

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 PETITIONERS
—————

ID: 10712

Counsel for Petitioners

January 23, 2005

Questions Presented

1. Is a statutory provision that permanently denies the right to vote only to persons who have committed a second or subsequent 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 disenfranchisement of a violent felon, predicated on his prior conviction of an infamous crime, a cruel and unusual punishment in violation of the Eighth Amendment?

Parties to the Proceeding

Petitioners are the Maryland State Board of Elections, Janet Fallins in her official capacity as State Administrator of Elections for Maryland; the Board of Elections of the City of Baltimore; and Edward D. Jones in his official capacity as Election Director for Baltimore. Respondent is Jeffrey Coolidge.

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OPINIONS BELOW

The July 16, 2005 the Court of Appeals for the Fourth Circuit reversed the District Court's dismissal of both the Voting Rights Act claim and the Eighth Amendment claim. The order of the appellate court is unreported. Record at 29. The Feb 23, 2005 opinion of the District Court for the District of Maryland granted Petitioner's motion to dismiss and is unreported. Record at 20.

JURISDICTIONAL STATEMENT

On July 16, 2005, the judgment of the court of appeals was entered. The petition for a writ of certiorari was granted on October 14, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal

U.S. Const. amend. VIII.

U.S. Const. amend. XIV.

U.S. Const. amend. XV.

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

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

State of Maryland

Md. Const. art. I, § 4.

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

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

STATEMENT OF THE CASE

Respondent is a Baltimore resident and formerly registered voter. Report at 11. He was convicted of two felonies, one a violent felony. Report at 21. His first conviction was for possession of ten grams of cocaine with intent to distribute. Report at 10. His second was a convicted robbery, an "infamous crime of violence" under Md. Code Ann., Criminal Law § 14-101(a) (Bender 2005). Maryland publishes a list of crimes considered infamous each year to signify which crimes will result in felony disenfranchisement. Under Md. Code Ann., Election Law § 3-102 (Bender 2005), Respondent became ineligible to vote when he was sentenced. Pursuant to Md. Code Ann., Election Law § 3-501 (Bender 2005), Report at 12. After being convicted of a second felony that was a crime of violence, Respondent became permanently ineligible to vote in Maryland under 3-102(c). *Id.* All fifty states currently either temporarily or permanently disenfranchise felons. Record at 14. Maryland has amended its disenfranchisement laws twice to relax the voting restrictions placed on felons. Most importantly, Maryland's law now provides convicted felons a chance to vote provided their second or subsequent infamous crime is not a crime of violence. *Id.*

SUMMARY OF THE ARGUMENT

State disenfranchisement laws should be upheld unless the law clearly stated a discriminatory purpose; the law has an ongoing racially disproportionate impact; or different regions of the same state applied felony disenfranchisement laws unequally. According to current Supreme Court interpretation of § Two of the Fourteenth Amendment and the Voting Rights Act, Maryland's felony disenfranchisement laws are constitutional because they only discriminate based on felons or non-felons. Furthermore the prophylactic legislation contained in the Voting Rights Act does not clearly state it is meant to abrogate *felony* disenfranchisement. Therefore striking Maryland's felony disenfranchisement law would not be a proportional and congruent response to the harm Congress was trying to remedy, voter discrimination that is not exempt for § Two of the Fourteenth Amendment. Furthermore, if Congress is allowed to override Maryland's law, the balance between state and federal power will be jeopardized.

The first step in determining if a statute violates the Eighth Amendment is to determine if the disability created by the statute is a punishment. If it is not a punishment, the analysis is over. If it is a punishment, then the hurdle of whether it is cruel and unusual must be crossed. Only by

satisfying both conditions can a statute be said to violate the Eighth Amendment.

ARGUMENT

I. MARYLAND'S PROVISION DENYING A PERSON WHO HAS COMMITTED A SECOND OR SUBSEQUENT FELONY IS A VOTING QUALIFICATION ALLOWED BY THE FOURTEENTH AMENDMENT BECAUSE IT DOES NOT RESULT IN DENIAL OF A RIGHT TO VOTE ON ACCOUNT OF RACE.

State disenfranchisement laws may be scrutinized using the "results test" for "purposeful racial discrimination" if (i) the state clearly stated a discriminatory purpose, (ii) the law had an ongoing racially disproportionate impact, or (iii) different regions of the same state applied felony disenfranchisement law unequally. *Hunter v. Underwood*, 471 U.S. 222 (1985), *Chisom v. Roemer*, 501 U.S. 380, 394-5 (U.S. 1991) (Section Two of the Voting Rights Act uses a "results test" to determine the impact of the allegedly discriminatory law). Respondent cannot prove that the Maryland law violated any of these factors because Section Two of the Fourteenth Amendment and the common law deny the type of claims respondent attempts to make.

In *Richardson v. Ramirez*, the Court held that the existence of a felony disenfranchisement law does not in and of itself prove a clearly discriminatory purpose when read with Section Two of the Fourteenth Amendment. *Richardson v. Ramirez*, 418 U.S. 24 (1974). Section Two states, "[W]hen the right to vote at any election . . . or in any way abridged, except for

participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion . . .

" U.S. Const. amend. XIV. (emphasis added). In addition, the *Ramirez* Court stated that Section Two of the Equal Protection Clause of the United States Constitution provided that a state may deny the right to vote to those convicted of felonies, even if they had completed their sentences and paroles. *Richardson v. Ramirez*, 418 U.S. 24 (1974). Furthermore, the Court did not find that the state had historical intent to disenfranchise any person on the basis of race because the Section 2 of the Fourteenth Amendment. *Contra, Richardson v. Ramirez*, 418 U.S. at 75-76 (Marshall J. dissenting). The law only discriminated against felons or non-felons which in the Court's view did not inherently discriminate on the basis of race. Therefore, the *Ramirez* Court held that felony disenfranchisement laws were not subject to review under the Equal Protection Clause, unless (i) the disenfranchisement laws were based on misdemeanor rather than felony convictions and, or (ii) they violated the strict scrutiny test. *Richardson*, 418 U.S. 24 (strict scrutiny: compelling state interest implemented by the least restrictive means), *McLaughlin v. City of Canton, Mississippi*, 947 F. Supp. 954 (S.D. Miss. 1995) (the court ruled that strict scrutiny was required where disenfranchisement was based on a misdemeanor rather than a felony conviction.).

In *Hunter v. Underwood*, the Court appears to narrow the *Richardson* decision by finding that "purposeful racial discrimination" can violate the Equal Protection Clause under certain circumstances other than strict scrutiny. *Hunter*, 471 U.S. 222. However, while the decision focuses on disproportionate racial impact and unequal application of the law; it is also important to highlight the language of the disputed statute. The law at issue in *Hunter* prohibited citizens convicted of a crime involving "moral turpitude" to exercise their right to vote. *Hunter* at 222-3. In this case, crimes of "moral turpitude" included misdemeanors. *Id.* According to the *Richardson* Court, felon disenfranchisement could not be based on misdemeanor convictions, only felony convictions unless the law passed strict scrutiny. *Richardson*, 418 U.S. 24. Therefore while the *Hunter* Court discusses other arguments, the holding is consistent with the *Richardson* decision because the Court finds misdemeanants should not be disenfranchised. It is unclear whether the Court's argument would be the same if misdemeanor convictions were not included in the crimes of "moral turpitude." The Supreme Court has not further clarified the factors of the "results test;" however the Fourth Circuit, which is the circuit for Maryland, has spoken. The Fourth Circuit held that permitting states to classify certain crimes but not others as disqualifying crimes is

permitted under § Two of the Equal Protection Clause. *Thiess v. State Administrative Bd. of Elect. Laws of Md.*, 387 F. Supp. 1038 (D. Md. 1974), *Accord, Allen v. Ellisor*, 664 F.2d 391 (4th Cir. 1980) (same decision regarding South Carolina felony disenfranchisement law). More specifically, the Fourth District held that Maryland's infamous crimes list is an acceptable application of § Two of the Equal Protection Clause. *Id.*

Respondent provided arguments that the felony disenfranchisement laws did violate Section 2 of the Fourteenth Amendment, however after reviewing relevant case law it is clear he does not have a claim. According to the *Richardson* Court, the Maryland felony disenfranchisement law does not state a clearly discriminatory purpose based on race. *Richardson*, 418 U.S. 24. The only discrimination is based on felons and non-felons, which is allowed because of Section 2 of the Fourteenth Amendment. *Id.* Continuing the *Richardson* Court's analysis, it is clear that if Respondent was not a misdemeanor. Respondent was convicted of not one felony, but two, including one, involving violence. Because Respondent was disenfranchised on account of convicted felonies, and the Court found Section Two provided a disenfranchisement exception for felons, Respondent's proof for stating a claim would fail both prongs of the *Richardson* test.

Respondent also fails to prove that the law had unequal application. While respondent presented statistics regarding the number of African Americans that had been permanently disenfranchised for convicted felonies, this information, alone is not enough to prove unequal application. Therefore, this claim alone does not currently provide the proof necessary to state a claim. See *Richardson* 418 U.S. at 52-4.

While parties in Florida and Washington argued that the legislative history of felony disenfranchisement law has had a disproportionate impact on African American voters, no court has found the same to be true of Maryland's felony disenfranchisement law. *Johnson*, 405 F.3d. 1214, 1234 (11th Cir. 2005). *Muntaqim v. Coombe*, 366 F.3d 102, 124 (2nd Cir. 2004). Also, the Supreme Court has not decided whether the legislative history of felony disenfranchisement laws is racially discriminatory and the *Johnson*, *Muntaqim*, and *Farrakhan* courts are currently split on whether an argument regarding whether felony disenfranchisement is historically has a racially disproportionate on African Americans. *Johnson*, 405 F.3d. 1214, 1234 (11th Cir. 2005). *Muntaqim v. Coombe*, 366 F.3d 102, 124 (2nd Cir. 2004), *Farrakhan v. Locke*, 359 F.3d 1116 (9th Cir. 2004), *cert. denied*. Furthermore, the Fourth Circuit found that because Maryland publishes which laws constitute "infamous crimes" and violate the law, they take a step to prevent unequal

application rather than promote it. *Theiss v. State Admin. Bd. of Elec. Law of Md.*, 387 F. Supp. 1038, 1039, 1041 (D.Md. 1974).

The list provides for uniform guideline for application across the state by providing a clear understanding of which crimes do and do not jeopardize voter eligibility. *Id.*

Without proving clearly stated racial discrimination or unequal application, the Respondent cannot argue that the law had a racially disproportionate impact. If Respondent fails to state a claim that the law violates Section Two of the Fourteenth Amendment then he will also fail to state a case that the law violates the Voting Rights Act, especially because the Voting Rights Act does not apply to felony disenfranchisement law. *Hunter* at 222-3.

II. MARYLAND'S DISENFRANCHISEMENT LAW IS NOT SUBJECT TO THE VOTING RIGHTS ACT VIA PROPHYLACTIC LEGISLATION.

Congressional abrogation allows Congress to enact "prophylactic legislation" that bans facially constitutional conduct in order to prevent and deter unconstitutional conduct. *City of Boerne v. Flores*, 521 U.S. 507. While Congress has this power, it is restricted to whether or not it creates a "substantive change in governing law." *Boerne* at 519. To determine whether Congress acted pursuant to a grant of Constitutional authority, the *Boerne* Court held that there must be proof of two elements. First, an examination of legislative

history must provide evidence that Congress clearly expressed its intent to abrogate. *Id.* Second, the relationship between the injury to be remedied and the legislation must be “congruent and proportional.” *Id.* at 520. Finally, the arguments for both elements must be considered given the “totality of the circumstances.” *Chisom v. Roemer*, 501 U.S. 380, 394-5 (U.S. 1991). The “totality of the circumstances” for the Voting Rights Act considers whether “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.” 42 U.S.C. § 1973(b), *Thornburg v. Gingles*, 478 U.S. 30, 47. If respondent fails to prove that the Voting Rights Act applied to the Maryland law other than in ways that have already been dismissed by courts, then he will fail to state a claim on which relief can be granted.

A. The Voting Rights Act Did Not Provide a Clear Statement Indicating the Constitutional violation of Felony Disenfranchisement.

The Supreme Court held that Congress clearly stated that the Voting Rights Act was a response to the historic disenfranchisement of African Americans. *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (disenfranchisement based on a literacy test). However, the Supreme Court did not comment on felony disenfranchisement except to say that there is a

“likelihood of unconstitutionability” in regard to criminal disenfranchisement laws, given the history of the discriminatory intent behind many laws. *City of Boerne v. Flores*, 521 U.S. 507 at 520 (1997). Without further guidance, the Circuit Courts split their decisions.

In *Baker v. Pataki*, 85 F.3d 919 at 929-30 (2nd Cir. 1996), a Second Circuit ten-judge panel evenly divided on whether Congress explicitly stated its intention for the Voting Rights Act to apply to felony disenfranchisement. One half of the panel argued that if finding Congress did clearly state their intent to abrogate then Congress’ power to prohibit state’s from creating felony disenfranchisement laws would upset the balance between states and the federal government. *Id.* The other half of the court found felony disenfranchisement law that Congress did intend to bar disenfranchisement laws that resulted in racial discrimination. *Id.* Because the court split its decision, the New York felony disenfranchisement statute has not been eliminated by the Voting Rights Act.

In *Muntaqim v. Coombe*, 366 F.3d 102 (2nd Cir. 2004), the Second Circuit concluded that the Voting Rights Act did not apply to felony disenfranchisement because Congress did not explicitly state its intention to do so. This decision reaffirmed one half of the *Pataki* court that refused to interpret the Voting Rights Act to prohibit felony disenfranchisement laws

resulting in the denial of the states' well-established discretion and disturbing the balance between the states and the federal government. *Baker v. Pataki*, 85 F.3d 919 at 929-30 The Eleventh Circuit is the only circuit to shift the burden of proof to the state government to prove that historically discriminatory disenfranchisement law somehow excluded felony disenfranchisement from non-discriminatory law. *Johnson v. Bush*, 405 F.3d 1214, 1234 (11th Cir. 2005).

Although the courts split their decisions, the state felony disenfranchisement law has only been rendered unconstitutional by the Eleventh Circuit. Two other circuits allowed state felony disenfranchisement laws because they did not find Congress clearly stated its intent to abrogate. Therefore while it is unclear how the Supreme Court would decide the case and there is a strong argument that disenfranchisement is historically based on race, *felony disenfranchisement* does not share the same arguments and therefore a higher standard of proof is necessary to state a claim on which relief can be granted. Because Respondent has not provided such evidence, motion for summary judgment should be granted.

B. The Voting Rights Act Is Not a Congruent or Proportional Remedy for the Violation Targeted.

To prove the relationship between the legislation and the injury is congruent and proportional, the Court weighs the

historical evidence of racial discrimination or hostility against the type of discrimination involved. *City of Boerne v. Flores*, 521 U.S. 507 at 519-22 (1997). The Supreme Court held that different categories of discrimination allow Congress less power. *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003). However the Supreme Court has not specifically addressed whether felony disenfranchisement law should receive lower level scrutiny or not. The only discrimination that the Supreme Court allowed Congressional abrogation was regarding gender-based discrimination of a state employee and lack of handicap access to state buildings. *Id.*, *Tennessee v. Lane*, 541 U.S. 509 (U.S. 2004). According to the Court, state zoning laws that infringe on free exercise of religion; state laws regarding age and employment; and state laws regarding disabled employment receive a lower level of scrutiny from the Court. *City of Boerne v. Flores*, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62 (2000), *Garrett v. Univ. of Alabama*, 193 F.3d 1214 (11th Cir. 1999). In *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986), the Sixth Circuit Appellate Court held that states have a legitimate interest in denying the vote to those who commit crimes. Because felony disenfranchisement law is not a named category that receives a higher form of scrutiny, argument the plaintiff was denied the vote because he committed a crime, not because of his race would

be upheld. *Id.* Thus, Congress' power to enact legislation and provide a "remedy" for these forms of perceived discrimination in state laws is limited.

When Congress' power is limited, this also means that the relationship between the congressional act and the constitutional violation must be more compelling than in categories such as gender-based discrimination of state employees. Otherwise the Court will strike the act as a violation of a state's rights. This interpretation of Congress' right to abrogate clarifies the proximity of the relationship necessary for Congressional legislation to be congruent and proportional. While the Supreme Court only allowed a higher standard for state employees that did not involve voting rights, the Ninth Circuit argued that criminal disenfranchisement laws perpetuate the racial bias in the criminal justice system. *Farrakhan v. Locke*, 338 F.3d. 1009, 1014 (9th Cir. 2003). Because of this bias, the Ninth Circuit held that felony disenfranchisement involved relevant social and historical factors that courts may consider to determine whether disenfranchisement laws discriminate on account of race. *Id.*

In the majority of Supreme Court cases regarding whether Congressional abrogation is proportional and congruent, the Court found that Congress did not have the right to create legislation that conflicted with and overturned state law.

Nevada Dept. of Human Resources v. Hibbs, 538 U.S. 721 (2003), *Tennessee v. Lane*, 541 U.S. 509 (U.S. 2004). In *Hibbs*, the Court explained that categories of discrimination would receive a similar level of review to the Court's review of cases involving the same category but a different subject. *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003). For example, if the Supreme Court usually applied strict scrutiny to gender-based discrimination laws then it would do the same when reviewing gender-based felony disenfranchisement under the Voting Rights Act. Therefore although the Court did not explicitly state that felony disenfranchisement it did direct analysis to mirror Supreme Court analysis of the category in other areas. Therefore because felony disenfranchisement law is an exception to § Two of the Equal Protection Clause, the exception gives the Court reason to use a lower basis of review. Given this analysis, respondent has not provided proof required that felony disenfranchisement should receive a higher level of scrutiny. Without this proof, respondent fails to state a claim on which relief may be granted, therefore the District Court's Motion for Summary Judgment should be upheld.

III. PERMANENT FELON DISENFRANCHISEMENT IS A REGULATION NOT A PUNISHMENT.

The test for determining whether a statute creates a punishment was laid out in *Trop v. Dulles*, 356 U.S. 86 (1958).

The Court in *Trop* said that in order to determine punishment, one must look at the purpose of the statute. If the purpose serves some "legitimate governmental purpose" then it is nonpenal in nature.

Trop involved denationalization as a punishment for desertion from the army during wartime. However, the court presented an example of a bank robber who is disfranchised. The court explicitly stated this was an example of a "nonpenal exercise of the power to regulate the franchise." *Id.* at 596. Thus, the court seems to accept the ability to regulate the franchise as a legitimate governmental purpose in and of itself.

This power to disfranchise those convicted of committing a crime comes from Section Two of the Fourteenth Amendment, which explicitly provides that a citizen's right to vote may be abridged without penalty in cases of "rebellion, or other crimes." U.S. Const. amend. XIV (emp. added). The Fourteenth Amendment involves citizenship rights and is not in any way involved with matters of punishment. Furthermore, the statute at issue in the instant case is Section 3-102 of Maryland's election law, and sets out both the requirements for eligibility to vote and enumerates those who are not allowed to vote. This latter group not only includes those convicted of a crime, but also those "under guardianship for mental disability." Thus, at

least the primary facial purpose of the statute involves regulating the right to vote, and not punishment.

In *Green v. Board of Elections of City of New York*, 380 F.2d 445 (2d Cir. 1967), the court outlined one of the commonly held purposes of felon disfranchisement with reference to the social contract theory of John Locke. By entering into society, man authorizes society to make laws to benefit and protect that society. *Green*, 380 F.2d at 451. By committing a crime, a person breaches that contract, and has abandoned the right to further participation in the society. The court in *Green* goes on to say that it is not reasonable to allow those who have committed serious crimes to elect those people who make and enforce those crimes. *Id.*

VI. DISENFRANCHISEMENT IS NOT CRUEL AND UNUSUAL PUNISHMENT.

Even if felon disfranchisement is a punishment, it still must be deemed cruel and unusual to fail to pass muster under the Eighth Amendment. The current doctrine regarding cruel and unusual punishment encompasses two slightly differing standards. In *Trop*, the court lays out a way of analyzing punishments in reference to the "evolving standards of decency that mark the progress of society." *Trop* at 101. In addition, starting with *Weems v. United States*, 217 U.S. 349 (1910), the courts have found a "narrow proportionality principle" in applying the Eighth Amendment to particular punishments.

A. The Evolving Standards of Decency Doctrine.

At issue in *Trop* was a statute denationalizing anyone found guilty of the crime of desertion, which the Court found to be a cruel and unusual punishment. A plurality of the Court stated that it was virtually unanimous belief by the nations of the world that expatriation is not to be used as punishment for crime. The doctrine of an "evolving standard of decency" was later explicitly invoked by a majority of the Court in *Furman v. Georgia*, 408 U.S. 238 (1972). Since then, this doctrine has been accepted as the cornerstone of Eighth Amendment jurisprudence. See, eg. *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002), *Penry v. Lynaugh*, 492 U.S. 302, 330-31 (1989), *Stanford v. Kentucky*, 492 U.S. 361, 369 (1989), *Thompson v. Oklahoma*, 487 U.S. 815, 821 (1988), *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987), *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981), *Gregg v. Georgia*, 428 U.S. 153, 172-73 (1976), *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

In determining what the standards of decency are, the Court has stated that Eighth Amendment judgments should be as objective as possible. *Rummel v. Estelle*, 445 U.S. 263, 274 (1980). To that end, the Court in *Penry* found that the "clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry* at 331. The court below points out that 13 States still practice permanent disfranchisement. Record at 39. Respondent, in his

complaint, further states that the other 37 States disenfranchise felons to some extent. R. at 14. In addition, the lower court agrees with Maryland that Section Two of the Fourteenth Amendment explicitly allows felon disfranchisement. Given that felon disfranchisement has existed in this country since the ratification of the Eighth Amendment, and still occurs in virtually the entire country, disfranchisement does not violate the current standards of decency. The court in *Green*, in fact, explicitly states that the large of states disfranchising felons "forbids" a conclusion that is cruel and unusual punishment within the "evolving standards of decency." *Green*, 380 F.2d at 451.

B. Proportionality.

This Court found a "narrow proportionality principle" in the Eighth Amendment in *Weems v. United States*, 217 U.S. 349 (1910). In other words, the Eighth Amendment prohibits "'greatly disproportioned' sentences." *Harmelin v. Michigan*, 501 U.S. 957, 997 quoting *Weems v. United States*, 217 U.S. at 371. In *Weems*, the Court found that twelve years of hard labor was disproportionate to the crime of falsification of a public document. However, on the whole, this Court has been loathe to find punishments other than execution to be disproportionate to their given crimes. For instance, in *Rummel v. Estelle*, 445 U.S. 263 (1980), this Court failed to strike down a sentence of life

imprisonment, with possibility of parole, under a recidivism statute for three underlying offenses. Those offenses included fraudulent use of a credit card, forging a check, and the indict that led to the contested imprisonment, obtaining \$120.75 by false pretenses. *Rummel v. Estelle*, 445 U.S. 263, 265-66 (1980). A major point for this Court in deciding *Rummel* was a "reluctance to review legislatively mandated terms of imprisonment." *Rummel v. Estelle*, 445 U.S. 263, 274 (1980). Thus, the Court found that the subjective nature of determining the severity of a particular punishment versus the severity of a crime is best served by leaving it to individual legislatures.

Petitioner would like to reiterate the point made by this Court, and quoted by the court below, that "the Constitution does not mandate adoption of any one penological theory." *Ewing v. California*, 538 U.S. 11, 25 (2003). However, petitioner disagrees with the lower court in its conclusion that punishment (if it is considered punishment at all) of permanent disfranchisement is disproportionate to the crime committed in this case. Respondent robbed a bank with a threat of assault. This Court found that life imprisonment in *Rummel* was not disproportionate, notwithstanding the essentially nonviolent nature of the offenses. Again, petitioner would urge that the Court give as much deference to the legislature in determining the length of disfranchisement as that given in deciding length

of imprisonment. The line to be drawn between whether disfranchisement or imprisonment is the more severe, is one best left to the State legislatures. Especially given that disfranchisement itself is explicitly allowed under the Constitution.

CONCLUSION

Maryland's statute regulating voter eligibility survives scrutiny under the Fourteenth Amendment because they only discriminate based on felon status. Current Supreme Court interpretation of Section Two of the Fourteenth Amendment holds this to be constitutional. The prophylactic legislation contained in the Voting Rights Act does not clearly state it is meant to abrogate felony disenfranchisement. Alas, striking Maryland's disenfranchisement law would not be a proportional and congruent response to the harm Congress was trying to remedy. Furthermore, if Congress is allowed to override Maryland's law, the balance between state and federal power will be jeopardized.

The challenge to the statute under the Eighth Amendment cannot be upheld. First, the statute is a regulation of voter eligibility and thus the Eighth amendment does not apply. Even if disenfranchisement is held to be a punishment, it does not rise to the level of cruel and unusual, and thus is constitutional.

For the foregoing reasons, the Defendants urge this Court to affirm the judgment of the district court.

Respectfully submitted,

January 23, 2005

ID: 10712

CERTIFICATE OF SERVICE

The undersigned attorney for the State of hereby certifies that on this day of January 23, 2005, a copy of the foregoing brief was served by personal service on:

ID:10712