

No. 05-

In the Supreme Court of the United States

MARYLAND STATE BOARD OF ELECTIONS
ET AL., PETITIONERS,

v.

JEFFREY COOLIDGE,
RESPONDENT.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

RECORD
AMERICAN CONSTITUTION SOCIETY
MOOT COURT COMPETITION

QUESTIONS PRESENTED

1. Is a statutory provision that permanently denies the right to vote only to persons who have committed a second or subsequent violent felony a voting qualification or prerequisite subject to § 2 of the Voting Rights Act, 42 U.S.C. § 1973, because it results in a denial of the right to vote on account of race?
2. Is Maryland's disfranchisement of a violent felon, predicated on his prior conviction of an infamous crime, a cruel and unusual punishment in violation of the Eighth Amendment?

(ORDER LIST: 546 U.S.)

Friday, October 14, 2005

CERTIORARI GRANTED

05-1207 MARYLAND STATE BOARD OF ELECTIONS, ET AL.,
V. JEFFREY COOLIDGE.

The petition for a writ of certiorari is granted on Questions 1 and 2 as presented by the petition. The briefs of the parties, not to exceed 30 pages, are to be filed with the Clerk and served upon opposing counsel on or before 8 p.m., Friday, January 23, 2006. No reply briefs are permitted. The case is set for oral argument on Saturday, March 4, 2006, at 10 a.m., and a total of 40 minutes is allotted for oral argument.

STIPULATIONS

1. All documents contained in the Record are to be used for Moot Court purposes only. They are not to be cited or used as a reference in any other context.
2. The two Questions Presented are the two issues on appeal.
3. **No other issues are presented in this appeal.** In particular, the parties will not argue standing, jurisdiction, or ripeness.
4. Competitors should note the procedural posture of the case. They should take care to argue only matters appropriately before the Supreme Court at this stage.
5. The facts and statistics presented in the Complaint are entirely fictional. Competitors should not do research to confirm, refute, or supplement them.
6. All statutory and case law of the State of Maryland cited within this Record is true and accurate to the best of the authors' knowledge as of October 14, 2005. However, the Opinion of the Attorney General, construing "second or subsequent" crime of violence, is fictional. Competitor may cite to it as Record at 42-44. Competitors may research Maryland law further.
7. Competitors may not read, consult, or cite any law review article, journal article, or judicial opinion published after October 14, 2005.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

FEDERAL

U.S. Const. amend. VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. But when the right to vote at any election...is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced...

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XV.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude

—

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

Voting Rights Act of 1965, 42 U.S.C. § 1973

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of 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 of 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Civil Rights Act of 1871, 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable...

STATE OF MARYLAND

Md. Const. art. I, § 4.

The General Assembly by law may regulate or prohibit the right to vote of a person convicted of infamous or other serious crime or under care or guardianship for mental disability.

Md. Code Ann., Election Law § 3-102 (Bender 2005)

(b) Exceptions.- An individual is not qualified to be a registered voter if the individual:

- (1) has been convicted of theft or other infamous crime, unless the individual:
 - (i) has been pardoned; or
 - (ii) 1. in connection with a first conviction, has completed the court-ordered sentence imposed for the conviction, including probation, parole, community service, restitutions, and fines; or
 2. in connection with a subsequent conviction, has completed the court-ordered sentence imposed for the conviction, including probation, parole, community service, restitutions, and fines, and at least 3 years have elapsed since the completion of the court--ordered sentence imposed for the conviction, including probation, parole, community service, restitutions, and fines;
- (2) is under guardianship for mental disability; or
- (3) has been convicted of buying or selling votes.

(c) Same-Second or subsequent crime of violence- Notwithstanding subsection (b) of this section, an individual is not qualified to be a registered voter if the individual has been convicted of a second or subsequent crime of violence, as defined in § 14-101 of the *Criminal Law Article*.

Md. Code Ann., Criminal Law § 14-101(a) (Bender 2005)

“Crime of violence” defined. ---- In this section, "crime of violence" means:

- (1) abduction; (2) arson in the first degree; (3) kidnapping;
- (4) manslaughter, except involuntary manslaughter; (5) mayhem;
- (6) maiming, as previously proscribed under former Article 27, §§ 385 and 386 of the Code;
- (7) murder; (8) rape; (9) robbery under § 3--402 or § 3--403 of this article;
- (10) carjacking; (11) armed carjacking; (12) sexual offense in the first degree;
- (13) sexual offense in the second degree; (14) use of a handgun in the commission of a felony or other crime of violence;
- (15) an attempt to commit any of the crimes described in items (1) through (14) of this subsection;
- (16) assault in the first degree; (17) assault with intent to murder;
- (18) assault with intent to rape; (19) assault with intent to rob;
- (20) assault with intent to commit a sexual offense in the first degree; and (21) assault with intent to commit a sexual offense in the second degree.

See appendices A and B for interpretations of § 3-102. App. A represents current practice in Maryland, but it is a fictional opinion.

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

JEFFREY COOLIDGE

3 Clinton Street, #26
Baltimore, MD

Plaintiff,

v.

MARYLAND STATE

BOARD OF ELECTIONS

151 West Street, Suite 200
Annapolis, MD 21401;

JANET FALLINS,

STATE ADMINISTRATOR OF ELECTIONS

151 West Street, Suite 200
Annapolis, MD 21401;

BOARD OF ELECTIONS OF

THE CITY OF BALTIMORE

Charles L. Benton Bldg., Room 129
417 E. Fayette Street
Baltimore MD 21202-3432

EDWARD D. JONES,

ELECTION DIRECTOR

Charles L. Benton Bldg., Room 129
417 E. Fayette Street
Baltimore MD 21202-3432

Defendants.

COMPLAINT

INTRODUCTION

1. Plaintiff Jeffrey Coolidge (hereinafter “Coolidge”) hereby brings an action against defendants Maryland State Board of Elections (hereinafter “State Board”); Janet Fallins (hereinafter “Fallins”), the State Administrator of Elections, in her official capacity; the Board of Elections of the City of Baltimore (hereinafter “City Board”); and Edward D. Jones (hereinafter “Jones”), its Election Director, in his official capacity, seeking declaratory and injunctive relief pursuant to 42 U.S.C. § 1983, U.S. Const. amend. VIII, 42 U.S.C. § 1973, and U.S. Const. amends. XIV and XV.
2. By and through his undersigned attorneys, for his complaint herein, Coolidge alleges as follows:

JURISDICTION AND VENUE

3. This court has subject matter jurisdiction under 28 U.S.C. § 1331, as this action arises under the Civil Rights Act, 42 U.S.C. § 1983; § 2 of the Voting Rights Act, 42 U.S.C. § 1973; and the United States Constitution.
4. Venue is proper because all defendants reside and are found within this District, within the contemplation of 28 U.S.C. § 1391(b).

PARTIES

5. Plaintiff Coolidge is an individual resident and citizen of Baltimore, Maryland. He resides at 3 Clinton Street, #26, Baltimore, Maryland.
6. Defendant State Board is an agency of the State of Maryland with its principal offices at 151 West Street, Suite 200, Annapolis, Maryland. It is charged under Maryland law to supervise elections conducted in Maryland, ensure compliance with the requirements of

state and federal election laws, and certify the results of elections within the State.

7. Defendant Fallins is the State Administrator of Elections, charged under Maryland law with supervising the operations of local boards of elections and performing other duties delegated to the State. She is the chief election official for the State of Maryland. Fallins is a defendant in her official capacity.
8. Defendant City Board is an agency of the City of Baltimore with its principal offices at Charles L. Benton Bldg., Room 129, 417 E. Fayette Street, Baltimore, Maryland. It is charged under Maryland law to conduct federal, state, and municipal elections in the City of Baltimore, under the supervision of State Board.
9. Defendant Jones is the Election Director of the City of Baltimore. He manages the operations of City Board and is the chief election official of the City of Baltimore. Jones is a defendant in his official capacity.

FACTUAL BACKGROUND

PLAINTIFF'S CONVICTION AND DISFRANCHISEMENT

10. Plaintiff Coolidge is presently 42 years old. He has been a resident of Baltimore since he was born. Coolidge identifies himself as African American.
11. In 1982, when he was 19 years old, Coolidge was apprehended in Pikesville, Maryland, by Baltimore County police who were investigating reports of a robbery by an African-American man of similar build. Two policemen stopped Coolidge while he was driving his car on city streets. In searching him, they found 10 grams of cocaine.
12. Coolidge was never charged in relation to the reported robbery, nor was any suspect ever charged. Coolidge was indicted for possession with intent to distribute a controlled

substance. He was convicted by a jury comprising one African-American and eleven white members and sentenced to one year in prison and one year of probation. Under Maryland law, this crime was an infamous crime within the contemplation of what is now Md. Code Ann., Election Law § 3-102(b) (Bender 2005).

13. Coolidge served his sentence at Baltimore City Correctional Center. He was released from prison in 1984. During his probationary period, he was apprehended by Baltimore City police, who found 1 gram of cocaine in his possession. He was indicted and convicted for misdemeanor possession of a controlled substance and received a sentence of six months in jail. Under Maryland law, this crime was not an infamous crime.
14. Upon his release in 1985, Coolidge underwent treatment for addiction to cocaine. He successfully completed treatment after two years and resumed residence in Baltimore.
15. Coolidge registered as a voter for the first time in 1992. He registered as a resident of Baltimore City and voted in the 1992 Presidential election. He also voted in the 1996 and 2000 Presidential elections.
16. In April 2004, Coolidge entered a convenience store in Baltimore and purchased a newspaper. When the clerk opened the cash register, Coolidge demanded all the cash in the drawer. He threatened to assault the clerk if she did not deliver the cash, but he did not display a weapon. He took \$150 from the clerk. He was apprehended by police several hours later and identified using video footage from the store's security camera. The police did not find a weapon when they arrested him.
17. Coolidge was indicted and convicted of robbery, which is a crime of violence under Md. Code Ann., Criminal Law § 14-101(a) (Bender 2005). In October 2004, he received a sentence of 5 years in prison and 5 years of probation.

18. Under Md. Code Ann., Election Law § 3-102 (Bender 2005), Coolidge became ineligible to vote when he was sentenced. Pursuant to Md. Code Ann., Election Law § 3-501 (Bender 2005), Coolidge was removed from the registry of voters immediately thereafter and did not vote in the 2004 Presidential election. Coolidge is now permanently ineligible to vote in Maryland under § 3-102(c), because he has been convicted of a crime of violence and was previously convicted of an infamous crime.

DISCRIMINATION IN VOTING

19. The population of Baltimore is approximately 628,000. African Americans make up 64.3% of the total population. Baltimore County, which does not include the City of Baltimore, has approximately 781,000 people, of which 20.1% are African Americans. The population of Maryland is approximately 5,508,000, of which 27.9% are African Americans. African Americans are 12.3% of the population of the United States.
20. Of African Americans of voting age who are permanent residents of Baltimore, 0.9% are currently in prison. Of these, 54% are serving sentences for violent crimes. Of African Americans of voting age in Maryland, 0.8% are currently in prison, of which 48% are serving sentences for violent crimes.
21. By comparison, only 0.25% of white Maryland residents are in prison, of which 50% are serving sentences for such crimes.
22. Of African Americans of voting age in Baltimore, 4.3% are permanently ineligible to vote under Md. Code Ann., Election Law § 3-102(c) (Bender 2005). Of African Americans of voting age in Maryland, 3.9% are permanently ineligible to vote.
23. Only 1.0% of white Maryland residents of voting age are permanently ineligible to vote.
24. Among African Americans in prison in Maryland, 25% are serving sentences for drug-

- related crimes, while only 9% of white prisoners are serving sentences for such crimes.
25. African Americans in Maryland are in contact with the police 75% more often than white residents. In Baltimore County, 32% of traffic stops involve at least one African-American motorist.
 26. Local police in Baltimore County and Baltimore City apprehend African Americans at a disproportionately high rate. Prosecutors charge them at a disproportionately high rate.
 27. African Americans receive competent legal representation at trial less often than white Maryland residents. African-American defendants in Baltimore plead guilty 35% more often than whites.
 28. Juries in Baltimore County have on average 1 African-American juror for every 14 white jurors, even though the population of the county has 1 African-American resident for every 5 residents.
 29. Juries in the City of Baltimore have on average 1 African-American juror for every 3 white jurors, even though the population of the city has 2 African-American resident for every 3 residents.
 30. Baltimore County has fewer African Americans, on average, than Maryland as a whole. Racial discrimination in traffic stops, in prosecution, and at trial in Baltimore County played a prominent role in Coolidge's 1982 arrest and conviction.
 31. Coolidge was struck from the rolls of voters upon his recent conviction. By operation of Maryland law as enforced by Defendants, he will never be eligible to register again.
 32. The set of crimes defined as infamous by Maryland law is skewed towards those that are committed more often by African Americans than by whites.

FELONS' VOTING RIGHTS IN OTHER JURISDICTIONS

33. Only 13 States permanently disfranchise some criminals. The other 37 States disfranchise felons for at most the terms of their sentences.
34. Since 1997, 12 States have relaxed their disfranchisement of criminals.
35. Indeed, Maryland has amended its disfranchisement laws twice in the last 30 years. First, in 1972, the Maryland Constitution was amended to eliminate mandatory disfranchisement and give the Maryland Assembly discretion over disfranchisement. Second, in 2002, Maryland restored the right to vote to former convicts who had committed a second or subsequent infamous crime, except for those whose second or subsequent crime was a crime of violence.
36. Relatively few western democracies practice disfranchisement of felons. In 13 countries, including Japan, South Africa, Canada, and France, even prisoners may vote. Many others, including India and Brazil, allow convicts to vote upon their release from prison. Armenia is the only democratic nation that disfranchises persons with former felony convictions permanently.
37. Denying prisoners the right to vote is a violation of the European Convention on Human Rights. Hirst v. United Kingdom, App. No. 74025/01 (Eur. Ct. H.R. Oct. 5, 2005).

CLAIMS FOR RELIEF

CLAIM ONE

38. Plaintiff repeats and re-alleges the allegations in paragraphs 1-37 of this complaint.
39. Defendants permanently denied Coolidge the right to vote on account of his race in two ways. First, crimes giving rise to disfranchisement in Maryland are committed more

often by African Americans than by whites. Second, Maryland discriminates in its conviction of African Americans. Thus, by enforcing Maryland's disfranchisement law, Defendants have denied Coolidge the equal protection of the laws, in violation of the Fourteenth Amendment to the U.S. Constitution.

40. Defendants violated the Fifteenth Amendment to the U.S. Constitution by denying Plaintiff the right to vote on account of race.

CLAIM TWO

41. Plaintiff repeats and re-alleges the allegations in paragraphs 1-40 of this complaint.
42. Maryland convicts African Americans of infamous crimes, as defined by Maryland state law, at a rate disproportionate to their share of the population. Maryland convicts African Americans of violent crimes at a rate disproportionate to their share of the population.
43. Under Md. Code Ann., Election Law § 3-102(c) (Bender 2005), a citizen permanently loses the right to vote if he is convicted of an infamous crime and a subsequent violent crime.
44. As a result of discrimination at all stages of the criminal justice system, from the definition of infamous crimes through sentencing, African Americans are disfranchised under § 3-102 at a disproportionately high rate.
45. Under § 3-102, conviction of a violent crime and prior conviction of an infamous crime are voting qualifications within the contemplation of § 2 of the Voting Rights Act of 1965 as amended in 1982, 42 U.S.C. § 1973.
46. Because § 3-102, as enforced by Defendants, disfranchises African Americans at a disproportionately high rate, it denies them the right to vote on account of race, in violation of § 1973.

CLAIM THREE

47. Plaintiff repeats and re-alleges the allegations in paragraphs 1-46 of this complaint.
48. Coolidge has been convicted of robbery and sentenced to five years in prison.
49. As a result of this conviction, combined with his prior conviction for an infamous crime, he is permanently ineligible to vote.
50. As of his sentencing, he was struck from the rolls of voters, and he may never register to vote again.
51. Permanent disfranchisement is being visited on Coolidge as a punishment. In the light of evolving conceptions of human right, it is a cruel and unusual response to his crimes. Thus, it violates the Eighth Amendment to the U.S. Constitution.
52. By inflicting this cruel and unusual punishment on Coolidge, Defendants have violated his civil rights under color of law. Thus, they have violated 42 U.S.C. § 1983.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this court, as authorized by the U.S. Constitution, 42 U.S.C. § 1983 and 42 U.S.C. § 1973, and pursuant to its own equitable powers:

- a. Declare that the permanent disfranchisement of felons under Md. Code Ann., Election Law § 3-102(c) constitutes a voting qualification that denies plaintiff and others similarly situated the right to vote on account of their race, in violation of § 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the U.S. Constitution;
- b. Declare that the permanent disfranchisement of Plaintiff is cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution;
- c. Permanently enjoin Defendants from violating the Voting Rights Act and the U.S.

Constitution as alleged herein, and from enforcing § 3-102(c);

d. Order Defendants to permit the Plaintiff and others similarly situated to register as voters in their counties of residence upon completion of their court-ordered sentences;

e. Award Plaintiff his costs and reasonable attorneys' fees for this action;

f. Grant such other relief as the court may deem just and proper.

November 4, 2004

JEFFEREY O. PARNESON
MARIAH DAVEYS
570 Macdougall Street
Baltimore, MD 21201

Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

JEFFREY COOLIDGE,

Plaintiff,

v.

**MARYLAND STATE
BOARD OF ELECTIONS,
et al.,

Defendants.**

CIVIL ACTION NO. 4629572048

DEFENDANTS' MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendants respectfully move this court for judgment in favor of all defendants on the ground that the Complaint fails to state a claim upon which relief can be granted. Grounds in support of this motion are set forth briefly below.

Claim 1. Plaintiff has not alleged any act of intentional discrimination by any defendant. Therefore, he cannot maintain a claim under either the Fourteenth or Fifteenth

Amendment.

Claim 2. The Voting Rights Act, 42 U.S.C. § 1973, does not apply to state felon disfranchisement provisions.

Claim 3. Under the Fourteenth Amendment, states have broad authority to regulate voting by criminals. Such regulation does not constitute punishment and therefore cannot be challenged under the Eighth Amendment.

Respectfully submitted,

STONE T. MITCHUM

Assistant Attorney General of Maryland

ARGYLE R. STEVENSON

City Attorney of Baltimore

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

JEFFREY COOLIDGE,

Plaintiff,

v.

**MARYLAND STATE
BOARD OF ELECTIONS,
et al.,

Defendants.**

CIVIL ACTION NO. 4629572048

OPINION AND ORDER

In an action for declaratory and injunctive relief pursuant to violations of plaintiff's constitutional rights, defendants move for dismissal for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6).

I. Overview

The plaintiff, a convicted felon, brought this action under 42 U.S.C. § 1983, the Eighth Amendment to the U.S. Constitution, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments to the U.S. Constitution to challenge his ineligibility to vote in Maryland. The

defendants, election authorities and officials of the State of Maryland and the City of Baltimore, have moved for dismissal, arguing that Maryland may choose not to extend the franchise to criminals. This struggle has been played out in multiple courts around the country with little success for plaintiffs. Supreme Court precedent compels this court to follow suit. We grant the defendant's motion to dismiss in full for the reasons set forth below.

II. Background

A. Facts

Responding to a motion under Rule 12(b)(6), this court must view the claims presented in the light most favorable to the plaintiff, assuming for the moment that the factual allegations in the complaint are true. District 28, United Mine Workers of America v. Wellmore Coal Corp., 609 F.2d 1083, 1085 (4th Cir. 1979).

The plaintiff, Jeffrey Coolidge, is a long-term Baltimore resident with a two-decade criminal record. His first conviction, in 1982, was for possession with intent to distribute cocaine; his second, for possession alone. Recently, he was convicted of robbery, which is a violent felony, Md. Code Ann., Criminal Law § 14-101(a)(9) (Bender 2005). Although the maximum penalty for this crime is 15 years, Md. Code Ann., Criminal Law § 3-402 (Bender 2005), he received a sentence of 5 years in prison and 5 years of probation, beginning in October 2004.

Md. Code Ann., Election Law § 3-102, establishes the State's qualifications for voter registration. With respect to the disfranchisement of those persons with criminal convictions, § 3-102(b) and (c) describe a three-tiered voter-qualification scheme. First, a person who commits a "theft or other infamous crime" for the **first** time may not register to vote unless the individual has been pardoned or has "completed the court-ordered sentence imposed for the conviction." §

3-102(b)(1).¹ Second, a person who has been convicted of an infamous crime for the **second** time (or more) must complete the court-ordered sentence and also wait three years for restoration of the right to vote. § 3-102(b)(2); Record at 44.

The third tier of the scheme distinguishes second-time (and subsequent) offenders who commit violent felonies. All felonies, violent or otherwise, are “infamous crimes” according to Maryland law. Record at 45-51. Conviction of a second or subsequent infamous crime that is not also a violent felony subjects an individual to the three-year waiting period described by § 3-102(b)(1)(ii)(2). However, if the second or subsequent crime is a violent felony, the convicted criminal permanently forfeits the right to vote. § 3-102(c); Record at 44.

Therefore, an individual who is convicted of any infamous crime and is subsequently convicted of a violent felony permanently loses the right to vote by action of § 3-102(c). This is Coolidge’s situation. Maryland’s electoral registrars periodically receive notice of convictions from courts in the state, including this court, Md. Code Ann., Election Law § 3-504 (Bender 2005), and strike convicted criminals from the rolls. Md. Code Ann., Election Law § 3-501 (Bender 2005). Coolidge was a registered voter in the City of Baltimore before his arrest, and his name has now been struck. As a result, Coolidge, who was registered to vote before his robbery conviction, has now lost his registration, and he will not be able to register again.

B. Plaintiff’s claims

The plaintiff rests his equal protection claims mainly on the allegation that Maryland’s sharp racial disparity in the prosecution and conviction of infamous crimes results from racial discrimination.

Further, plaintiff argues that Congress’ enforcement power under the Reconstruction

¹ The Attorney General of Maryland occasionally analyzes the relevant case law and summarizes it with a list of crimes believed to be “infamous.” The most recent list is attached as an appendix.

Amendments extends to the full limits of the Voting Rights Act, and therefore that 42 U.S.C. § 1973 must be read literally to invalidate any voting prerequisite that has the effect of denying the right to vote on account of race.

Finally, plaintiff argues that permanent disfranchisement constitutes a cruel and unusual punishment in violation of the Eighth Amendment, as applied to the states by the Fourteenth Amendment.

Plaintiff sues defendants in their official capacities under 42 U.S.C. § 1983 and the U.S. Constitution.

III. Discussion

Under the Federal Rules of Civil Procedure, dismissal of a civil action is appropriate where plaintiff has failed to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b) (6). Therefore, a motion to dismiss will be granted if, as a matter of law, there is no set of facts that the plaintiff could prove that would entitle him to favorable judgment. Herlihy v. Ply-Gem Indus., Inc., 752 F. Supp. 1282, 1285 (D. Md. 1990). In evaluating a motion to dismiss, the court must view the claims presented in the light most favorable to the plaintiff, assuming for the moment that the factual allegations in the complaint are true. These requirements are especially stringent in a case that invokes 42 U.S.C. § 1983. Wellmore Coal Corp., 609 F.2d at 1085. Nevertheless, if it is clear that the plaintiff cannot make out a claim under any set of facts, the defendant's motion must be granted.

A. Fourteenth and Fifteenth Amendments

This court may easily dispose of Plaintiff's Fourteenth and Fifteenth Amendment claims. To maintain an equal protection claim under either Amendment, a plaintiff must adequately allege intentional discrimination. Washington v. Davis, 426 U.S. 229, 240, 242 (1976).

Plaintiff's complaint fails to allege that Maryland's election law intentionally discriminates on the basis of race either on its face or as applied and enforced. The only allegation of intentional discrimination made by Plaintiff is contained in paragraph 30 of the complaint, wherein he charges that "[r]acial discrimination in traffic stops in Baltimore County played a prominent role in his 1982 arrest and conviction." Record at 13. Assuming this allegation is true, it provides only a nexus between Plaintiff's race and his apprehension, without suggesting that Baltimore County or its police intended their discriminatory behavior. In any case, Maryland's election law operates at two removes from the alleged discrimination, and therefore the implied nexus between race and disfranchisement is insufficient to demonstrate intentional discrimination on the basis of race in voting registration.

Even if Plaintiff had alleged intentional discrimination in the operation of Maryland's election law, his claim would fail because § 2 of the Fourteenth Amendment explicitly authorizes the several States to disfranchise persons who have been convicted of felonies. The constitutional text is perfectly explicit: abridgement of the right to vote shall result in reduction in a State's representation in Congress unless the persons disfranchised shall be guilty of "participation in rebellion, or other crime." U.S. Const. amend. XIV, § 2. This circuit's leading felon disfranchisement case held that the Supreme Court's 1974 Richardson v. Ramirez decision "is generally recognized as having closed the door on the equal protection argument in a challenge to state statutory voting disqualifications for conviction of crime." Allen v. Ellisor, 664 F.2d 391, 395 (4th Cir. 1980), citing Richardson v. Ramirez, 418 U.S. 24, 56 (1974).

Plaintiff's argument that the arbitrary classification of crimes as infamous or not under § 3-102 violates his constitutional rights under the Equal Protection Clause of the Fourteenth Amendment also fails because felon disfranchisement laws are explicitly allowed under § 2.

Richardson, 418 at 56. The Fourth Circuit has already rejected a challenge to disfranchisement law using a “classification based on specific crimes.” Allen, 664 F.2d at 397. Indeed, this District dismissed a such a claim based on Maryland’s infamous crimes list. Thiess v. State Administrative Bd. Of Elec. Law of Md., 387 F.Supp. 1038, 1039, 1041 (D.Md. 1974).

Finally, Plaintiff’s Fifteenth Amendment claim must also fail. Plaintiff has not alleged that the State of Maryland denied him the right to vote on account of his race. Plaintiff may have grounds to allege that the State has violated his civil rights by subjecting him to “racial profiling” in apprehension, arrest, conviction, and sentencing, but that claim is not before this court.

We hold that Plaintiff’s Fourteenth and Fifteenth Amendment claims are dismissed for failure to state a claim upon which relief can be granted.

B. Voting Rights Act

Plaintiff argues that § 2 of the Voting Rights Act applies to Maryland’s felon disfranchisement law, § 3-102. Section 2, unlike the Fourteenth and Fifteenth Amendments, requires only evidence that state or political subdivision has used “any voting qualification or prerequisite to voting or standard, practice, or procedure...in a manner which results in a denial or abridgement of the right...to vote on account of race or color[.]” 42 U.S.C. § 1973(a). A plaintiff need only show disparate impact, not intentional discrimination. Therefore, if Plaintiff is correct, the “totality of circumstances” test established by Thornburg v. Gingles might apply to the factual situation underlying Plaintiff’s claim, as “the essence of a [VRA] § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.” Thornburg v. Gingles, 478 U.S. 30, 47 (1986).

However, before engaging the fact-specific inquiry necessary for a claim under § 2 of the

Voting Rights Act, we must decide the threshold question whether the Act governs felon disfranchisement law at all. Neither the Supreme Court nor the Fourth Circuit has ruled on the question. The three Circuit Courts that have considered it are split; one is in favor, Farrakhan v. Locke, 338 F.3d 1009, 1014-15 (9th Cir. 2003), reh'g denied, 359 F.3d 1116 (9th Cir. 2004), cert. denied, 160 L.Ed.2d 365, 125 S.Ct. 477 (2004), and two are opposed, Muntaqim v. Coombe, 366 F.3d 102, 124 (2d Cir. 2004), cert. denied, 160 L.Ed.2d 356, 125 S.Ct. 480 (2004), vacated pending reh'g, 396 F.3d 95 (2d Cir. 2004), and Johnson v. Bush, 405 F.3d 1214,1234 (11th Cir. 2005).

The Second Circuit's cogent arguments persuade us to rule the Voting Rights Act inapplicable to Maryland's felon disfranchisement law. See generally Muntaqim. First, despite the fact that the powers of Congress are at their zenith when enforcing voting rights law, South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966), such powers are still limited by § 2 of the Fourteenth Amendment, which authorizes the States to disfranchise felons. Richardson, 418 U.S. at 56; Muntaqim, 366 F.3d at 108. In addition, and in consideration of the traditional authority of the State, such an application of the Voting Rights Act would shift the federal-state balance of power in the absence both of a congressional finding of constitutional violations and of a congressional "clear statement" indicating that such was the Legislature's intent. 366 F.3d at 124, 126. Such a shift, we believe, would violate Supreme Court jurisprudence that has required legislative remedies to be congruent and proportional to the constitutional violations targeted, City of Boerne v. Flores, 521 U.S. 507, 530 (1997). It is not simply a matter of § 2 of the Fourteenth Amendment; federalism concerns urge us to tread cautiously where, as here, a record of specific constitutional violations does not exist.

For these reasons, we hold that the Voting Rights Act does not apply to § 3-102.

C. Eighth Amendment/42 U.S.C. § 1983

The Thiess court also discussed the argument that disfranchisement is a punishment. This court finds the reasoning in the opinion persuasive and will not repeat it at length. In brief, the court recognizes that the concept of punishment includes inflictions besides “physical mistreatment,” Trop v. Dulles, 356 U.S. 86, 101 (1958). However, losing the right to vote falls far short of the complete expulsion from society that was rejected in Trop. Indeed, many citizens of the United States cannot vote where they live, including minors, mentally incompetent persons, and short-term residents. It can hardly be a punishment to situate Plaintiff with so many Americans who have committed no crimes. Moreover, as the Richardson court made clear, the Fourteenth Amendment granted states positive authority to restrict voting by criminals *after* the Eighth Amendment was adopted. It represents a clear statement that far from being cruel and unusual, disfranchisement is an ordinary regulation contemplated by the Constitution.

III. Conclusion

For all the reasons set forth herein, Defendants’ motion to dismiss is hereby granted and this action is dismissed with prejudice.

ORDERED and ADJUDGED that Defendants’ motion for dismissal for failure to state a claim is granted, and Plaintiff’s claim is dismissed.

Date: February 23, 2005

Baltimore, Maryland

District Judge George Smith

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

JEFFREY COOLIDGE,

Plaintiff,

v.

**MARYLAND STATE
BOARD OF ELECTIONS,
et al.,

Defendants.**

CIVIL ACTION NO. 4629572048

NOTICE OF APPEAL

Notice is hereby given that Jeffrey Coolidge, plaintiff in the above captioned case, hereby appeals to the United States Court of Appeals for the Fourth Circuit the order and judgment entered in this case on February 23, 2005.

March 1, 2005

Jefferey O. Parneson
Mariah Daveys
570 Macdougall Street
Baltimore, MD 21201

Rights Act, 42 U.S.C. § 1973, prohibits Maryland from using past criminal conviction as a voting qualification in a discriminatory manner. Second, he argues that permanent disfranchisement is a cruel and unusual punishment for the robbery of which he was convicted.

We hold that Maryland may not use past criminal conviction as a basis for the disfranchisement of individuals where, as here, such convictions interact with political, economic, and social factors to deny the right to vote on account of race. Therefore, we hold that Plaintiff has made out a cognizable claim under 42 U.S.C. § 1973. Further, we agree that permanent disfranchisement is a cruel and unusual punishment. Accordingly, we reverse the dismissal of both claims and remand the case to the District Court.

I. Background

Felon disfranchisement statutes prohibit convicted criminals from voting, in some cases during their sentences and in other cases permanently. Maryland's State Constitution allows such disfranchisement, declaring that "the General Assembly by law may regulate or prohibit the right to vote of a person convicted of infamous or other serious crime." Md. Const. art. I, § 4. The General Assembly has implemented this provision in Md. Code Ann., Election Law § 3-102 (Bender 2005):

- (b) Exceptions. An individual is not qualified to be a registered voter if the individual:
- (1) has been convicted of theft or other infamous crime, unless the individual:
 - (i) has been pardoned; or
 - (ii) 1. in connection with a first conviction, has completed the court-ordered sentence imposed for the conviction, including probation, parole, community service, restitutions, and fines; or
 2. in connection with a subsequent conviction, has completed the court-ordered sentence imposed for the conviction, including probation, parole, community service, restitutions, and fines, and at least 3 years have elapsed since the completion of the court--ordered sentence imposed for the conviction, including probation, parole, community service, restitutions, and fines;
 - (2) is under guardianship for mental disability; or

(3) has been convicted of buying or selling votes.
(c) Same--Second or subsequent crime of violence. Notwithstanding subsection (b) of this section, an individual is not qualified to be a registered voter if the individual has been convicted of a second or subsequent crime of violence, as defined in § 14-101 of the Criminal Law Article.

Thus, Maryland imposes three levels of disfranchisement. First, those convicted of a first infamous crime are disfranchised during the term of their sentences. § 3-102(b)(ii)(1). The Attorney General of Maryland periodically issues a list, not exclusive, of those crimes thought to be infamous. Record at 45-51. Second, those convicted of a second or subsequent infamous crime are disfranchised during their sentences and for a three-year waiting period thereafter.² § 3-102(b)(ii)(2). Finally, if the second or subsequent crime is a crime of violence, they are disfranchised permanently. Record at 44. The eligibility of citizens to vote is checked by county election boards, which receive information on convictions from the Maryland courts. Md. Code Ann., Election Law § 3-504 (Bender 2005).

The appellant, Jeffrey Coolidge, is a citizen of Maryland³ who is ineligible to vote as a result of his conviction for robbery. He was first convicted of a crime in 1982, when he received one year in prison and one year of probation for possessing 10 grams of cocaine for distribution. Since this crime is an infamous crime, State v Woodland, 654 A.2d 1314, 1316 (Md. 1995), he was ineligible to vote while in prison and on probation. However, the appellant did not attempt to vote during this time. While on probation, he was arrested again in possession of 1 gram of cocaine, for which he was convicted of misdemeanor possession and sentenced to six months in

² Before 2003, all second offenders were permanently ineligible to vote. 2002 Md. Laws 304 amended the election code to its present form.

³ Plaintiff is an African American, and Baltimore, where he lives, has a population that is 64% African American. Across Maryland, Plaintiff claims 3.9% of the African-American population is permanently disfranchised under § 3-102(c), compared to 1.0% of the white population.

prison. On his release in 1985, he was apparently still addicted to cocaine, but he successfully completed a treatment program. During the following decade, he registered to vote, and he regularly voted in Presidential elections. In 2004, he stole \$150 from a convenience store in Baltimore, for which he was convicted of robbery and sentenced to 5 years in prison and 5 years of probation. Upon conviction, he was struck from the roll of voters; under Maryland law, he will henceforth be ineligible to vote, because he was convicted of a crime of violence after previously being convicted of an infamous crime. Md. Code Ann., Election Law. § 3-102(c) (Bender 2005).

Plaintiff challenged his disfranchisement by filing suit in the District of Maryland, naming as defendants the Board of Elections of the City of Baltimore, the Maryland State Board of Elections, and their chief officers, Edward D. Jones and Janet Fallins respectively. He made claims under the U.S. Constitution, under 42 U.S.C. § 1983, and under § 2 of the Voting Rights Act, 42 U.S.C. § 1973. First, he argued that § 3-102(c) violates the Fourteenth and Fifteenth Amendments because it denies African Americans the right to vote on account of race. Second, he charged that § 3-102 is a voting qualification that denies him and other African Americans the right to vote on account of their race, in violation of § 1973. He sought declaratory and injunctive relief to prevent Defendants from enforcing § 3-102(c). Third, he argued that his disfranchisement is a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. Under § 1983 and the U.S. Constitution, he asked the District Court to enjoin Defendants to enroll him as a voter.

On Defendants' motion, the District Court dismissed all three of Appellant's claims. The court found that neither Appellant's Fourteenth nor his Fifteenth Amendment argument stated a cognizable claim. Although the court agreed that § 3-102 does discriminate between criminals

on the basis of their past convictions, it ruled that such discrimination is permissible under Richardson v. Ramirez, 418 U.S. 24 (1974). With respect to Plaintiff's Fifteenth Amendment claim that he was denied the right to vote on account of his race, his failure to allege intentional discrimination is fatal. We affirm the District Court's dismissal of this claim and decline to discuss it further.

This court will address the two remaining issues. The District Court dismissed Appellant's § 1973 claim on the grounds that § 2 of the Voting Rights Act does not apply to felon disfranchisement laws. Further, the court ruled that discrimination on the basis of criminal convictions does not meet the requirement in § 1973 that voting be denied "on account of race." With respect to Appellant's Eighth Amendment claim, the District Court ruled that disfranchisement is a voting regulation permitted by the Fourteenth Amendment, rather than a punishment.

II. Discussion

We review a dismissal under Rule 12(b)(6) *de novo*, Bass v. E.I. Dupont de Nemours & Co., 324 F.3d 761, 764 (4th Cir. 2003), using the same legal standards as the District Court. We must take the facts alleged in the complaint as true, and dismissal may only properly be affirmed when it is clear as a matter of law that Appellant could not obtain relief under any set of facts consistent with the allegations. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

A. Voting Rights Act

Appellant urges that Maryland election law has the effect of denying him the right to vote on account of his race. It reaches this effect by combining his initial, race-inflected conviction for an "infamous crime" with a second conviction for a violent felony to deprive him forever of

the right to vote. Thus, in the totality of circumstances, Maryland's three-tiered mechanism for felon disfranchisement interacts with political and social conditions in the State of Maryland to deny his right to vote on account of race. The District Court, having correctly addressed first the threshold question of whether the Voting Rights Act applies to Maryland's felon disfranchisement laws, held those laws beyond its scope. We now reverse.

In determining the meaning and scope of the Voting Rights Act in relation to felon disfranchisement laws, we turn first to the text. The language of § 2 of the Voting Rights Act is perfectly clear:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color[.] 42 U.S.C. § 1973(a).

Where a prerequisite (like a past conviction) interacts with surrounding circumstances to deny the right to vote on account of color, that prerequisite is barred by § 2 of the Voting Rights Act on its face. 42 U.S.C. § 1973(b) (establishing a violation “if, based on the totality of circumstances, it is shown that [members of protected classes] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice”); S. Rep. No. 97-417 (1982); Thornburg v. Gingles, 478 U.S. 30, 47 (1986).

To determine whether the Voting Rights Act applies to felon disfranchisement provisions, we must first ask whether § 2 of the Fourteenth Amendment forecloses such an application. The clause stipulates that a State that infringes the right to vote will be subject to reduction of its representation. However, the provision provides an exemption for denial of the right to vote to those engaged in “rebellion, or other crime.” U.S. Const. amend. XIV, § 2. The Second and Eleventh Circuits have ruled that § 2 of the Fourteenth Amendment immunizes felon

disfranchisement laws from Voting Rights Act challenges in the absence of specific and clear evidence of intentional racial discrimination. Muntaqim v. Coombe, 366 F.3d 102, 122 (2d Cir. 2004), cert. denied, 160 L.Ed.2d 356, 125 S.Ct. 480 (2004), vacated pending reh'g, 396 F.3d 95 (2d Cir. 2004); Johnson v. Bush, 405 F.3d 1214 (11th Cir. 2005). However, we are persuaded by the cogent argument of Judge Barkett of the Eleventh Circuit that felon disfranchisement laws clearly fall under the plain meaning of § 2 of the Act. Johnson, 405 F.3d 1247 (11th Cir. 2005) (Barkett, J., dissenting). In so arguing, Judge Barkett sharply and, we think, correctly distinguishes felon disfranchisement laws “generally and those that result in racial discrimination,” as the Act would have no effect on state disfranchisement laws unless they resulted in discrimination on account of race. 405 F.3d at 1248.

Moreover, the Voting Rights Act was enacted to enforce the Fifteenth Amendment, which followed the Fourteenth Amendment and was intended to strengthen its protection of the right to vote from discrimination on account of race. Chisom v. Roemer, 501 U.S. 380, 383 (1991). The Fifteenth Amendment contains no exception for felon disfranchisement. In fact, its legislative history indicates that Congress considered, but rejected, such provisions. Cong. Globe, 40th Cong., 3d Sess. 1012-13, 1041 (1869). The historical evidence urges our conclusion that the Fifteenth Amendment renders logical the application of the Voting Rights Act to felony disfranchisement provisions. Such an application enforces the Fifteenth Amendment’s incontrovertible ban on discrimination in voting on account of race.

The second question presented by the Act’s possible application to felon disfranchisement laws is whether such application would exceed Congress’s enforcement power under the Fourteenth and Fifteenth Amendments.⁴ The Supreme Court has ruled that Congress

⁴ As noted, the Act enforces the Fifteenth Amendment, not the Fourteenth, but Congress’ enforcement powers under each Amendment have been ruled coterminous by the Supreme Court. South Carolina v. Katzenbach, 383 U.S. 301,

may enforce, but not expand, constitutional rights; that a finding of constitutional violations must precede the legislative remedy; and that such a remedy must be congruent and proportional to the harm suffered. Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 728 (2003); Tennessee v. Lane, 541 U.S. 509, 520 (2004).

Appellees therefore urge us not to apply the Voting Rights Act to felon disfranchisement, because to do so would expand the reach of individuals' constitutional rights as previously determined by the Court. In turn, this expansion of Congress' enforcement power would shift the federal-state balance in the absence of demonstrated constitutional violations. However, we find to the contrary that such an application would be well within Congress' power. In documenting violations, Congress need not make specific findings on a case-by-case basis. Rather, the extensive findings that it has made regarding widespread and ingrained racial discrimination in voting suffice to motivate the full coverage of the Act without the necessity of findings specific to felon disfranchisement.⁵

The right to vote is our nation's most sacred guardian of democracy. That guardian is currently stained by the mark of racial disparity and crippled by an overly broad reading of just one provision—§ 2—of the Fourteenth Amendment. We find it painfully ironic that this should be so despite the fact that the Amendment was drafted with the noble purpose of banishing racial prejudice from the face of our nation. We find our refuge from a jurisprudence of exclusion in the interlocking structure of a document that binds us to recognize the political and civic

325 (1966).

⁵ We note the Supreme Court's focus on Congress' lack of generalized findings of religious discrimination in their criticism of RFRA as in excess of enforcement power. City of Boerne v. Flores, 521 U.S. 507, 531 (1997). We note further the Court's willingness to accept findings outside the Congressional Record as support for Congressional enforcement legislation. Tennessee, 541 U.S. at 1988-90.

humanity of each and every citizen. The holding of the District Court is hereby reversed. We hold that § 2 of the Voting Rights Act is applicable to the felon disfranchisement laws of the State of Maryland. We remand to the District Court for further proceedings not inconsistent with this opinion.

B. Eighth Amendment

Next, we discuss Appellant's Eighth Amendment challenge. We have already rejected the argument that the Fourteenth Amendment permits *any and all* disfranchisement. To support an Eighth Amendment claim, however, Appellant's disfranchisement must actually be a punishment, Wilson v. Seiter, 501 U.S. 294, 300 (1991), and it must be impermissibly extreme compared to his crime.

1. Punishment or regulation

We recently reiterated the process by which we decide whether a condition is a punishment: we must first determine if the condition is a "disability." Slade v. Hampton Rds. Reg'l Jail, 407 F.3d 243, 250 (4th Cir. 2005). If it is, "we must ask whether the [condition's] express purpose is to punish, or whether an alternative purpose to which [the condition] may rationally be connected is assignable for it and the action does not appear excessive in relation to the alternative purpose assigned." Id. For example, we have held that taxing or withholding property is not necessarily a punishment. See, e.g., id. (a \$1 per day fee to cover pretrial detention costs not a punishment); Davis v. Bowen, 825 F.2d 799, 800 (4th Cir. 1987) (withholding of Social Security benefits from inmates not a punishment).

Here, the express purpose of felon disfranchisement is to punish convicted criminals. For most criminals, the period of disfranchisement is closely connected to the term of their sentences,

terminating at the end of “the court-ordered sentence imposed for the conviction, including probation, parole, community service, restitutions, and fines,” § 3-102(b), or three years thereafter. Further, under Md. Code Ann., Election Law § 3-504, courts periodically notify state election officials of convictions for infamous crimes, so that criminals can be struck from the voter registry. A disfranchisement that is wholly concomitant with court-ordered sentence is surely meant as part of the overall sentence. Granted, some violent felons are permanently ineligible to vote. However, compared to the disfranchisement Maryland imposes for infamous crimes, this permanent disfranchisement is simply a more severe punishment for more serious crimes.

Certainly permanent disfranchisement is an infliction heavy enough to constitute a punishment. Severity is not measured simply by years in confinement or magnitude of physical pain; a punishment may involve “no physical mistreatment, no primitive torture.” Trop v. Dulles, 356 U.S. 86, 101 (1958). The state may wound a person as deeply in his political existence as in his physical person. Permanent disfranchisement bars an individual from many forms of participation in civic society. He may not vote, nor may he stand for public office, Md. Code Ann., Election Law § 5-202; sign a petition, Md. Code Ann., Election Law § 6-203; or participate in forming a political party, Md. Code Ann., Election Law § 4-102, among other detriments. Indeed, in Baltimore County he may not even obtain a liquor license in a partnership, Md. Code Ann. Art. 2B, § 9-101. In short, a permanently disfranchised citizen is largely excluded from public life. Although disfranchisement is not the “total destruction of the individual’s status in organized society,” Trop, 356 U.S. at 101, it is substantial.

Appellees argue that § 3-102(c) is intended to protect the electoral process from the inappropriate influence of criminals. This argument has been persuasive in the past. For

example, Judge Friendly noted that a state may take “account... of the heavy incidence of recidivism and the prevalence of organized crime,” Green v. Bd. of Elections of N.Y., 380 F.2d 445, 451 (2d Cir. 1967), in deciding to stop such bad men from “electing the legislators who make the laws, [or] the judges who are to consider their cases,” id. However, this justification no longer suffices. We have now recognized that “‘fencing out’ from the franchise a sector of the population because of the way they may vote is constitutionally impermissible.” Carrington v. Rash, 380 U.S. 89, 94 (1965).

2. Cruel and unusual

Permanent disfranchisement is not cruel and unusual in itself, but it may be disproportionate in some circumstances. To reach this result, we must interpret the Eighth Amendment “with due regard for its purpose and function in the constitutional design,... referring to ‘the evolving standards of decency that mark the progress of a maturing society.’” Roper v. Simmons, 125 S.Ct. 1183, 1189, 161 L.Ed.2d 1, 15 (2005), quoting Trop, 356 U.S. at 101. As Appellant has pointed out, felon disfranchisement is gradually disappearing, both in the United States and in other democracies. Only 13 States still practice the most extreme form, permanent disfranchisement. Appellant also notes that felon disfranchisement has recently been held to violate the European Convention on Human Rights. Hirst v. United Kingdom, App. No. 74025/01 (Eur. Ct. H.R. Oct. 5, 2005). Nevertheless, felon disfranchisement clearly does not violate the U.S. Constitution, which explicitly permits it in § 2 of the Fourteenth Amendment. Further, most states do still disfranchise criminals either temporarily or permanently. It would be premature to conclude that a State could never impose the punishment of permanent disfranchisement. But in light of the evolution of our concepts of human dignity, permanent disfranchisement as a punishment deserves scrutiny.

3. Proportionality

Nevertheless, “no penalty is per se constitutional,” Harmelin v. Michigan, 501 U.S. 957, 1000 (1991) (Kennedy, J., concurring), and the Eighth Amendment “encompasses a narrow proportionality principle,” id. at 997. We may not inquire too closely into the relationship between crime and punishment, but we must ask whether permanent disfranchisement is “grossly disproportionate,” id. at 1001, to the crime that Appellant committed.

We judge Maryland’s law by analogy to the three-strikes rules for imprisonment that were at issue in Rummel v. Estelle, 445 U.S. 263 (1980), and Ewing v. California, 538 U.S. 11 (2003). We do so because, as we observed above, a first offender in Appellant’s place would have been ineligible to vote during his sentence and for three years thereafter. Appellant has received the more severe punishment of permanent disfranchisement because of his previous conviction for an infamous crime. In this sense, § 3-102(c) operates as a “two-strikes” rule for disfranchisement.

In judging the rule, we must defer largely to Maryland’s policy choices, for “the Constitution does not mandate adoption of any one penological theory.” Ewing, 538 U.S. at 25. However, unlike the three-strikes rule in Ewing, § 3-102(c) cannot be justified as anything but retribution. First, whereas imprisonment is a reasonable response to a habitual recidivist, to keep him from doing further harm, prevention is not at issue here. Appellant will be ineligible to vote long after Maryland has seen fit to release him into society. Second, certainly § 3-102(c) cannot be meant to ease Appellant’s reintegration into society, because it does exactly the opposite by excluding him forever from an important sphere of social relations. We are forced to conclude that Appellant has been permanently disfranchised in retribution for his complete criminal

history. As retribution, this is arbitrarily harsh. For the same crime, Appellant would only be temporarily disfranchised, if he had no prior conviction; he receives the harsher, permanent sanction simply because of his single prior conviction for possession of 10 grams of cocaine.

III. Conclusion

In sum, we hold that Maryland's statute permanently disfranchising some violent felons, Md. Code Ann., Election Law § 3-102(c), is not immune from suit under § 2 of the Voting Rights Act, 42 U.S.C. § 1973. Because we disagree with the District Court's answer to this threshold question, we reverse its dismissal of Appellant's § 1973 claim. It remains to be seen whether Appellant's theory of discrimination, according to which § 3-102 imports discrimination in criminal justice into the electoral process, describes a vote denial "on account of race," as required by § 1973(a). We need not decide this issue here; the District Court should consider it in the first instance on remand.

Further, we hold that permanent disfranchisement under § 3-102(c) is a punishment within the meaning of the Eighth Amendment. Appellant states a valid claim that it is cruel and unusual as applied to him. Therefore, we disagree with the District Court's decision to dismiss Appellant's Eighth Amendment claim, and we reverse that dismissal.

Affirmed in part, reversed in part, and remanded for further proceedings not inconsistent with this opinion. So ordered.

Appendix A

1 of 3

[93 OP. ATT'Y GEN. 5]

ELECTIONS

FELON DISFRANCHISEMENT—INFAMOUS CRIMES—REVISIONS TO MARYLAND ELECTION LAWS— CONSTRUCTION OF MD. CODE ANN., ELECTION LAW § 3-102

October 26, 2003

Elections Board of Maryland

You have requested our opinion concerning proper construction of Md. Code Ann., Election Law § 3-102. The provision, which addresses eligibility to vote in the State of Maryland, reads as follows:

§ 3-102. Qualifications for voter registration

(a) In general. -- Except as provided in subsection (b) of this section, an individual may become registered to vote if the individual:

- (1) is a citizen of the United States;
- (2) is at least 18 years old or will be 18 years old on or before the day of the next succeeding general or special election;
- (3) is a resident of the county as of the day the individual seeks to register; and
- (4) registers pursuant to this title.

(b) Exceptions. -- An individual is not qualified to be a registered voter if the individual:

- (1) has been convicted of theft or other infamous crime, unless the individual:
 - (i) has been pardoned; or
 - (ii) 1. in connection with a first conviction, has completed the court-ordered sentence imposed for the conviction, including probation, parole, community service, restitutions, and fines; or

2. in connection with a subsequent conviction, has completed the court-ordered sentence imposed for the conviction, including probation, parole, community service, restitutions, and fines, and at least 3 years have elapsed since the completion of the court-ordered sentence imposed for the conviction, including probation, parole, community service, restitutions, and fines;

(2) is under guardianship for mental disability; or

(3) has been convicted of buying or selling votes.

(c) Same -- Second or subsequent crime of violence. -- Notwithstanding subsection (b) of this section, an individual is not qualified to be a registered voter if the individual has been convicted of a second or subsequent crime of violence, as defined in § 14-101 of the Criminal Law Article.

I. Discussion

In interpreting the law, you have posed the question whether “second or subsequent crime of violence,” § 3-102(c), requires that a person be convicted of two violent felonies before suffering permanent disfranchisement, or whether a person convicted of one or more infamous crimes and then convicted of one violent felony may be subject to permanent disfranchisement.

The statute is ambiguous. If subsection (c) indicates that two violent felony convictions are necessary to a permanent disfranchisement, subsections (a) and (b) are surplusage with respect to subsection (c). On the other hand, subsection (c) might indicate that a second or subsequent criminal conviction that happens to be a violent felony will disfranchise an individual, while a second or subsequent conviction that is an infamous crime will not.

Where the plain meaning of a statute is not clear, the State Constitution and the legislative history of the law in question aid statutory construction. Here, we turn first to the Maryland Constitution, which clearly authorizes felon disfranchisement laws. Md. Const. art. I, § 4 (the legislature “may regulate or prohibit the right to vote of a person convicted of an infamous or other serious crime[...]").

The legislative history of § 3-102 indicates that the Maryland Legislature enacted the law as part of a liberalization of the State’s attitude toward the disfranchisement of felons. The State’s previous voter eligibility provision permanently disfranchised all persons convicted of a second infamous crime. Md. Ann. Code art. 33, § 3-102 (2000), *In the Matter of: G.L.S.*, 586 F. Supp. 375, 379 n.3 (D. Md. 1984) (first conviction for theft or infamous crime deprives a person of the right to vote during term of sentence, probation, or parole, while a second conviction for

theft or infamous crime disfranchises permanently). The 2003 law does not disfranchise for a second infamous crime conviction; rather, the second or subsequent conviction must be a violent felony.

In amending the law to disfranchise persons permanently for a second crime conviction only if said crime was a violent felony, then, the Legislature signaled its movement away from the harshness of the previous standard. At the same time, it kept in place a strict disfranchisement scheme that recognized the seriousness of violent felonies, triggering immediate and permanent disfranchisement for any person convicted of a violent crime who has previously been convicted of an infamous crime.

The State Constitution authorizes the permanent disfranchisement of those convicted of infamous crimes. The election law's legislative history indicates that permanent disfranchisement for a violent felony subsequent to an infamous crime would in fact be a liberalization of prior, very strict disfranchisement law. In combination, these two extra-statutory sources urge a reading of § 3-102 that does not stray too far from the previous strictures of the law.

II. Conclusion

In summary, we conclude that a person subject to the laws and Constitution of Maryland who has been convicted of an infamous crime and, subsequently, a violent felony is subject to permanent disfranchisement by operation of Md. Code Ann., Election Law § 3-102.

George McClellan

Attorney General

Appendix B

JULY 2005 INFAMOUS CRIMES LIST

Note: This is an extract from the current list; it does not include all the crimes held to be infamous.

COMMERCIAL LAW

§12-304(a) False advertising - consumer loans
§12-403 False advertising - secondary mortgage loans
§12-602 False advertising - installment sales
§13-303 Deceptive trade practices (practices described in Commercial Law Art. §13-301(1)-(9), (11); §14-302(6),(11); §14-12A-02(3),(4); §14-2003(a)(1)-(3); and §14-2504(1))
§14-803 Intentional deceit - used radio & TV
§14-902 Misrepresentation - kosher products
§14-1215 False pretenses - consumer information
§14-1902(a)(3)-(5) False statements - credit services business
§14-2803 False representation - sale of product as made by the blind
§14-2902 False & fraudulent advertising
§14-2903 False advertising - bait & switch
§18-201(b) Fraud - bills of lading
§18-202 Fraud - bills of lading
§18-203 Fraud - bills of lading
§18-204 Fraud - bills of lading
§18-205 Fraud - bills of lading
§18-206 Fraud - bills of lading
§18-207 Fraud - bills of lading
§18-303 Fraud - warehouse statements
§18-306 Fraud - warehouse statements

CORPORATIONS & ASSOCIATIONS

§2-216(a)(3) False entries - corporate records
§11-301 Securities fraud
§11-302(a) Securities fraud
§11-302(c) Securities - misrepresentation
§11-303 False statements - securities
§11-304(b) Misrepresentation concerning effect of filing, registration, or exemption

CRIMINAL LAW

§1-301 Accessory after the fact to felony
§2-201 Murder, 1st degree
§2-204 Murder, 2nd degree
§2-205 Attempt to commit murder, 1st degree

§2-206 Attempt to commit murder, 2nd degree
§2-207 Manslaughter
§2-209 Manslaughter by vehicle or vessel
§2-503 Homicide by motor vehicle or vessel while under the influence of alcohol or under the influence of alcohol per se
§2-504 Homicide by motor vehicle or vessel while impaired by alcohol
§2-505 Homicide by motor vehicle or vessel while impaired by drugs
§2-506 Homicide by motor vehicle or vessel while impaired by a controlled dangerous substance
§3-102 Assisted suicide
§3-202 Assault, including attempt, 1st degree
§3-203(c) Assault against law enforcement officer, 2nd degree
§3-213 Attempt to poison another
§3-214 Contaminating water supply, drink, food, food product (including attempt & conspiracy)
§3-303 Rape, 1st degree, including attempt
§3-304 Rape, 2nd degree
§3-305 Sexual offense, 1st degree
§3-306 Sexual offense, 2nd degree
§3-307 Sexual offense, 3rd degree
§3-309 Attempted rape, 1st degree
§3-310 Attempted rape, 2nd degree
§3-311 Attempted sexual offense, 1st degree
§3-312 Attempted sexual offense, 2nd degree
§3-315(a) Continuing course of unlawful sexual conduct against child
§3-321 Sodomy
§3-323 Incest
§3-324 Sexual solicitation of minor or officer posing as minor
§3-402 Robbery, including attempt
§3-403 Armed robbery, including attempt
§3-405 Carjacking; armed carjacking
§3-502 Kidnapping
§3-503(a)(1) Abduction/kidnapping - child under 12
§3-503(a)(2) Kidnapping by force or fraud - child under 16 (except by parent)
§3-601 Child abuse (1st or 2nd degree)
§3-602 Sexual abuse to minor
§3-604 Abuse or neglect of vulnerable adult – 1st degree
§3-701 Extortion (\$500 or more), including attempt
§3-702 Extortion by public officer or employee (\$500 or more), including attempt
§3-703 Inducing another to give up compensation
§3-704 Extortion by false accusation
§3-705 Extortion by verbal threat
§3-706 Extortion by written threat
§3-805.1 False electronic mail messages, including conspiracy
§4-103 Disarming law enforcement officer, including attempt
§4-404 Use of machine gun in crime of violence, including attempt
§4-503 Manufacture or possession of destructive device
§5-601(a)(2) Controlled substance - fraud in obtaining, including attempt

§5-602 Controlled substance - manufacture, distribution, possession with attempt to manufacture or distribute
§5-603 Controlled substance - manufacture, distribution, possession of production equipment
§5-604 Controlled substance - counterfeit
§5-605 Controlled substance - keeping common nuisance
§5-606 False prescription
§5-613 Conspiracy to manufacture, distribute, or transport controlled substance - drug kingpin
§5-614 Controlled substance - importation
§5-617 Controlled substance - distribution of fake, including attempt
§5-620(a)(1) Controlled paraphernalia - fraud in obtaining, including attempt
§5-621 Controlled substance - use of weapon in trafficking
§5-622 Possession of firearm by convicted drug felon
§5-623 Use of proceeds from drug crime
§5-627 Controlled substance – manufacture/distribution/possession with intent to distribute in school vehicle or near school property, including conspiracy
§5-628 Controlled substance - using or bringing minor into state to manufacture, etc.
§5-701(d)(2),(4) Fraud - prescription drugs, including attempt
§5-702 Sale of drug different from that ordered
§5-903 Controlled substance - use of false registration number
§5-904(a)(2) Controlled substance - willful distribution of Schedule I or II drug without order form
§6-102 Arson, 1st degree
§6-103 Arson, 2nd degree
§6-104 Malicious burning of personal property, 1st degree
§6-106 Burning with intent to defraud
§6-202 Burglary, 1st degree
§6-203 Burglary, 2nd degree
§6-204 Burglary, 3rd degree
§6-207 Burglary with destructive device, including attempt
§6-208 Breaking & entering research facility
§6-303 Fraud - electric companies
§6-304 Fraud - gas companies
§6-305 Fraud - water companies
§6-306(a) Intentionally removing/defacing/obliterating serial number
§6-502 Obstruction/derailing of railroad vehicle
§7-104 Theft (\$500 or more)
§7-105 Motor vehicle theft
§7-113 Embezzlement - fraudulent misappropriation by fiduciary
§7-114 Defalcation by revenue officer
§7-116 Fraud - grain or other merchandise in storage
§7-301 Fraudulent use of code grabbing device
§7-302 Unauthorized access to computers & related material (aggregate loss of \$10,000 or more), including attempt
§7-303 Fraud - cable television companies, including attempt
§7-315 Fraud - telecommunication services
§8-103 Obtaining property or services by bad check (property or services valued at \$500 or more,

whether through one check or through checks issued within 30-day period)
§8-203 Fraud in procuring issuance of credit card
§8-204 Credit card theft
§8-205 Credit card counterfeiting
§8-206 Obtaining property by counterfeiting, theft, or misrepresentation
§8-207 Fraud - honoring stolen or counterfeit credit card; false representation to issuer
§8-208 Completing credit card without consent; possessing contrivance to reproduce credit card without consent
§8-209 Knowingly receiving goods or services obtained through credit card fraud (>\$500)
§8-214 Unauthorized use or disclosure of credit card number
§8-301(b),(c)(2) Fraud - personal identifying information
§8-302 Sale of blank incorrect ID card, including attempt
§8-303 Fraud - use of government ID document
§8-401 Fraudulent conversion of partnership assets
§8-402 Fraudulent misrepresentation by corporate officer or agent
§8-403 Fraudulent removal of personal property
§8-405 Wrongful disposal of vessel cargo
§8-407 Fraudulent conversion of leased or rented goods
§8-503 Public assistance fraud, including attempt
§8-504 Fraudulent statement in application for public assistance
§8-505(a) Fraudulent disposition of donated food
§8-509 Defrauding State health plan
§8-510 Conversion of State health plan benefit (if violation results in death or serious injury or if value of goods & services is \$500 or more)
§8-511 Bribe or kickback to health plan benefit provider (if violation results in death or serious injury or if value of goods & services is \$500 or more)
§8-512 Rebate for referral under State health plan (if violation results in death or serious injury or if value of goods & services is \$500 or more)
§8-513 False representation to qualify facility/institution/State health plan, including attempt
§8-514 Fraud - obtaining drugs or medical care under State health plan, including attempt
§8-515 Unauthorized possession of medical or pharmacy assistance card (if violation results in death or serious injury or if value of goods & services is \$500 or more)
§8-520 Fraudulent solicitation of funds for police or fire department/ public safety officer
§8-521 Fraudulently obtaining representation from Public Defender's Office, including attempt
§8-522 Fraud - simulated process
§8-523 False statement - housing assistance
§8-601(a) Counterfeiting of private instruments & documents
§8-601(b) Fraudulent possession of counterfeited instruments & documents
§8-602 Issuing counterfeit private instruments & documents
§8-603 Possessing counterfeit title to motor vehicle
§8-604 Counterfeiting U.S. currency
§8-604.1 Possession or issuance of counterfeit U.S. currency
§8-605 Counterfeiting of public documents
§8-606 False entries - public records, including attempt
§8-607 Counterfeiting - public seal
§8-608 Counterfeiting - Comptroller's stamp

§8-609 Counterfeiting orders for money or goods
§8-610 Counterfeiting prescription, including attempt
§8-611 Counterfeiting trademark
§8-612 Counterfeiting & issuing tokens
§8-613 Unlawful operation of vending machines & related manufacture of slugs, including attempt
§8-701 Embezzling, altering will or record
§8-702 Destroying or hiding will
§8-801 Wrongfully obtaining property of vulnerable adult (\$500 or more)
§8-902 Fraud - methyl alcohol in drug
§8-904 Racing horse under false name
§8-905 Fraud - parimutuel tickets
§9-101 Perjury
§9-102 Subornation of perjury
§9-201 Bribery of public employee, including attempt; demand or receipt of bribe
§9-202 Bribery of juror, including attempt; acceptance of bribe
§9-203 Bribery of voter
§9-204 Bribery, athletic contest, including attempt
§9-205 Acceptance of bribe, athletic contest
§9-302 Inducing false testimony or avoidance of subpoena
§9-303 Retaliation for testimony or report of crime
§9-305 Intimidating or corrupting juror, witness, etc.
§9-306 Obstruction of justice
§9-404 Escape, 1st degree
§9-413 Contraband for escape
§9-414 Contraband - weapon
§9-501 False statement to law enforcement officer
§9-502 False statement to law enforcement officer when under arrest
§9-503 False statement to public official concerning crime or hazard
§9-504 False statement concerning destructive device or toxic material
§9-505 Representation of destructive device
§9-506 False or concealed material fact - Md. Higher Education Commission fund application
§9-601(b)(2) False report about emergency
§9-604 False alarm
§9-702 Sabotage/interference with defense-related activity
§9-703 Sabotage/interference with defense-related activity – defective workmanship
§9-706 Willful unauthorized use of ID badge or card
§10-111 Fraud or alteration of drug/alcohol screening test
§10-113 Beverage misrepresentation
§§10-301 to 10-304 Hate crimes (if violation involves separate felony), including attempt
§10-502 Bigamy
§10-606 Aggravated cruelty to animals
§10-607 Aggravated cruelty to animals - dogfight
§10-608 Aggravated cruelty to animals - cockfight
§10-620 Interference with race horse
§11-207 Child pornography

§12-109 Fixing horse race, including attempt
§12-304(f) Misrepresentation - slot machine license application
§13-2424(e)(3) Fraudulent report - tip jar licensee

ELECTION LAW

§13-601 Perjury - campaign finance reports
§16-101(a)(1)-(4),(7),(8) False registration
§16-201 False voting
§16-202 Voting by person disqualified by conviction, including attempt
§16-206(a)(2) Misrepresentation of ability to vote
§16-302 Tampering with election records
§16-304 Adding or deleting votes
§16-401 Willful false statements/misrepresentations - petitions
§16-501 Perjury and subornation of perjury - election
§16-601 Willful false election report
§16-701 Willfully defacing or removing election records
§16-801 Willful destruction of election equipment
§16-802 Willful tampering with voting equipment or unauthorized possession of key
§16-803 Defacement, destruction, or removal of election equipment
§16-804 Willfully tampering with electronic voting system
§16-901 Fraud - election certificate

HEALTH) GENERAL

§4-226(b) False information - vital records
§4-226(c) Alteration of vital records
§4-226(d) Misuse of vital records
§4-226(f) Fraud - birth, death, marriage certificate
§4-309(c)(1), (e) False pretenses/deception) obtaining medical records
§5-610 Forgery of advance directive for health care
§7-910(b) False statements - application for license to serve
developmentally disabled
§10-1002(a)(1) False statements - admission to mental health facility
§18-301(a)(2) Misrepresentation as to cancer cure by non-physician
§19-1909(a) Perjury - criminal history records check for adult dependent
care program employee
§20-601 Female genital mutilation
§21-256(1)-(3),(5),(6),(10) Misrepresentation - food, drugs, & cosmetics
§21-258(b)(4)-(12) Fraud - drugs
§21-259(1) False reports - food & drugs
§21-339(e) False statements - crab meat containers
§21-341(a) Misrepresentation - crab meat
§24-432(a)(1),(2),(d)(1),(2),(4) False representations - sale of bedding & upholstered furniture

COMMON LAW OFFENSES

Arson
Bigamy

Burglary
Forgery
Kidnaping
Manslaughter
Mayhem
Murder
Perjury
Robbery or attempted robbery (including armed robbery or attempted armed robbery)
Sodomy

Note: Many, if not all, of the above-listed common law offenses have been codified or given statutory penalties.

The following is a list of some of the most frequently encountered offenses that are *not* infamous crimes:

CRIMINAL LAW

§1-202 Conspiracy, unless part of one of the statutory crimes included on the list
§3-203 Assault, 2nd degree
§3-308 Sexual offense, 4th degree
§5-601(a)(1) Drug possession
§5-620(a)(2) Possession of drug paraphernalia
§6-105 Malicious burning of personal property, 2nd degree
§6-301 Malicious destruction of property
§7-104 Theft (<\$500)
§9-402 Harboring a fugitive
§9-403 Harboring an escaped inmate
§10-201(c) Disorderly conduct; disturbing the peace
§10-202 Keeping disorderly house
§§11-303 through 306 Prostitution and related offenses

COMMON LAW OFFENSES that are *not* infamous crimes

Intent to distribute
Maintaining a common nuisance
Attempt or conspiracy (unless the attempt or conspiracy is part of one of the statutory crimes included on the list)
Note: Larceny, assault, battery, escape, and resisting arrest are no longer common law offenses in Maryland.
They have been replaced by statutory crimes. There should no longer be convictions for these formerly recognized common law crimes.