

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?

IN THE SUPREME COURT OF THE UNITED STATES

MARYLAND STATE BOARD OF ELECTIONS, <i>et al.</i>)	
)	
PETITIONERS,)	ON PETITION FROM THE
)	UNITED STATES COURT OF APPEALS
v.)	FOR THE FOURTH CIRCUIT
)	
JEFFREY COOLIDGE,)	
)	CASE No. 05-00001
RESPONDENT.)	

MERIT BRIEF FOR THE PETITIONERS MARYLAND STATE BOARD OF ELECTIONS, *et al.*

BRIEF I.D. 10676
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JURISDICTION

The Government concedes the jurisdiction of this Court to hear the case now before it.

CITED STATUTES

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.

STATEMENT OF CASE

The facts of this case are not in dispute. A court considering a defendant's motion to dismiss under Rule 12(b)(6), must take the claims presented in the light most favorable to the plaintiff and assume the factual allegations of the complaint to be true. District 28, United Mine Workers of America v. Wellmore Coal Corp., 609 F.2d 1083, 1085 (4th Cir. 1979).

The plaintiff, Jeffrey Coolidge ("Coolidge" or "Respondent"), 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) create a three-tiered voter-qualification scheme. In the first tier, 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 In the second tier, 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 under § 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.

Coolidge challenged § 3-501 on the basis that it had discriminatory results in its application under § 2 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973, and that the permanent denial of his right to vote constituted a cruel and unusual punishment under the Eighth Amendment. The Petitioners made a motion to dismiss, which was granted by the district court. The 4th Circuit Court of Appeals reversed the district court and reinstated Coolidge's claim. The Petitioners appealed to this court which granted certiorari.

SUMMARY OF ARGUMENT

This court should reverse the Court of Appeals and affirm the District Court's grant of the Government's motion to dismiss. First, § 2 of the Fourteenth Amendment recognizes the ability of states to disenfranchise people who have committed "rebellion or other crimes." Second, application of the VRA to the Maryland felony disenfranchisement statute would exceed Congress's enforcement power under the Fourteenth and Fifteenth Amendments.

Furthermore, Md. Code Ann., Election Law § 3-102, does not violate the Eighth Amendment's prohibition of cruel and unusual punishment. To support such a claim, Coolidge's disenfranchisement must be both punishment and be impermissibly extreme compared to his crime.

Trop v. Dulles, 356 U.S. 86 (1958), is the controlling case with regard to both issues. Court stated that laws disenfranchising felons of their voting rights were not penal because the purpose of the statute at issue was to not punitive in nature but to create a reasonable ground of eligibility for voting and is a nonpenal exercise of a state's power to regulate the voting.

With respect to whether disenfranchisement is cruel and unusual, the great number of states excluding felons from the franchise forbids a conclusion that it is. Furthermore, disenfranchisement serves the legitimate purposes of retribution and deterrence of future bad conduct, and, as in the case of Coolidge, is no more extreme than necessary for a person guilty of the commission of multiple felonies.

ARGUMENT

I. THE VOTING RIGHTS ACT DOES NOT APPLY TO FELON DISENFRANCHISEMENT STATUTES.

The Second and Eleventh Circuits have both held the Voting Rights Act inapplicable to state felon disenfranchisement

statutes and this court should resolve the circuit split between them and the Ninth Circuit in their favor and apply the "clear statement rule" to conclude that Congress did not intend to expand Federal power further into the realm of state election practices.

History and Supreme Court precedents recognize the proposition that Congress has the power to enforce, but not expand, Fourteenth and Fifteenth Amendment rights. Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment state: "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." This court has interpreted this to mean that Congress can remedy or prevent unconstitutional behavior but not make substantive changes to the governing law. City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997).

In Richardson v. Ramirez, 418 U.S. 24, 94 S. Ct. 2655, 41 L. Ed. 2d 551 (1974), this court considered a provision of California's constitution whereby, as here, a person convicted of an "infamous crime" would lose the right to vote. Although decided in the context of an Equal Protection claim, this Court decided Ramirez largely on the strength of the historical evidence and the plain language of § 2 of the Fourteenth Amendment:

We hold that the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of § 2 and in the historical and judicial interpretation of the Amendment's applicability to state laws disenfranchising felons, is of 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. Ramirez at 54, 2671.

In determining whether the clear statement rule should apply, a court must ask two questions: first, whether applying § 1973 to a state's disenfranchisement statute would alter the constitutional balance between State and Federal government; and second, whether Congress made its intention to alter such balance unmistakably clear. Muntaqim v. Coombe, 366 F.3d 102, 116.

In Muntaqim, the 3rd Circuit considered these questions. In a unanimous opinion, the court held that extending the VRA to apply to felon disenfranchisement statutes would cause "serious constitutional problems." The ambiguity caused by the conflicting language of § 2 of the Fourteenth Amendment and § 2 of the VRA requires the application of the "clear statement rule." Gregory v. Ashcroft, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991). The clear statement rule says that "if Congress intends to alter the usual Constitutional balance between the States and Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." Gregory at 460-61.

The court in Muntaqim based its decision primarily on the holding of Judge Mahoney in the evenly-split *en banc* 3rd Circuit decision of Baker v. Pataki, 85 F.3d 919.

In his opinion, Judge Mahoney reasoned that applying the VRA to state felon disenfranchisement statutes would cause serious constitutional problems by altering the federal-state power balance and was thus ambiguous as to its application. Because of this ambiguity, the court had to apply the canons of statutory construction. DeBartolo Corp. v. Florida Gulf Coast Trades Council, 485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988) (“Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress, or usurp power constitutionally forbidden it.”)

Under these canons, a statute should be construed to change the balance of power between the federal and state governments only upon a clear statement of Congress’s intent to do so. Judge Mahoney was unable to find any such clear statement in the language of the VRA, and so held the VRA inapplicable to felon disenfranchisement statutes.

The 11th Circuit case Johnson v. Bush, 405 F.3d 1214, also considered whether a felon disenfranchisement law violated § 2 of the VRA. The court on a rehearing *en banc* held that it does

not. *Id.* at 1216. In an opinion by Judge Kravitch, the court initially found support for its position in the language of the Fourteenth Amendment, itself, which states that a state may not abridge the right of a person to vote except when that person is guilty of rebellion or other crime.

The Johnson court noted that when the Fourteenth Amendment was enacted, twenty-nine out of thirty-six states (including Maryland) had felon disenfranchisement statutes, thus indicating that disenfranchisement statutes did not originate with any racially motivated purpose as they pre-existed the right of blacks to vote. (Footnote 28, Quoting Richardson v. Ramirez at 48.)

The Johnson court reaffirmed that § 2 of the Fourteenth Amendment serves as an affirmative grant to the states of the power to disenfranchise those who had "participat[ed] in rebellion or other crime." *Id.* at

The court also noted that there was no external support for the proposition that the Fifteenth Amendment, by not including any language regarding disenfranchisement, repealed § 2 of the Fourteenth Amendment. (Footnote 29) This court has also never accepted such a proposition. (See Ramirez.)

"To be a valid exercise of Congress's enforcement power, 'there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that

end.'" Quoting City of Boerne v. Flores, 521 U.S. 507, 520, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997). The court went on to hold that in order to properly enact enforcement legislation, Congress must have relied on a clear record of violations. The standard is relaxed slightly in instances of prophylactic legislation, but even that requires at least some record of Constitutional violations in order for Congress to have an adequate Constitutional basis for such legislation. *Id.* at 1231-32, n34. The court then determined that Congress had not, in fact, made adequate findings. This created the "grave Constitutional problems" that gave rise to the need for application of the clear statement rule.

The Respondent would have this court follow Judge Barkett's dissent in Johnson v. Bush, and hold the VRA to be unambiguous as it applies to felon disenfranchisement statutes. Judge Barkett rejected the majority's reasoning that the clear statement rule should apply because she found the VRA to be unambiguous. *Id.* at 1248.

Judge Barkett claimed that the majority reached its conclusion because it "failed to recognize the difference between felon disenfranchisement statutes generally, and those that result in racial discrimination." *Id.* at 1248 (Barkett, J, dissenting). The mere assertion that there is no ambiguity in the VRA does little to resolve the conflict between the

Fourteenth Amendment's affirmative sanction of felon disenfranchisement statutes and the VRA's purported ability to declare felon disenfranchisement statutes unconstitutional. Furthermore, the very fact that courts are divided on this issue and on the issue of how the VRA should be interpreted supports the ambiguity of the VRA's application to state felon disenfranchisement statutes.

Only one other reported decision has held that § 2 of the VRA applied to state felon disenfranchisement statutes. Farrakhan v. Washington, 338 F.3d 1009, assumed that § 2 of the VRA applied to Washington state's disenfranchisement statute, although it did not explain its decision. Its only reference to relevant precedent was a footnote that mentioned the *en banc* decision in Baker v. Pataki. Therefore, the Farrakhan decision gives little guidance as to why § 2 of the VRA should apply.

Since Congress did not make any clear statement in the language of the VRA or in the statute's legislative history that Congress intended to infringe upon the states' ability to conduct and manage their own elections, this court should follow the Second and Eleventh Circuits in Muntaqim and Johnson to hold that where, as here, a statute is ambiguous, courts should construe the statute to alter the federal balance only when Congress makes its intention to do so unmistakably clear in the language of the statute.

II. DISENFRANCHISEMENT DOES NOT CONSTITUTE "CRUEL AND UNUSUAL PUNISHMENT" UNDER THE EIGHTH AMENDMENT OF THE CONSTITUTION.

Maryland's decision to remove Coolidge's voting rights does not violate of the Eighth Amendment's prohibition against cruel and unusual punishment. To support a claim of cruel and unusual punishment under the Eighth Amendment, Coolidge's disenfranchisement must: 1) actually be a punishment, Wilson v. Seiter, 501 U.S. 294, 300 (1991); and 2) be impermissibly extreme compared to his crime. Prohibiting Coolidge the right to vote based on his conviction of an infamous crime, and subsequent conviction of a violent crime is not a punishment; even granting that disenfranchisement constitutes punishment, it is not cruel and unusual.

A. Coolidge's disenfranchisement is not a punishment.

Coolidge's disenfranchisement is not a punishment as interpreted under controlling authority. The Fourth Circuit relied on Slade v. Hampton Rds. Reg'l Jail, 407 F.3d 243, 250 (4th Cir. 2005), in determining that Coolidge's disenfranchisement is punishment, stating that the test for determining whether an act is punishment is, first, that the act must impose a disability or harm. If the disability or harm applies, the act constitutes punishment if: "1) imposed with expressed intent to punish; or 2) not reasonably related to a legitimate nonpunitive governmental objective, in which case an

intent to punish may be inferred.” *Id.*, quoting Martin v. Gentile, 849 F.2d 863, 870 (4th Cir. 1988).

However, the correct application of the term “punishment” in the instant case is this Court’s analysis in Trop v. Dulles, 356 U.S. 86 (1958) and re-iterated in Green v. Bd. of Elections of the City of New York, 380 F.2d 445 (2nd Cir. 1967):

In deciding whether or not a law is penal, the Supreme Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment, that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered non-penal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.

356 U.S. at 96.

In Trop, the Court went on to say that that laws disenfranchising felons of their voting rights were not penal because the purpose of the statute at issue was to not punitive in nature but to “designate a reasonable ground of eligibility for voting” and is a “nonpenal exercise of the power to regulate the franchise.” *Id.* at 96-97. Thus, we turn to the purpose of the Maryland statute under which Coolidge is disenfranchised.

The opinion letter by the Attorney General interpreting Md. Code Ann. § 3-102 provides the only available insight into the purpose of the statute. The letter states that the Maryland Legislature’s amendment to § 3-102 narrowed the scope of disenfranchisement for repeat offenders while keeping in place a

"strict . . . scheme that recognized the seriousness of violent felonies." 93 Op. Att'y Gen. 5. While there is no indication that the statute, as amended, was for a non-penal purpose, there is also no indication that it is penal. Recognizing "the seriousness of violent felonies" could indicate the Legislature's desire to designate a "reasonable ground for eligibility of voting," 356 U.S. 86 at 97, or any other legitimate, non-penal purpose, which is within Maryland's rights under its Constitution. See Md. Const. art. I, § 4.

Further, as the District Court noted in its opinion, many Americans are not permitted to vote for reasons not considered penal, and Coolidge is similarly situated, as a citizen restricted from voting, with those Americans.

Absent any indication that the statute's purpose is penal, we cannot assume that it is. Therefore, Coolidge's disenfranchisement under Md. Code. Ann. § 3-102 does not constitute punishment under Trop.

B. Even if disenfranchisement constitutes "punishment" under the Eighth Amendment, it is not "cruel and unusual."

Assuming *arguendo* that Coolidge's disenfranchisement is punishment for purposes of Eighth Amendment analysis, we turn to whether it is unlawfully cruel and unusual. Felon disenfranchisement is not cruel and unusual punishment *per se*. In fact, "the great number of states excluding felons from the

franchise forbids a conclusion that this is a "cruel and unusual punishment" within the context of "evolving standards of decency that mark the progress of a maturing society."" Green, 380 F.2d at 451, quoting Trop, 356 U.S. at 101.

In addition to adhering to evolving standards of decency, non-capital punishment under the Eighth Amendment must be narrowly proportional to the offense for which it is administered. Ewing v. California, 538 U.S. 11, 20 (2003); Harmelin v. Michigan, 501 U.S. 957, 996-97 (1991); and Rummel v. Estelle, 445 U.S. 263 (1980). Successful challenges to the proportionality requirement are rare in cases other than capital punishment. Ewing, 538 U.S. at 21, quoting Rummel, 445 U.S. at 272.

Restricting Coolidge's right to vote serves both deterrence and retributive purposes. As in Ewing where parolees left California to avoid its "three strikes" law (*Id.* at 27), first-time offenders of infamous crimes may think twice before committing a violent crime because they know they will be permanently disenfranchised if convicted of the second, violent offense.

Coolidge's disenfranchisement is not, as the Fourth Circuit found, "arbitrarily harsh." Instead, it is proportional considering his conviction of the violent crime which ultimately caused his disenfranchisement and his history of criminal

behavior. Coolidge has a history of criminal behavior that goes beyond mere minor offenses, which shows that he is "simply incapable of conforming to the norms of society as established by its criminal law." *Id.* at 29. The purpose of multiple strike laws is to treat repeat offenders more harshly, a theory which has been upheld by this Court. *See id.*; *see also Rummel*, 445 U.S. at 276; *Solem v. Helm*, 463 U.S. 277, 296 (1983). The Legislature is entitled to enact a punishment it sees fitting to the nature of specified offenses. In the instant case, Coolidge showed a history of failure to abide by the laws of the State of Maryland, and his disenfranchisement marks a proportional, retributive response to such failure.

While disenfranchisement may be controversial and out of vogue, *see Richardson v. Ramirez*, 418 U.S. 24, 55 (1974), there is no reason that Maryland's legislative judgment should not be entitled to deference in the instant case. The state has a legitimate public safety interest in deterring and punishing repeat offenders, and the Eighth Amendment does not limit its ability to make that choice. *See Ewing*, 538 U.S. at 25. Maryland's disenfranchisement of Jeffrey Coolidge is therefore not a cruel and unusual punishment but a measured, justified response to his repeated, dangerous criminal behavior.

CONCLUSION

For the foregoing reasons, this Court should reverse the Court of Appeals and affirm the district court's grant of the Government's motion to dismiss under Fed. R. Civ. Pro. 12(b)(6).

Respectfully submitted,

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I certify that a true and accurate copy of this Merit Brief was sent by ordinary U.S. mail on this 23rd day of January 2006

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No. 05-

In the Supreme Court of the United States

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ET AL., PETITIONERS,

v.

JEFFREY COOLIDGE,

RESPONDENT.

MERIT BRIEF OF PETITIONERS

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