centered on the relative effects of a particular provision on blacks and whites or among different groups of whites. There were no delegates at that convention. All of the delegates were white by the way. There were

delegates at that convention who stood up and suggested that blacks should be given a full, free, and equal franchise with whites. Instead, the debate was over how far to take the disfranchisement of blacks and how far to take the disfranchisement of others.

Now --

QUESTION: Mr. Still, do you think that the state is forever bound by that original discriminatory purpose or can the passage of time and circumstances ultimately change that?

MR. STILL: I believe they are bound. In this Court's decision in City of Richmond versus the United States just two years ago the Court said an official action taken for the purposes of discriminating against Negros on account of their race has no legitimacy at all under our Constitution.

And, in the Arlington Heights case, the Court said that racial discrimination is not just another competing consideration. When you find racial discrimination, that should be the judicial deference that goes along with state laws evaporates.

QUESTION: Well, in your view then is the felony disinfrancishement provision equally invalid?

MR. STILL: That whole provision, Section 182, would probably have to be rewritten, but I think we would have to --

QUESTION: Your answer is yes --

MR. STILL: No.

QUESTION: -- that it is also invalid?

MR. STILL: No, because the 1875 Constitution disfranchised the felons, so we would have to compare it against what they had before and go back to the provision that they had previously which would disfranchise felons only and not misdemeanors.

QUESTION: Suppose, Mr. Still, that the 1901 attitudes were a continuation of the Jefferson point of view that only the property class should vote. Is that not a matter of history?

MR. STILL: I believe that was Jefferson's view. But, the 1901 Constitutional Convention had, of course, many view points in it but they were primarily interested in disfranchising blacks. In fact, the Democratic Party had agreed to have the Constitutional Convention on a pledge that they would disfranchise blacks and not whites and they were elected to the Convention on that basis.

QUESTION: The provision with respect to whites in the 1901 Constitution would violate -- Do you think it would violate the Fourteenth Amendment even if it didn't violate the Fifteenth?

MR. STILL: Some of the provisions of the 1901 Constitution as applied to whites have been struck and as

applied to all people. For instance, the poll tax was struck down in Alabama in 1966 in U.S. versus Alabama.

So, there are many provisions of this Constitution that have been struck down on general equal protection, non-racial grounds over the years. The grandfather clause, for instance, which this Court struck down in Keoun verus Oklahoma. There was never any particular case about it in Alabama, but it is invalid under Keoun versus Oklahoma.

QUESTION: Mr. Still, what worries me is suppose the legislature of Alabama tomorrow adopts this same law.

MR. STILL: Well, first of all, I do not believe that the legislature of Alabama would adopt this law. As a matter of fact, they adopted a different constitutional provision.

QUESTION: Would you mind assuming that hypothetical.

MR. STILL: All right. If they adopted this same provision --

QUESTION: That is what worries me in this case.

MR. STILL: Well, the Plaintiffs would still have to show in that kind of situation that the -- whether or not the provision had been adopted for a racially discriminatory purpose and then also they would still be allowed to show whether or not it had a racially discriminatory effect.

QUESTION: I didn't say re-enact. I said enact.

MR. STILL: Well, my answer would be same whether they enact it for the first time or they re-enact it.

QUESTION: You would say that tomorrow Alabama would do it on racial grounds?

MR. STILL: I am saying the Plantiffs would have to prove that.

QUESTION: I am talking about tomorrow.

MR. STILL: It would depend upon the evidence in the case.

QUESTION: What evidence do you have to Alabama doing it today?

MR. STILL: I am not suggesting that Alabama would adopt this provision today. As I said, two years ago they adopted a whole new Constitution or proposed one which did not include this provision.

QUESTION: All I asked is if Alabama does it tomorrow it still will be unconstitutional, is that your answer?

MR. STILL: No, sir. My answer is if Alabama does it tomorrow the Plaintiffs will have to prove the same thing they proved in this case, but I am not predicting what the proof will be because I do not believe that Alabama will adopt this provision based on what they did two years ago. There was a whole new Constitution proposed two years ago which did not include this particular provision and that Constitution has not yet come to a vote of the people

of Alabama because of a technicality with the Alabama Supreme Court who said you can't propose a whole --

QUESTION: So it would be valid?

MR. STILL: No, this --

QUESTION: If it was adopted tomorrow, it would be -- You said they couldn't show it was invalid.

MR. STILL: No, sir.

QUESTION: So, wouldn't that be --

MR. STILL: Your Honor, I have not said that they could not show it was invalid. I have said the Plaintiffs would have to prove that it would be invalid. It is my contention --

QUESTION: Well, they can't prove it is invalid or can they?

MR. STILL: I believe they can prove that it is invalid because of its present continuing effect. Now whether they would be able to prove it still had that intent tomorrow I don't know. It depends on what the evidence shows in the case.

Turning back to 1901 though we know that that had a discriminatory purpose. The author of the provision said I have written this to have a discriminatory purpose. Everyone at the Convention assumed that it did and all historians have agreed that no one disputed that point.

In fact, the Defendants' own expert, the

Appellants' own expert testified that 90 percent of the people who were disfranchised in the first year after the passage of the Constitution for commission of a misdemeanor were black.

QUESTION: Mr. Still, just how much evidence do you think a Plaintiff has to have to make the sort of showing that the Court of Appeals found you have made here? You say that the proponent stated, this was his motive, he wanted to disinfranchise blacks. Now, you know, I don't know how many people there were in the Constitutional Convention, but how much showing do you have to have as to the motivation, say, of at least a majority of the people who voted?

MR. STILL: I think in any type of test that you apply that this situation in Alabama is going to be held to be discriminatory because the racial --

QUESTION: I think that is probably true but that wasn't the question I asked you.

MR. STILL: Well, I do not know how much is necessary. I am simply saying that under any test that has been proposed by any of the Justices of this Court in any of their opinions over the last ten years or so, that this meets the test because there was such a pervasive racial attitude in that Convention that everyone wanted to discriminate against blacks in terms of voting.

QUESTION: But, you wouldn't offer any more general

test than just whatever the test is of this passage which is certainly a permissible point of view.

MR. STILL: I would suggest that. I would suggest that the tests that have been enunciated in Arlington Heights and in Rogers versus Lodge are tests that have been adopted by the majority of this Court and that this would be proven to be discriminatory under either one of those tests.

Actually what we have in this situation though is this Court has identified over the years three different kinds of discriminatory laws. There are the ones that overtly discriminate, say race is a factor such as Brown versus Board of education. Then there is the kind that have been described as an obvious pretext towards discrimination such Yick Wo versus Hopkins or Gomillion versus Lightfoot. And the third type is disproportionate impact on minorities such as Washington versus Davis and Arlington Heights..

This case falls into that second category. This is a Yick Wo type case. Yick Wo was a pretty transparent provision passed by the San Francisco City Council. This is a --

QUESTION: Still I say that there is nothing wrong with the ordinance in Yick Wo.

MR. STILL: Well --

QUESTION: Yick Wo said it was enforced with a discriminatory purpose.

MR. STILL: It was --

QUESTION: And it didn't knock the statute out, it knocked its enforcement out.

MR. STILL: That is right. Well, perhaps I should depend upon Gomillion then which we know was in the statute itself.

QUESTION: Right.

MR. STILL: And, Gomillion is another example of a pretty transparent law. It eliminated practically every black person from the City of Tuskegee and left practically every white person in the City of Tuskegee.

So, this is that same type of obvious pretext for discrimination. In that kind of case, you don't have to spend a lot of time worrying about what test you are going to apply because all you have to do is cut through the pretext and say we know what the decision is.

QUESTION: I know, but can you be sure without the sort of evidence of actual discriminatory intent that you adduce on the part of the sponsor that it is necessarily a pretext? Supposing they had a lot of people getting up on the convention floor and saying I realize the sponsor says this is to disinfranchise blacks. I don't want to disinfranchise blacks but I will regretfully go along with this because I think it is a sound principle to disinfranchise these kinds of misdemeanors.

MR. STILL: If you had that kind of evidence in this case, that would be a contraindication to the evidence that we have, but as one of the expert witnesses said, while the evidence may be circumstantial it all points in the same direction and that is the kind of situation we have here. All of the circumstantial evidence points in the same direction.

Now, the question was asked earlier, what do other states do? Alabama is the only state that disfranchises misdemeanors on the basis of committing a crime of moral turpitude. There are seven states that disfranchise everybody convicted of any crime while they are serving their sentence and, of course, with a misdemeanor that is going to be less than a year. There are five states that disfranchise people convicted of felonies and election laws. There is one state that disfranchises people convicted of election laws only.

Now, Alabama and Mississippi are the only two states that have lists in their Constitution and the lists say here are the crimes that are to be disfranchised. Mississippi's list does not say and crimes of moral turpitude.

Now, the question was also asked, what is a crime of moral turpitude in Alabama? I wish I knew the answer to that. The Supreme Court of Alabama has said it is a crime that is inherently evil and the Attorney General of

the State of Alabama, in giving one of his opinions to a board of registrars, listing all the crimes that had been found to be crimes of moral turpitude, said, well, there may be some other crimes that are moral turpitude, it all depends on the moral standards of the judges who happen to be hearing particular cases.

So, moral turpitude in Alabama is a somewhat fluid concept and I suppose drunk driving offenses could become a crime of moral turpitude if the Alabama Supreme Court decides that they are crimes of moral turpitude.

Mr. Ward and the Appellants have claimed that the affirmative sanction of Section 2 of the Fourteenth Amendment allows them to disfranchise on the basis of misdemeanors of moral turpitude.

What the Fourteenth Amendment says is that the state may disfranchise on the basis of participation in rebellion or other crime. It doesn't say you get to pick and choose among the other crimes or among the people who participate in rebellion.

QUESTION: May I ask one other question about the moral turpitude and the particular offense here which I guess was passing a worthless check. What are the contours of the particular offense here? Is it if you overdraw your bank account, is that --

MR. STILL: If you overdraw your bank account,

if you have a non-sufficient funds check and the merchant sends you the check or sends you a certified letter that says I have got your check for $25, come in here within ten days and clear this up, and you don't respond to the letter, that is considered to be prima facie evidence that you intended to defraud the person, that you intended to give him a worthless check. If you go and clear it up, the case is dropped. Then, of course, you are able to rebut that presumption.

The offense that the two Plaintiffs in this case were convicted of was a first offense. It carries a $100 fine. Even with repeated offenses in Alabama, you can only get, I think, a $400 fine for passing a bad check. You can't even get any jail time under the particular law that they were convicted of.

QUESTION: Is it the opinion of the Attorney General? How do we know it is moral turpitude?

MR. STILL: I believe there is an opinion of the Alabama Supreme Court in this particular case. Usually cases get -- crimes get defined as being crimes of moral turpitude because it comes up in a question about whether a witness is credible or not, so it comes up that way, and it is a collateral attack in effect on the original conviction of the person.

But, most of the time, if a persons seeks to be

registered to vote and the Board of Registrars has some question about it, they will hold the person's registration certificate and write to the Attorney General for an opinion.

There are some interesting anomolies in Alabama's decisions about what is a crime of moral turpitude. For instance, selling untaxed, illegal liquor is not a crime of moral turpitude but selling narcotics is a crime of moral turpitude in Alabama.

And, as I said, driving while intoxicated may become a crime of moral turpitude in Alabama some time soon.

But, the affirmative sanction of Section 2 of the Fourteenth Amendment that the Appellants rely on, as I say, does not allow a state to pick and choose among those crimes and say, well, we are going to disfranchise some people within this category and not others. The Fourteenth Amendment cannot provide a shield to the State of Alabama any more than the Twenty-First Amendment can provide a shield to a state that says we are going to set one drinking age for boys and another drinking age for girls. This Court --

QUESTION: I take it the import of your argument, present argument is that without any consideration of race this statute is invalid.

MR. STILL: Yes. That is another claim that we make.

QUESTION: Because it picks and chooses among almost identical kind.

MR. STILL: That is correct and that particular argument that we made has not yet been ruled upon by the Court of Appeals. That is one of the issues that they have not yet ruled upon.

QUESTION: Are you relying upon it here?

MR. STILL: I rely upon it to the extent that I believe that it may assist the Court in making --

QUESTION: As another ground for affirmance?

MR. STILL: Yes, as another ground for affirmance. But, I also believe that if this Court remanded to the Court of Appeals, they would then have to decide that particular issue.

Now, the Court of Appeals also analyzed the state's reasons for adopting Section 182, the reasons they proffered. They found that those reasons were not supported in the record as being reasons that had actually been considered at the 1901 Convention and they also found them to be insufficient as a matter of law.

Now, the state said we have got a right to disfranchise people who were convicted of crimes of moral turpitude or any type of crime that we want to use and they cite the case of Washington versus State which was decided about a decade and a half before the Constitutional

Convention. They were unable to show the Court of Appeals or the District Court any citation in the records -- We have a verbatim record of the Constitutional Convention -- any place anybody debated the existence, even mentioned the existence of the Washington versus State case. And then also because of this picking and choosing feature the Court held that the state was not using the best means available to meet its particular end.

For instance, in Alabama it is not a crime of moral turpitude to assault a police officer. It is not a crime of moral turpitude to be convicted of second degree manslaughter. Each one of those is a relatively serious offense that is going to get you a lengthy jail term but still a misdemeanor, much more than you can get for passing a bad check for which you can get no jail time at all and yet neither one of those offenses is an offense that will disfranchise one. The Court of Appeals found that because of that that the state's argument about picking and choosing or wanting to disfranchise people who had been convicted of violating the state's laws was not legally valid.

QUESTION: Was it credible?

MR. STILL: Pardon?

QUESTION: Did they say not legally valid?

MR. STILL: I believe they --

QUESTION: On the grounds of discrimination on

the equal protection --

MR. STILL: They rejected it as being an insufficient grounds because they said -- You say you want to disfranchise people who have been convicted of violating your laws, but you leave out a lot of serious offenses and reach down and get people --

QUESTION: So they just said their explanation was not credible?

MR. STILL: They said the explanation was not credible. They said there also was no evidence to support that anybody had even discussed that idea. Instead, all of this discussion, I reiterate, in the 1901 Convention about the suffrage article was about the racial effect of those provisions. There were discussions about how many blacks and how many whites it would disfranchise. They ended up with a package of laws which were obviously to disfranchise as many blacks as possible and to leave as many whites as possible on the voting rolls.

They put this provision, Section 182, in specifically because the list of crimes was a list of crimes that the sponsor had determined to be ones that blacks committed more often than whites.

For these reasons we believe that the Court of Appeals' judgment ought to be affirmed in this case. I would point out that the remand of the case from the Court of

Appeals has already taken place to the District Court and the District Court has already entered a final order. And, the class of Plaintiffs in this case, many of them have already gone down and sought to be reinfranchised. I believe that this Court should not interfere with the judgment of the Court of Appeals and should affirm it.

QUESTION: What was the effect of the Court of Appeals' judgment, that this particular provision is just invalid on its face?

MR. STILL: They declared it to be invalid as applied to misdemeanors.

QUESTION: Both blacks and whites?

MR. STILL: Yes, as to both blacks and whites.

QUESTION: Why do the whites get the benefit of it?

MR. STILL: Well, because the provision is --

QUESTION: You say what you are relying on is that the purpose of it was to discriminate against blacks.

MR. STILL: In all other cases that I know of where a court has invalidated a law on the basis that it was infected with a racially discriminatory purpose and it also had some effect on whites as well as on blacks. They have just struck down the law. They have not said let's have different laws for whites and blacks.

So, I think what they did in this case was consistent

with what this Court and other courts have done in the past.

The effect of the Court's decision was to remand the case to the District Court with instructions to enter a judgment and the District Court did so within a couple of months.

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Ward? You have three minutes remaining.

ORAL ARGUMENT OF JAMES S. WARD, ESQ.

ON BEHALF OF THE APPELLANTS -- REBUTTAL

MR. WARD: Justice Stevens, I have the citation to that case if you would like it, sir, to the state decision that defines this offense as one involving moral turpitude.

QUESTION: Yes.

MR. WARD: If you would like it, I have it. It is Irwin versus the State, 203 Southern Second, 283.

QUESTION: Thank you.

MR. WARD: Yes, sir. Unless there are any questions, I -- Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

(Whereupon, at 11:01 a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-76 - NELL HUNTER, ET AL., ETC., Appellants V. VICTOR UNDERWOOD AND CARMEN EDWARDS, ETC.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)