

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

RICHARD GOODEN, et al.,)	
)	
Plaintiffs,)	
)	
VS.)	CASE NO.: 2:05-CV-02562-wma
)	
NANCY WORLEY, etc., et al.,)	
)	
Defendants.)	

**RESPONSIVE BRIEF OF DEFENDANTS ANITA GIBSON, WALTER LONG, AND
MOLLY MEADOWS (BOARD OF REGISTRARS
FOR HOUSTON COUNTY, ALABAMA)**

COME NOW Defendants Anita Gibson, Walter Long, and Molly Meadows, in their official capacities as Houston County Voter Registrars, to submit this response to “Plaintiffs’ Section 5 Enforcement Action Brief” filed with the Clerk of this Court on April 7, 2006.

INTRODUCTION

As acknowledged by the Plaintiffs in their principal brief, this Court’s inquiry should ultimately be focused on whether these Defendants effected a change in voting procedures and whether any change had been pre-cleared by the U.S. Justice Department. Defendants should prevail on these issues should the Court reach them. The threshold inquiry, however, in this case as in every case brought before courts of limited jurisdiction, is whether the court has jurisdiction to hear the case. Because Plaintiff does not have standing to assert this action and his claim is furthermore not ripe for consideration, this Court lacks jurisdiction under Article III, Section 2 of the United States Constitution because Plaintiffs have not presented a case in controversy.

Although Plaintiffs eschew the need to prove adverse minority impact of the challenged practices, they nonetheless cannot resist dredging up Alabama’s sorry history of denying voting

rights to minority citizens. While that history is certainly part of the story, it does not tell the whole story because it omits the most recent and thereby most relevant chapters. By the late 1960's, only a few years removed from Selma's "Bloody Sunday," Greene County, Alabama had registered enough black voters to become the first county in the nation to elect a black probate judge. Steady improvements were made to the point that, by, 2001 there were 756 black elected officials serving in all levels of local and state government in Alabama. See "Black Elected Officials: A 2001 Statistical Summary," Joint Center for Political and Economic Studies, Washington, D.C. In that year, Alabama was second to only one other state, Mississippi (with 892 black elected officials), in the number of its elected officials who were black. Ibid. Those numbers translate into black elected officials accounting for 17.2% of all elected officials in Alabama. Ibid. This percentage is remarkable especially considering the fact that in the state with the fourth highest number of black officials, Illinois (with 624 black elected officials), black elected officials made up only 1.5 % of all elected officials. Ibid. Significantly, of the total number of black elected officials in the United States (9,101), Alabama had 8.3% of that total.

Today, Alabama has 35 state legislators which accounts for 23.5 percent of Alabama's legislative delegation. Those 35 members are almost three times the national average for states in this country (605 black legislators in all the states, an average of 12.1 per state). See Joint Center for Political and Economic Studies, Washington, D.C., 2006. Similarly, black county commissioners make up 23.9 percent of all county commissioners in Alabama. These percentages reflect almost exactly the percentage of black voters in Alabama¹, 24.09% of all active registered voters according to the Alabama Secretary of State's website².

¹ As of 2004, Blacks made up 26% of the total population of Alabama. See U.S. Census Bureau website, Alabama Fact Sheet, 2004 American Community Survey.

²See Alabama Secretary of State's website, <http://www.sos.state.al.us/downloads/dl3.cfm?trgturl=election/vr/ALVR-2006.xls&trgtfile=ALVR-2006.xls>, 1 April 2006.

According to the most recent information made available by the Alabama Democratic Conference, Alabama has a total of 870 black elected public office-holders including (in addition to the legislator and county commissioners listed above) one district attorney, eleven circuit judges, seven district judges, five probate judges, eight sheriffs, twenty-five constables, ten circuit clerks, six tax assessors, five tax collectors, three revenue commissioners, 126 local school board members, one school board superintendent, seven coroners and 484 city council members. (Table One-Number of Black Elected Official in Alabama, Compiled by the Alabama Democratic Conference).

Again, these facts have little to do with the issues before the Court today, but they are submitted only to rebut the “factual background” submitted by the Plaintiffs in an obvious effort to prejudice the Court in deciding the issues which are rightly before the Court. Defendants seek only to balance the impression left by Plaintiffs’ brief.

ARGUMENT

I. PLAINTIFF EKEYESTO DOSS LACKS STANDING TO BRING THIS ACTION AGAINST THE HOUSTON COUNTY, ALABAMA DEFENDANTS.

Prior to determining the merits of a case, the court must consider whether the plaintiff has standing to bring the matter to the court for adjudication. The United States Supreme Court stated: “In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” Warth v. Sledin, 422 U.S. 490, 498 (1975).

In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a ‘case or controversy’ between himself and the defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the court to entertain the suit. As an aspect of justiciability, the standing question is whether the plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf. The Art. III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the court’s judgment may

benefit others collaterally. A federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action .

Warth, 422 U.S. at 698-499.

To satisfy standing requirements, a plaintiff must show the following:

(1) [he] has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 528 U.S. 167, 180-181 (2000).

At a minimum a plaintiff must show that he personally suffered some actual or threatened injury.

Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 472 (1982).

In the instant case, Plaintiff Doss has failed to establish his own standing to challenge the alleged practice of denying all felons the right to vote because (1) Doss has been convicted of at least one felony of moral turpitude; and (2) Even if Doss had not been convicted of such felony, he failed to challenge the Board of Registrars' purging of his name from the voting rolls pursuant to pre-cleared procedures designed for such a challenge in Ala. Code § 17-4-124. Because Doss lacks standing to bring this action, this Court lacks jurisdiction and the matter is due to be dismissed.

A. Doss has been convicted of at least one felony of moral turpitude.

The parties have stipulated to the fact that Plaintiff Doss of Houston County has been convicted of at least two crimes. *See* Stipulation of Facts, p. 2, ¶ 7. Those convictions were for felony possession of marijuana in violation of Ala. Code § 13A-12-213 and Theft of Property II in violation of Ala. Code § 13A-08-04. Based on these stipulations, Plaintiff Doss has been convicted of at least one felony involving a crime of moral turpitude. Defendants use the term "at least one" due to the ambiguity of Ala. Code § 13A-12-213. It is conceivable that Doss's

conviction under this section amounted to one of moral turpitude despite the description of the crime as “unlawful possession.” Subsection (1) of Section (a) provides that “[a] person commits the crime of unlawful possession of marihuana in the first degree if, except as otherwise authorized: he possesses marijuana for *other than personal use*.” The possibility that Doss was charged with the possession of marijuana for purposes “other than personal use” takes Doss’s crime out of one easily characterized as non-moral turpitude, i.e., *mere* possession of marijuana (see Neary v. State, 469 So. 2d 1321 (Ala. Crim. App. 1985) and moves it, arguably, toward crimes that have been held to be ones of moral turpitude. See Ex parte McIntosh, 443 So. 2d 1283, 1286 (Ala. 1993) (listing possession of marijuana for resale as a crime of moral turpitude).

Nonetheless, even if the ambiguity in Ala. Code § 13A-12-213 could be cleared up in a manner favorably to Doss, his conviction of Theft of Property II is, without question, a felony conviction involving a crime of moral turpitude. Theft of property, according to Alabama law, is a Class C felony. See Subsection (b) of § 13A-8-4. Having established that Doss’s conviction is a felony, the only question remaining is whether the crime was one of moral turpitude. That question was answered in the affirmative by the Alabama Supreme Court in Ex parte Bankhead, 585 So. 2d 112, 122 (Ala. 1991): “Larceny, now known in our Code as theft “petit or grand, is a crime of moral turpitude” See also Marshall v. State, 629 So. 2d 766, 767 (Ala. Crim. App. 1993)(quoting Bankhead); Germany v. State, 630 So. 2d 132, 135 (Ala. Crim. App. 1993) (observing that “she also admitted prior convictions for theft of property and for check fraud, both of which were crimes involving moral turpitude.”)

Plaintiff Doss may contend that since his conviction for Theft of Property II was prosecuted under Alabama’s Youthful Offender Act, the conviction cannot be used to disenfranchise him pursuant to Ala. Code § 15-19-7(a), which provides, in part, that “[n]o determination under the provisions of this chapter shall disqualify any youth for public office or

public employment, operate as a forfeiture of any right or privilege or make him ineligible to receive any license granted by public authority, and such determination shall not be deemed a conviction of crime.” Any advantage that Doss might have obtained under the first two clauses of § 15-19-7(a) was lost by operation of the final clause of § 15-19-7(a) when he was convicted of felony possession of marijuana. The final clause of § 15-19-7(a) adds the following caveat: “Provided, however, that if he is subsequently convicted of crime, the prior adjudication as youthful offender shall be considered.” In other words, Doss’s subsequent conviction of marijuana possession revived the consequences of his theft of property conviction and mandated that the theft of property conviction “be considered” as a forfeiture of his right to vote under Alabama law.

Consequently, since Plaintiff Doss has committed at least one felony involving a crime of moral turpitude, his name was properly purged from the voting rolls of Houston County by the Houston County Board of Registrars. Doss has no standing to assert a claim that voting practices in Houston County disenfranchised all felons, and not just felons who had committed crimes of moral turpitude, were not properly pre-cleared. Doss would not have been entitled to vote under either scenario.

B. Doss failed to challenge the purging of his name from Houston County’s voting rolls as required by pre-cleared statutory requirements.

According to Ala. Code § 17-4-124 (whose procedures were pre-cleared by the Justice Department), those voters denied registration are given a right of appeal to the circuit courts of Alabama. According to the stipulated facts, Doss never effected an appeal to the Circuit Court of Houston County. *See* Stipulation of Facts, ¶ 61. Nor did Doss respond to the certified letter sent him by the Houston Board of Registrars informing him that he could appear at the Board’s office to contest the removal of his name from the voting rolls. Because Doss failed to pursue either of these alternatives, his claim for relief under Section 5 of the Voting Rights Act is not ripe. *See*

American Energy Solutions, Inc. v. Alabama Power Company, 16 F.Supp.2d 1346, 1354 n. 8 (M.D. Ala. 1998) (explaining any overlap between standing and ripeness). *See also* Hallandale Professional Fire Fighters Local 2238 v. City of Hallandale, 928 F.2d 756, 760 (11th Cir. 1991).

To the extent that 42 U.S.C. § 1971 eliminates the necessity for exercise of this judicial remedy, § 1971 contravenes Article III, § 2 of the United States Constitution and its requirement of an actual case or controversy before Article III jurisdiction attaches. *See* Verlinden v. Central Bank of Nigeria, 451 U.S. 480, 491, 103 S.Ct. 1962, 1970 (1993) (observing that “[t]his Court’s cases firmly establish that Congress may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution.”)

C. **Under the current practice of Houston County’s Board of Registrars, Doss lacks standing to obtain injunctive relief.**

According to the United States Supreme Court, “[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.” O’Shea v. Littleton, 414 U.S. 488, 495-96 (1974).

In City of Los Angeles v. Lyons, the plaintiff alleged that he had been subjected to a chokehold by arresting officers in violation of his federally protected rights. 461 U.S. 95, 97 (1983). The plaintiff sought an injunction barring the future use of police chokeholds. Id. 461 U.S. at 98. After the Ninth Circuit affirmed the district court’s grant of a preliminary injunction, the United States Supreme Court reversed, holding that the plaintiff lacked standing. Id. 461 U.S. at 99-100. The Court stated that the plaintiff’s standing rested solely on pure speculation that he *might* be stopped by the police, *might* be arrested, and *might* be subjected to another chokehold. Id. 461 U.S. at 108. The court noted that five months elapsed between the choking incident and the filing of the complaint and the plaintiff was not subjected to another chokehold. Id.

Here, any basis for injunctive relief is equally speculative. Because of the change in

Houston County's practice, it is unlikely that Doss (assuming he either has no felony convictions of crimes involving moral turpitude or has had his civil rights restored) could show he would attempt registration again and then be denied again using a non-precleared or new voting procedure. Such speculation into future conduct does not lay the foundation for establishment of Plaintiff Doss' standing. Lyons, 461 U.S. at 108.

II. THIS COURT SHOULD ABSTAIN FROM EXERCISING JURISDICTION OVER DOSS'S CLAIM UNTIL STATE LAW REMEDIES HAVE BEEN EXHAUSTED.

Registration applicants like Doss who considered their right to vote improperly denied because of a felony conviction not involving moral turpitude had an effective means for obtaining redress through the state's own legal process. Defendants assume that Plaintiffs will contend that 42 U.S.C. § 1971 obviates the need to pursue those means of redress. Defendants disagree and challenge that position above. However, even if Plaintiffs succeed in their argument that their standing is reinforced per § 1971, that does not mean the wisest course for this Court would not be to exercise abstention. Federal courts have made a distinction between exhaustion and abstention. In U.S. v. State of Tex., 430 F.Supp. 920 (D.C. Tex. 1977), a voting rights case, the district court explained that basis for that distinction:

Although U. S. v. Wood, supra, makes clear that state remedies need not be exhausted to bring a suit under 42 U.S.C. s 1971, it in no way holds or indicates that where there is an unsettled question of state law that might obviate the need for adjudicating federal constitutional claims a federal court might not postpone deciding the federal issues pending a resolution in state court of the state issues. It must be recognized that abstention and exhaustion of state remedies are distinct doctrines serving different purposes. Exhaustion of state remedies is required in certain classes of cases in order to give the state courts as a matter of comity the opportunity to make the initial determination as to all claims, federal or state, raised in those cases. Pullman abstention, on the other hand, is required not simply because a state remedy is available, but because there is an uncertain question of state law which the state courts are better able to resolve and which may make a constitutional adjudication unnecessary.

430 F. Supp. at 930. In a case involving the provision of medical services to aliens who were not legal residents of the United States, another Federal District Court followed this principle, stating

that where “clarity and unambiguity as to the effect and purpose of the state constitutional and statutory provisions is lacking” abstention by a federal court is appropriate. Ibarra v. Bexar County Hospital Dist., 86 F.R.D. 346, 349-50 (D.C. Tex. 1979), cited in Rousell v. St. James Parish School Bd., Not Reported in F.Supp., 1988 WL 59863 (E.D. La. 1988).

In the instant case, not only does state law provide a means of resolving this matter, but one of the Plaintiffs, Gooden, actually used the process in a state court action, filed on his behalf “and all those similarly situated” on September 29, 2005. The next day, in accordance with the state procedure for determining whether Gooden had been convicted of a felony involving moral turpitude, the Jefferson County Circuit Court restored his right to vote. In December of 2005, Plaintiff Doss intervened in that very same state court action.

Therefore, not only is there available to Plaintiff Doss a procedure under state law for him to have his voting rights restored if he in fact has not been convicted of a felony involving moral turpitude, but also he is presently a Plaintiff in a pending state court action that could result in that very remedy. The fact that a case that could resolve the question according to state law is presently pending in state court highlights the need for comity in this federal action. Also, there is a difference between federal law and state law as to what crimes are felonies involving moral turpitude and those that are not. Huffman v. State, 706 So. 2d 808 (Ala. Crim. App. 1997) (holding that even after Alabama adopted Rules of Evidence modeled after the Federal Rules of Evidence, larceny conviction is a crime of moral turpitude). There is also the question of what effect youthful offender status had upon Plaintiff Doss’s felony theft conviction in the context of his right to vote. Ala. Code 1975 § 15-9-7. Therefore, in addition to the fact that this matter could be resolved by the state court process, there is also “an uncertain question of state law which the state courts are better able to resolve.” 430 F.Supp. at 930.

III. THE PRACTICE OF THE HOUSTON COUNTY BOARD OF REGISTRARS CHALLENGED DID NOT AMOUNT TO A “CHANGE” IN VOTING PROCEDURES AND, EVEN IF DEEMED A CHANGE, THE PRACTICE WAS PRE-CLEARED.

The Houston County Defendants adopt and incorporate the legal arguments contained in the responsive brief filed on behalf of Alabama Secretary of State Nancy Worley with respect to the question of whether certain policies of the local registrars amounted to a “change” in voting practices within the meaning of Section 5 of the Voting Rights Act and, if so, whether the change had been pre-cleared.

IV. DOSS’S REQUEST FOR INJUNCTIVE RELIEF IS MOOT.

Since the current practice of Houston County is designed to better differentiate between those applicants having merely felony convictions and those applicants having felony convictions involving crimes of moral turpitude, Doss’s request for injunctive relief with respect to the Houston County Board of Registrars is moot. The changes sought by Plaintiff Doss have effectively been implemented already and are currently in practice at the Houston County Board of Registrars. Consequently, Plaintiff Doss’s request for injunctive relief is moot, and the action with respect to the Houston County Board of Registrars is due to be dismissed. *See National Advertising Co. v. City of Miami, 402 F.3d 1329, 1332 (11th Cir. 2005).*

Conclusion

Based on the foregoing, Defendants Anita Gibson, Walter Long, and Molly Meadows, in their official capacities as Houston County Voter Registrars, oppose the relief sought by Plaintiff Doss and move that summary judgment be granted pursuant to Rule 56 of the Federal Rules of Civil Procedure striking all claims against these Defendants. A motion for summary judgment shall be filed with the Court under separate cover.

Respectfully submitted on this the 21st day of April, 2006.

s/Bart Gregory Harmon

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CERTIFICATE OF SERVICE

I certify that on **April 21, 2006** I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: **Edward Still, Esq. [Edward Still, Esq. still@votelaw.com], Norman J. Chachkin, Esq. [nchachkin@naacpldf.org], Margaret L. Fleming, Esq. [m Fleming@ago.state.al.us], and John J. Park, Jr., Esq. [jpark@ago.state.al.us]**, and I hereby certify that I have mailed by the United States Postal Service the document to the following non-CM/ECF participants:

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