

No. 05-

---

---

In the Supreme Court of the United States

---

MARYLAND STATE BOARD OF ELECTIONS  
ET AL., PETITIONERS,

v.

JEFFREY COOLIDGE,  
RESPONDENT.

---

On Writ of Certiorari to  
the United States Court of Appeals  
for the Fourth Circuit

---

**BRIEF FOR THE PETITIONERS**

---

ID#: 10520

TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iv
OPINIONS BELOW .....	v
CONSTITUTIONAL PROVISION .....	v
STATUTORY PROVISIONS .....	vi
QUESTIONS PRESENTED .....	x
STATEMENT OF THE CASE .....	1
ARGUMENT .....	2
I. The Fourth Circuit erred in finding Felony	
Disenfranchisement to be a prerequisite or qualification subject	
to the Voting Rights Act .....	4
A. Felon disenfranchisement is a Constitutional right of	
the States .....	5
B. The Voting Rights Act alters the balance of power	
between the States and the Federal Government .....	5
C. The plain statement rule establishes that the Voting	
Rights Act does not apply to felon	
Disenfranchisement .....	7
II. The Fourth Circuit erred in finding Felony	
Disenfranchisement a cruel and unusual punishment .....	9
A. It is a punitive, rather than a regulatory	
measure .....	10

B. If the voting restriction is in fact punitive, as found by the 4<sup>th</sup> Circuit, the District court was correct in deciding that it is justifiably punitive and

therefore not "cruel and unusual." ..... 14

C. The 4th Circuit's reading of the 18th Amendment, finding felony disenfranchisement "cruel and unusual," would render the Constitution inconsistent because the 14th Amendment specifically permits denying a criminal the right to

vote ..... 20

TABLE OF AUTHORITIES

**Cases**

*Atkins v. Virginia*, 536 U.S. 304 (2002) ..... 12, 16  
*Beacham v. Braterman*, 396 U.S. 12 (1969)..... 15  
*Ewing v. California*, 538 U.S. 11 (2003) ..... 13, 16  
*Farrakhan v. Locke*, 987 F.Supp. 1304 (1997) ..... 18, 19  
*Flemming v. Nestor*, 363 U.S. 603 (1960)..... 10  
*Gregory v. Ashcroft*, 501 U.S.(1991)..... 4,6  
*Green v. Board of Elections of City of New York* 380 F. 2d 445  
(1967) ..... 11  
*Hunter v. Underwood*, 471 U.S. 222 (1985)..... 18  
*Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)..... 9  
*Kronlund v. Honstein*, 327 F. Supp. 71 (1971) ..... 11  
*Reid v. Covert* 354 U.S. 1, 8, n. 7 (1957) ..... 5  
*Richardson v. Ramirez*, 418 U.S. 24 (1974) ..... 4, 15, 17, 19  
*Robinson v. California*, 370 U.S. 660 (1962)..... 13  
*Solem v. Helm*, 463 U.S. 277 (1983) ..... 12  
*South Carolina v. Katzenbach*, 383 U.S. 301 (1966) ..... 4, 5  
*Thiess v. State Election Board of Marlyand*, 387 F.Supp. 1038  
(1974) ..... 13  
*Trop v. Dulles*, 356 U.S. 86 (1958) ..... 10, 13, 18  
*U.S. v. Brown* 381 U.S. 437 (1965) ..... 10  
*U.S. v. Salerno* 481 U.S. 739 (1987) ..... 10  
*United States v. Lopez*, 514 U.S. 549, 561 (1995) ..... 5  
*Washington v. State*, 25 Ala. 582 (1884) ..... 10

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at \_\_\_\_\_

The opinion of the United States District Court for the District of Maryland is reported at \_\_\_\_

CONSTITUTIONAL PROVISIONS

**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

STATUTORY PROVISIONS

**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...

**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.

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?

STATEMENT OF THE CASE

On November 4th, 2004, Plaintiff, Jeffrey Coolidge, a convicted felon, brought an action against Maryland State Board of Elections; Janet Fallins, the State Administrator of Elections, in her official capacity; the Board of Elections of the City of Baltimore; and Edward D. Jones its Election Director, in his official capacity, seeking declaratory and injunctive relief. He claims that Maryland's disenfranchisement laws deny him the equal protection of the law and the right to vote on account of race, in violation of the 14<sup>th</sup> amendment of the Constitution and 15<sup>th</sup> amendments. In addition, Plaintiff claims that Maryland's permanent disenfranchisement laws constitute a "cruel and unusual punishment", a violation of the 8<sup>th</sup> amendment.

On February 23<sup>rd</sup>, 2005, Defendant's motion to dismiss was granted by the District Court of Maryland. Plaintiff appealed to Fourth Circuit and the court affirmed the dismissal of Plaintiff's Fifteenth Amendment claim, but reversed the dismissal of Plaintiff's Eighth and Fourteenth Amendment claims. The Supreme Court granted certiorari.

SUMMARY OF ARGUMENT

Felon Disenfranchisement is constitutionally permissible as it is a state's right neither specifically prohibited by the

Voting Rights Act nor "cruel and unusual" according to the language and common interpretation of this clause and the specific permission granted by the Fourteenth Amendment.

The Voting Rights Act requires that States do not impose standards or have prerequisites that deny individuals the right to vote on account of their race. The question at issue is whether felon disenfranchisement qualifies as such a prerequisite. The constitution gives the states the authority to disenfranchise felons and Congress has not taken that authority away in the Voting Rights Act.

When a constitutionally given authority is removed from the States, the power once given them is shifted to the Federal Government. This results in the alteration of the balance of power between the States and the Federal Government. Congress must make its intentions explicitly clear in order to do so. The Voting Rights Act does not fulfill this requirement because it does not explicitly refer to felon disenfranchisement. In addition, felon disenfranchisement is also constitutionally permissible under the Eight Amendment.

The Maryland State Statute allowing the permanent disenfranchisement of repeat offenders of violent and infamous crimes, with regards to the 8<sup>th</sup> amendment's prohibition of "cruel and unusual punishments," is constitutional. Examination of the consistent interpretation, nature, and history of this

amendment's applicability clearly proves that felony disenfranchisement does not fall into realm of "cruel and unusual" and is therefore constitutionally sound.

Because the Maryland statute regulates the franchise rather than punishing ex-offenders, it is not "punishment" subject to the Eighth Amendment's ban on cruelty and unusualness. If, however, the Court chooses to classify this measure as "punitive," the statute still remains consistent with the Eighth Amendment because it is not "cruel and unusual," but commonplace and not grossly disproportionate. Finally, classifying felony disenfranchisement as a violation of the Eighth Amendment, in light of the Fourteenth Amendment's specific, would render the Constitution inconsistent. For these reasons, the Maryland Statute allowing the disenfranchisement of certain criminals is Constitutional.

#### ARGUMENT

We move pursuant to Federal Rule of Civil Procedure 12(b)(6) that the court dismiss the respondent's claim due to a "failure to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6). In order to dismiss a claim due to a 12(b)(6) motion the court must find that "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*,

355 U.S. 41 (1957). The respondent's claim states no set of facts that would lead to relief under any legal theory.

**I. The Maryland statute, Md. Code Ann., Election Law § 3-102, disenfranchising felons after a second or subsequent crime of violence is not a voting qualification or prerequisite that falls under the authority of the Voting Rights Act, 42 U.S.C. § 1973.**

Because applying the Voting Rights Act to Maryland's felon disenfranchisement statute would fundamentally alter the balance of power between the federal government and the states, and Congress has not clearly expressed its intent to do so, this Court must interpret the Act narrowly to exclude that application. The Voting Rights Act provides that "voting qualifications or prerequisite to voting or standard, practice, or procedure shall not be imposed or applied by any State... 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..." 42 U.S.C. §1973 (2000). A three step process is needed to establish that the Voting Rights Act does not give the federal government the right to prohibit Maryland from disenfranchising felons. The first step is to show Maryland has the Constitutional right to disenfranchise felons. The second step is to establish that the Voting Rights Act alters the balance of power between the states and federal government. After which,

the final step is applying the plain statement rule from *Gregory v. Ashcroft*, 501 U.S. 452 at 467 (1991), to the Voting Rights Act.

**A. The Fourteenth Amendment explicitly gave States the right to disenfranchise felons.**

Section 2 of the Fourteenth Amendment to the Constitution states, "...when the right to vote at any election...is denied to any of the male inhabitants of such State...or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced..." U.S. Const. Amdt. XIV § 2. By exempting states that deny the right to vote to its citizens based on participation in crime from reduction in representation, this Amendment shows that states have the authority to deny that right. *Richardson v. Ramirez*, 418 U.S. 24, 43 (1974). Therefore, Maryland is exercising its constitutional authority by disenfranchising felons after "...[s]econd or subsequent violent crimes[.]" Md. Code Ann., Elec. Law § 3-102(c) (2005).

**B. The Voting Rights Act alters the balance of power between the States and Federal government.**

The Constitution gives States the authority to prescribe the "times, places, and manner of holding elections for Senators and Representatives,..." U.S. Const. art. 1, § 4, cl. 1. The Elections Clause, when given its plain meaning, as required when

the Constitution is "clear and unambiguous", *Reid v. Covert* 354 U.S. 1, 8, n. 7 (1957), clearly includes regulating the participants in elections. In *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), the court upheld a number of provisions to the Voting Rights Act including temporary suspension of a State's voting tests or devices. This ruling meant that the Voting Rights Act could limit the manner of holding elections a state chose. Therefore this decision shifted the balance of power from the States to the Federal Government by disallowing the States ability to regulate participation in elections through mechanisms such as literacy tests. In *Katzenbach* the literacy tests which were found to be a violation of the Voting Rights Act were specifically designed after the Fourteenth Amendment was passed to discriminate in voting participation on the basis of race. This is distinguished from felon disenfranchisement which was used by the states before the Fourteenth amendment was passed, and has not been demonstrated to be an intentional constitutional violation, as were literacy tests. If the Voting Rights Act is applied to felon disenfranchisement laws it will also shift the power from the States to the Federal Government to prescribe the manner in which elections are held. But unlike *Katzenbach*, it will do so by prohibiting an act that has not historically been used as a means for prohibiting participation in elections based on race.

In addition to the authority to proscribe the manner in which elections are held, the states also have the power to define and enforce criminal law. The Supreme Court ruled that, "States possess primary authority for defining and enforcing the criminal law." *U.S. v. Lopez*, 514 U.S. 549, 561 (1995). Since disenfranchisement in Maryland is a consequence of committing crimes specified by the statute it falls under the state's authorities of "defining and enforcing criminal law." Id. Prohibiting felons who commit second or subsequent violent crimes from participating in elections is an authority given to the States and any federal limitation on that authority would constitute a shift in power from the State to the Federal Government.

Maryland's statute that disenfranchises felons is an exercise of the state's Constitutional authority. It also falls within its power to define and enforce the criminal law as well as prescribe the manner of elections in the state. Therefore any limitation to the disenfranchisement of felons will unquestionably alter the balance of power between the state of Maryland and the federal government.

**C. The application of the plain statement rule makes it clear that the Voting Rights Act does not apply to felon disenfranchisement.**

If the balance of power between States' authority, as given by the Constitution, and the Federal Government's authority is to be altered, then Congress must make a plain statement that it intends to do so. *Gregory*, 501 U.S. at 467. In *Gregory* the court found that the states have the power to determine the qualifications for public office holders. *Id.* at 462. If Congress intended to take that power away from the states, then it must unambiguously say it. *Id.* at 467. The Fourteenth Amendment gave States the right to disenfranchise those that committed crimes. *Richardson*, 418 U.S. at 43. Therefore Maryland's statute, Md. Code Ann., Election Law § 3-102, is enforcing an authority that the Constitution gives to that state. The Voting Rights Act, if applied to this statute, will alter the balance of power between States and the Federal Government by shifting the Constitutional authority of the State to disenfranchise felons as well as to prescribe the manner in which elections are held and to define and enforce criminal law to the Federal Government. Therefore the plain statement rule must be applied to the Voting Rights Act. Congress did not include a prohibition of felon disenfranchisement in the language of the Voting Rights Act. Consequently, since the Voting Rights Act does not unequivocally state it prohibits felon disenfranchisement, Md. Code Ann., Election Law § 3-102 cannot be a prerequisite or qualification subject to it. The

application of the Voting Rights Act to Md. Code Ann., Election Law § 3-102 would lead to the usurping Maryland's authority as given by the Constitution.

We ask the court to reverse the ruling of the Fourth Circuit that a claim can be brought against the Maryland State Board of Election for disenfranchising felons pursuant to Md. Code Ann., Election Law § 3-102 under the Voting Rights Act, and grant petitioners motion to dismiss.

## **II. The Fourth Circuit erred in finding Felony**

### **Disenfranchisement a cruel and unusual punishment.**

At issue in this case is the constitutionality of the Maryland State Statute allowing the disenfranchisement of repeat offenders of violent and infamous crimes, with regards to the 8<sup>th</sup> amendment's prohibition of "cruel and unusual punishments." Examination of the consistent interpretation, nature, and history of this amendment's applicability clearly proves that felony disenfranchisement does not fall into realm of "cruel and unusual" and is therefore constitutionally sound.

Section A explicates that Maryland Statute is a regulatory measure, not a punishment. Even if the Court disagrees and classifies the statute as "punitive," it still remains outside of the 8<sup>th</sup> amendment's grasp because it is not "cruel or unusual," rather frequently used and fitting for the crime, as

Part B details. Finally, Part C notes the inconsistent constitutional reading that arises from classifying felony disenfranchisement as a violation of the 8<sup>th</sup> amendment, in light of the 14<sup>th</sup> amendment's specific allowance. For these reasons, the Maryland Statute allowing the disenfranchisement of certain criminals is Constitutional.

**A. Felony Disenfranchisement is not a cruel and unusual punishment, as it is not punitive, rather a regulatory measure.**

The Eighth Amendment reads as follows: "U.S. Const. amend. VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Because the Eighth Amendment's ban on cruelty and unusualness applies only to statutory "punishments," and the Maryland statute is regulatory rather than punitive, the constitutional ban does not apply to the Maryland statute. A statute is only punitive if based on the "clearest proof," the disability it imposes is for the purpose of vengeance or deterrence and it is disproportionate to the broader regulatory objective. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963) The following cases each establish a distinctive element for determining whether a statute is punitive or regulatory. While the test generated by the following cases does not specifically address the Eighth amendment, it establishes a

general guideline for Constitutional determinations of punitive measures and therefore, shall be persuasive in regards to the Eighth amendment context of this argument. Primarily, "the question of whether or not a statute is punitive ultimately depends upon whether the disability it imposes is for the purpose of vengeance or deterrence, or whether the disability is but an incident to some broader regulatory objective." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 208 (1963). There is an element of proportionality associated with the regulatory function questioning "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *U.S. v. Salerno* 481 U.S. 739, 745 (1987) quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963). Throughout this examination, "'only the clearest proof could suffice' to establish that Congress' purpose was punitive rather than regulatory." *U.S. v. Brown* 381 U.S. 437, 476 (1965); quoting *Flemming v. Nestor*, 363 U.S. 603 (1960).

According to this established interpretation, felony disenfranchisement is a regulatory measure. The plurality in *Trop v. Dulles* held that the deprivation of voting rights to convicted felons is a "nonpenal exercise of the power to regulate the franchise." *Trop v. Dulles*, 356 U.S. 86, 96 (1958).

Maryland's regulatory bodies do not utilize this restriction with underlying motives of vengeance, they use it for the broader regulatory purpose of ensuring the integrity of election and societal norm-shaping, for which it is adequately proportionate.

Felon disenfranchisement provides Maryland with the means to accomplish its greater regulatory purpose of preserving the ballot box and ensuring that only those with regard for the law, get to shape it. The Supreme Court of Alabama noted over 100 years ago that felony disenfranchisement is necessary for protection against corruption. *Washington v. State*, 25 Ala. 582 (1884). While a fear of lawlessness provoked by criminals running the government may be unbelievable, the underlying principle is not and still holds true today. In a democracy, the citizens have the power to alter, create and enforce law. The United States District Court for the Northern District of Georgia noted that "A state has an interest in preserving the integrity of her electoral process by removing from the process those persons with proven anti-social behavior whose behavior can be said to be destructive of society's aims." *Kronlund v. Honstein*, 327 F. Supp. 71, 72 (N.D. Ga 1971). By giving those with a clear record of consistently poor decision-making this power, a state runs the risk of changing its legislative scheme through those who refuse to follow current laws established for

the protection of its people. "It can scarcely be deemed unreasonable for a state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations or the judges who are to consider their cases." *Green v. Board of Elections of City of New York* 380 F. 2d 445, 451 (1967) For these reasons, it is therefore permissible and necessary to remove repeat offenders of serious crimes from the voting pool.

This measure is one way to preserve the purity of the election without revoking a criminal's substantive rights and is therefore a proportionate regulation to the intended purpose. Unlike revocation of citizenship, a disenfranchised criminal still has the liberty to enjoy that which our country offers. The Bill of Rights guarantees the rights of citizenship, for example: freedom of speech, freedom of religion and unreasonable seizures of property. A disenfranchised ex-criminal regains all of the fundamental rights provided by these first ten Constitutional Amendments, but is denied just one: voting. In order to achieve the regulatory goal, this is the least imposing regulation that will still allow election preservation.

In addition, numerous other groups are excluded from the franchise, those who have broken no laws, but who might not have the decision-making skills necessary to participate in

democratic elections. For example, children are not allowed to vote. This is not a punishment for being under 18 years of age, it is a regulatory measure to secure the democratic process.

Therefore, felony disenfranchisement cannot be considered a "punishment," rather a regulation to preserve the overall democratic purpose of elections.

**B. If the voting restriction is in fact punitive, as found by the Fourth Circuit, the District court was correct in deciding that it is justifiably punitive and therefore not "cruel and unusual."**

The Eighth Amendment forbids only extreme sentences that are grossly disproportionate to the crime (*Weems v. United States*, 217 U.S. 349, 367 (1910)) based on an objective indicia of consensus and individual judgment when assessed according to evolving standards of decency (*Atkins v. Virginia*, 536 U.S. 304, 312 (2002)). In assessing whether a recidivism statute violated the Eighth Amendment proportionality principle, *Solem v. Helm* established a three-factor test that looked to the "gravity of offense compared to severity of the penalty, [the] penalty imposed within the same jurisdiction for similar crimes, [and] penalties imposed in other jurisdictions for the same offense. *Solem v. Helm*, 463 U.S. 277, 278 (1983).

If the statute in question is not capital, *Weems v. United States* established a vivid standard for a "cruel and unusual"

punishment. "It has been said that ordinarily the terms imply something inhuman and barbarous,--torture and the like." *Weems v. United States*, 217 U.S. 349 (1910).

Such inhuman reprimands have been limited to physical torture, complete expatriation, execution of the mentally ill and imprisonment for addiction. All of these punishments involve a complete loss of rights as well as an absolute segregation from society.

*Ewing v. California* notes that the Eighth Amendment does not guarantee strict proportionality and uses the legislative purpose to assess "gross disproportionality." In this case, the Supreme Court accepts the "3 strikes rule" for its intent to deter criminals from repetition of their bad acts. "Recidivism has long been recognized as a legitimate basis for increased punishment and is a serious public safety concern in California and the Nation." *Ewing v. California*, 538 U.S. 11, 12 (2003). The *Ewing* court also says that, "in weighing the offense's gravity, both his current felony and his long history of felony recidivism must be placed on the scales." *Ewing v. California*, 538 U.S. 11, 12 (2003). With repeat offenders, the judicial system needs to utilize an alternative remedy to incarceration, recognizing the ineffectiveness of such a temporary punishment as a means of deterrence.

The second standard of "cruel and unusual" is a subjective one in which individual judgment must play a dominant role, but can be supplemented by a viewing of similar cases and the judicial discretion exercised. *Weems v. United States*, 217 U.S. 349, 389 (1910).

While in *Harmelin* Justice Scalia and Chief Justice Rehnquist denied the proportionality test established by *Solem* in favor of a test of "gross disproportionality", the majority of the Justices denied refusal of a proportionality guarantee. *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991). Following either opinion, the Maryland statute passes the test established by *Solem* and therefore will also pass the test for "gross disproportionality." In the state of Maryland, a felon is disenfranchised if he has committed an infamous crime, followed by crime of violence. Md Const. art. I § 4. Coolidge first committed an infamous crime - possession of cocaine, and then again later, committed one of violence - robbery. First, similar crimes within the same jurisdiction, such as possession of other illegal drugs or firearm, followed by a crime such as kidnapping or assault would warrant the same punishment: disenfranchisement. Md Const. art. I § 4. Maryland does not disenfranchise criminals who commit two infamous crimes, such as drug possession, the second one must be one of violence.

"First, among the 'objective indicia that reflect the public attitude toward a given sanction' are statutes passed by society's elected representatives." *Atkins v. Virginia*, 536 U.S. 304, 342 (2002) quoting *Ford v. Wainwright* 477 U.S. 399, 408-409 (1986). Currently, this public opinion is codified in statutes of 48 states, allowing the disenfranchisement of criminals. In addition, 13 of these states have enacted statutes that permanently disenfranchise citizens. The Constitution permits each state to enact statutes that reflect the opinions of its own citizens and the citizens of these 13 states have decided that permanent disenfranchisement is not "cruel and unusual." The Supreme Court must respect the decisions of these states and use such legislation as objective indicia on which to base their decisions.

While such disenfranchisement statutes have been examined numerous times, the Supreme Court has consistently respected the state's practice and upheld their statutes. In *Richardson v. Ramirez*, 418 U.S. 24 (1974)., the Supreme Court held that California may constitutionally disenfranchise ex-felons. Also, *Beacham v. Braterman*, 396 U.S. 12 (1969) held that excluding from the franchise persons who otherwise would be allowed to vote is constitutionally permissible.

While *Harmelin* lacks a majority opinion, a majority of the court concurs with Part IV of Justice Scalia's opinion stating

that while "Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history. As noted earlier, mandatory death sentences abounded in our first Penal Code." *Harmelin v. Michigan*, 501 U.S. 957, 995 (1991). The Eighth Amendment forbids punishments that are "cruel and unusual" and as Justice Scalia noted, a practice cannot by definition be unusual if it is frequently utilized.

Such standards alone cannot guide this classification. When interpreting three words: "cruel and unusual," an exercise of individual judgment is necessary. The facts of the case show that disenfranchisement is proportional to the crimes committed and those of a similar nature.

Mr. Coolidge committed not one, but two serious crimes. According to *Solem v. Helm*, 463 U.S. 277, 298 (1983), the State is justified in punishing a recidivist more severely than it punishes a first offender. On one side of the scale, Coolidge threatened to assault and robbed a store owner and possessed illegal drugs, on the other side, he was denied one privilege. On the first side, he not only participated in illegal activities, he put someone else in serious fear, and on the other, he cannot have a say in shaping law. According to the 4<sup>th</sup> Circuit, "he receives the harsher, permanent sanction simply because of his single prior conviction for possession of

10 grams of cocaine." (ACS Moot Court Record, Fourth Circuit Opinion, pg. 41) In this analysis, it appears that the Court is placing disproportionately low value on crime of drug possession. While drug possession and robbery may be less severe than murder, they are more serious than for example, jaywalking. Similarly, on a scale of punishments with regard to rights, a criminal may lose all of his rights through execution or life imprisonment, on the other hand he could merely receive a ticket, or as with this case, his crime could fall somewhere in the middle and he could be temporarily imprisoned and permanently disenfranchised. A punishment must deter criminal activity in proportion to particular crimes. Coolidge is not expelled from society in the way expatriation or execution would achieve, but does receive a permanent sanction proportionate to his crime, and proportionate to achieving the government's deterrence rationale. A mandatory life sentence is not considered "cruel and unusual" in its attempts to stop repeat offenders. *Ewing v. California*, 538 U.S. 11 (2003). Disenfranchisement is far less severe than a life sentence. Thus, since California's policy is not a violation of the Constitution because it is not grossly disproportionate, neither is Maryland's, because it leaves the repeat offender with far more rights, in hopes of still achieving the same goals of deterrence.

Respondents argue that an "evolving standard of decency" would deem this punishment unconstitutional as in *Atkins v. Virginia*, 536 U.S. 304 (2002), when the court ruled execution of the mentally ill a "cruel and unusual punishment" even though it had been practiced in the past. The key to distinguishing these cases is assessing proportionality in relation to rational-decision making abilities. A mentally challenged individual does not physically have the capability to make consistent rational choices. Therefore, a legislative attempt at deterrence from recidivism would not be beneficial because a person who is mentally ill is not taking into consideration the consequences in the same manner as one on sound mind.

A felon committing an infamous and a violent crime has the power to understand that his actions could lead to a permanent sanction. Therefore, disenfranchisement as a punishment is humane because it has a valid legislative purpose, to deter criminality, without public humiliation or a complete loss of rights.

**C. The Fourth Circuit's reading of the Eighth Amendment, finding felony disenfranchisement "cruel and unusual," would render the Constitution inconsistent because the Fourteenth Amendment specifically permits denying a criminal the right to vote.**

The Supreme Court held that "the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of [sic] and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is on controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause by this Court." *Richardson v. Ramirez*, 418 U.S. 24, 25 (1974). The language of Fourteenth Amendment states: "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." U.S. Const. amend. XIV, Section 2 (emphasis added).

Additionally, in *Hunter v. Underwood*, the Supreme Court held that the Tenth Amendment cannot save legislation prohibited by the Fourteenth Amendment, because of the Fourteenth Amendment's subsequent ratification. *Hunter v. Underwood*, 471 U.S. 222 (1985). The Tenth Amendment reserves powers not directly given to the federal government for the states or the people. U.S. Const. amend. X. A state statute denying the right to vote on the basis on race, clear violation of the 14<sup>th</sup> amendment, cannot justify itself through the 10<sup>th</sup> amendment. As

stated in *Farrakhan v. Locke*, 987 F.Supp. 1304 (E.D. Wash 1997), the court "is not inclined to interpret the Constitution in this internally inconsistent manner." The evolution of the law is demonstrated through the usage of subsequent Constitutional amendments, an aid to understanding the Constitution and rights.

Therefore, the Eighth Amendment may not discard an action allowed by the Fourteenth Amendment. The language of the latter allows the state to deny the right to vote, not just for participation in a rebellion, but for any "other crime" as well.

The Fourth Circuit Court argues that the Eighth Amendment should ban disenfranchisement. But, a punishment...is considered cruel when it is "offensive to the cardinal principles for which the Constitution stands." *Trop v. Dulles*, 356 U.S. 86, 102 (1958). An action cannot be considered contrary to the "principles for which the Constitution stands" when the Constitution specifically provides for it, as noted above.

A look to history of the amendment supports the argument that Congress intended to allow disenfranchisement and did not intend the Eighth Amendment to prohibit this restriction. "Further light is shed on the understanding of those who framed and ratified the Fourteenth Amendment, and thus on the meaning of [sic], by the fact that at the time of the adoption of the Amendment, 29 States had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise

of the franchise by persons convicted of felonies or infamous crimes." *Richardson v. Ramirez*, 418 U.S. 24 (1974)

To find the Fourteenth Amendment in violation of the Eighth Amendment would require ratification of new amendment overruling part of the Fourteenth, a job for the legislature, not the court. As the court specifically stated, "In light of §2 of 14 amendment, felon disenfranchisement laws cannot be considered per se unconstitutional, when it is constitutionally permissible." *Farrakhan v. Locke*, 987 F.Supp. 1304 (1997).

CONCLUSION

As a matter of law, Maryland's statute permanently disenfranchising repeat offenders does not violate the Eight Amendment or the Voting Rights Act. Accordingly, this Court should reverse the 4<sup>th</sup> Circuit Court's conclusion that plaintiffs properly stated a claim under that provision.

Respectfully submitted,

DATED: \_\_\_\_\_

Attorney for Petitioners

CERTIFICATE OF SERVICE

I, \_\_\_\_\_, do hereby certify that I have this date served a true and correct copy of Petitioner's Brief upon Respondent's counsel by placing a true copy of the Appellants' Brief in the United States mail, with sufficient postage affixed, and addressed as follows:

DATED: \_\_\_\_\_

Attorney for Petitioners