

**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 RESPONDENT
—◆—

ID: 10878
Counsel for Respondent

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?

PARTIES TO THE PROCEEDINGS

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.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW vii

JURISDICTION vii

STATUTORY PROVISIONS INVOLVED vii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. A STATUTORY PROVISION THAT PERMANENTLY DENIES THE RIGHT TO VOTE ONLY TO PERSONS WHO HAVE COMMITTED A SECOND OR SUBSEQUENT VIOLENT FELONY IS A VOTING QUALIFICATION OR PREREQUISITE AND IS SUBJECT TO § 2 OF THE VOTING RIGHTS ACT, 42 U.S.C. § 1973, WHEN IT RESULTS IN A DENIAL OF THE RIGHT TO VOTE ON ACCOUNT OF RACE..... 4

 A. Maryland’s Denial Of The Right To Vote To Persons Convicted Of A Second Or Subsequent Violent Felony Is A Voting Qualification Or Prerequisite. 4

 B. Maryland’s Denial Of The Right To Vote To Persons Convicted Of A Second Or Subsequent Violent Felony Resulted In A Denial Of The Respondent’s Right To Vote On Account Of His Race, Giving Rise To A Claim For Relief Under The Voting Rights Act, 42 U.S.C. § 1973 5

 C. The Voting Rights Act Governs State Felon Disfranchisement Laws 7

II. PERMANENTLY DISFRANCHISING JEFFREY COOLIDGE AS A RESULT OF HIS STATUS AS A VIOLENT FELON HAVING HAD A PRIOR CONVICTION OF AN INFAMOUS CRIME IS CRUEL AND UNUSUAL PUNISHMENT AS CONTEMPLATED BY THE EIGHTH AMENDMENT. ... 15

A. *Richardson v. Ramirez* Does Not Hold That The Disfranchisement Of Felons Is Per Se Constitutional 15

B. Permanently Disfranchising A Citizen Of A Democratic Nation As A Result Of His Felon Status Is A Punishment 16

C. By The Standards Of Contemporary Society The Permanent Disfranchisement Of Felons Is Cruel And Unusual Punishment 19

CONCLUSION 24

TABLE OF AUTHORITIES

Cases	Page
<i>Allen v. Ellisor</i> , 664 F.2d 391 (4th Cir. 1980)	11
<i>Atkins v. Virginia</i> , 536 U.S. 304 (2002)	20
<i>Carrington v. Rush</i> , 380 U.S. 89 (1965)	18
<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997)	12
<i>Farrakhan v. Locke</i> , 338 F.3d 1009 (9th Cir. 2003), <i>reh'g denied</i> , 359 F.3d 1116 (9th Cir. 2004), <i>cert. denied</i> , 60 L.Ed.2d 365, 125 S.Ct. 477 (2004)	7,9,10
<i>Furman v. Georgia</i> , 408 U.S. 238 (U.S. 1972)	20,21,22
<i>Hunter v. Underwood</i> , 471 U.S. 222 (1985)	8,11
<i>Johnson v. Bush</i> , 405 F.3d 1214 (11th Cir. 2005)	7
<i>Kimel v. Florida Bd. of Regents</i> , 528 U.S. 62 (2000)	9
<i>McLaughlin v. City of Canton</i> , 947 F. Supp. 954 (S.D. Miss. 1995)	21
<i>Muntaqim v. Coombe</i> , 366 F. 3d 102 (2d Cir. 2004), <i>cert. denied</i> , 160 L.Ed.2d 356, 125 S.Ct. 480 (2004), <i>vacated pending reh'g</i> , 396 F.3d 95 (2d Cir. 2004)	7,8,12
<i>Nev. Dep't of Human Res. v. Hibbs</i> , 538 U.S. 721 (2003)	9,12,13
<i>Ramirez v. Brown</i> , 9 Cal. 3d 199 (Cal. 1973)	17
<i>Richardson v. Ramirez</i> , 418 U.S. 24 (1974)	8,15,16
<i>Solem v. Helm</i> , 463 U.S. 277 (U.S. 1983)	20,23
<i>South Carolina v. Katzenbach</i> , 383 U.S. 301 (1966) ..	10,12,13
<i>Tennessee v. Lane</i> , 541 U.S. 509 (2004)	12

<i>Thiess v. State Administrative Bd. of Elect. Laws of Md.</i> , 387 F. Supp. 1038 (D. Md. 1974)	11
<i>Thornburg v. Gingles</i> , 478 U.S. 30 (1986)	5
<i>Trop v. Dulles</i> , 356 U.S. 86 (1958)	16,17,19,20
<i>Washington v. State</i> , 75 Ala. 582 (Ala. 1884)	17
<i>Weems v. United States</i> , 217 U.S. 349 (1910)	20
<i>Wesley v. Collins</i> , 791 F.2d 1255 (6th Cir. 1986)	10

Constitutional Provisions

U.S. Const. amend. VIII	19
U.S. Const. amend. XIV	8
U.S. Const. amend. XV	11

Statutes

28 U.S.C. § 1254 (2005)	vii
Voting Rights Act of 1965, 42 U.S.C. § 1973	2,3,4,5
Civil Rights Act of 1871, 42 U.S.C. § 1983	1
Md. Code Ann., Election Law § 3-102 (Bender 2005)	1,4,6

Other Materials

Cong. Globe, 40 th Cong., 3d Sess. 1041 (1869)	10
<i>Hirst v. United Kingdom</i> , App. No. 74025/01 (Eur. Ct. H.R. Oct. 5, 2005)	22
M.E. Thompson, <i>Don't do the the Crime if you Ever Intend to Vote Again: Challenging the Disfranchisement of Ex-Felons as Cruel and Unusual Punishment</i> , 33 Seton Hall L. Rev 167 (2002)	15,16,18
S.Rep. No. 97-417 (1982)	9

OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on July 16, 2005. 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).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal

(Pertinent Texts Set Out in Petition for Writ of Certiorari)

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

State of Maryland

(Pertinent Texts Set Out in Petition for Writ of Certiorari)

Md. Const. art. I, § 4.

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

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

BRIEF FOR THE RESPONDENT

STATEMENT OF THE CASE

Respondent, Jeffrey Coolidge, is a forty-two year old African American who has been a resident of Baltimore, Maryland his entire life. Record at 10. Mr. Coolidge was first convicted of an infamous crime within the contemplation of Md. Code Ann., Election Law § 3-102(b) (Bender 2005) in 1982 for possession with intent to distribute a controlled substance. Record at 10. He was subsequently convicted of robbery in 2004. Record at 11. Since he had previously been convicted of an infamous crime and then convicted of a violent felony, Mr. Coolidge is now permanently ineligible to vote under Md. Code Ann., Election Law § 3-102(c) (Bender 2005). Record at 12.

Only 1% of white Maryland residents are permanently ineligible to vote, while nearly four times as many African Americans suffer that fate. Record at 12. Similarly, only 0.25% of white Maryland residents are in prison, while nearly four times as many African American residents are. Record at 12.

On November 24, 2004, Respondent brought a claim of action against the Petitioners, the Maryland State Board of Elections, Janet Fallins, the Board of Elections of the City of Baltimore, and Edward D. Jones under 42 U.S.C. § 1983, the Eighth Amendment

to the U.S. Constitution, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments to the U.S. Constitution to challenge his ineligibility to vote in Maryland. The Petitioners moved for a dismissal. The District Court for the District of Maryland ultimately dismissed all claims on February 23, 2005. It dismissed the Fourteenth and Fifteenth Amendment claims outright since Respondent did not allege that Maryland's election law was intentionally discriminatory. Record at 23-24. The district court then dismissed the 42 U.S.C. § 1973 claim, holding that the Voting Rights Act was foreclosed from governing felon disfranchisement laws under § 2 of the Fourteenth Amendment and the principles of federalism. Record at 26. The district court then dismissed Respondent's final claim under the Eighth Amendment, holding that disfranchisement is neither cruel nor unusual, but merely an ordinary regulation. Record at 27.

Respondent appealed to the United States Court of Appeals for the Fourth Circuit on March 1, 2005. On July 16, 2005, the Court of Appeals reversed the dismissal of the claims under 42 U.S.C. § 1973 and the Eighth Amendment, holding that Respondent had made out a cognizable claim under 42 U.S.C. § 1973 and that permanent disfranchisement is a cruel and unusual punishment. Record at 30. The Court of Appeals remanded the case to the District Court. Record at 30.

Petitioners then petitioned this Court for a writ of

certiorari which was granted on Questions 1 and 2 as presented by that petition on October 14, 2005. Record at 3.

SUMMARY OF THE ARGUMENT

Enforcement of the Voting Rights Act in cases of felon disfranchisement is not foreclosed by § 2 of the Fourteenth Amendment, nor by the principles of federalism, and enforcement is even suggested by legislative history regarding the passage of the Fifteenth Amendment and the act itself. Therefore, in accordance with the findings of the Court of Appeals for the Fourth Circuit, the Respondent does have a cognizable claim of action regarding racial discrimination in regards to Maryland's felon disfranchisement laws under the Voting Rights Act, 42 U.S.C. § 1973 and should be afforded the right to present that claim in the District Court for the District of Maryland.

The court of appeals correctly determined that the permanent disfranchisement of felons is a punishment. The statute imposes a disability that serves no other legitimate state purpose and can only be considered a punishment. The court of appeals was also correct when it ruled that Mr. Coolidge has a valid claim that forever denying him the right to vote is cruel and unusual under the Eighth Amendment to the Constitution. The punishment inflicts needless suffering and runs contrary to the evolving contemporary standards of decency

and thus falls under the Eight Amendments prohibition of cruel and unusual punishment.

ARGUMENT

I. A STATUTORY PROVISION THAT PERMANENTLY DENIES THE RIGHT TO VOTE ONLY TO PERSONS WHO HAVE COMMITTED A SECOND OR SUBSEQUENT VIOLENT FELONY IS A VOTING QUALIFICATION OR PREREQUISITE AND IS SUBJECT TO § 2 OF THE VOTING RIGHTS ACT, 42 U.S.C. § 1973, WHEN IT RESULTS IN A DENIAL OF THE RIGHT TO VOTE ON ACCOUNT OF RACE.

A. Maryland's Denial Of The Right To Vote To Persons Convicted Of A Second Or Subsequent Violent Felony Is A Voting Qualification Or Prerequisite.

Qualifications and prerequisites are prior conditions that are necessary or required in order to be eligible for a particular activity. In Maryland, "an individual is not qualified to be a registered voter if the individual has been convicted of a second or subsequent crime of violence." Md. Code Ann., Election Law § 3-102(c) (Bender 2005). The explicit use of the word "qualified" here is a clear indication that not having a second or subsequent conviction for a violent felony is indeed a qualification to be a registered voter in the State of Maryland. Further, the Court of Appeals correctly used the phrase "like a past conviction" to more specifically describe a prerequisite under the terms of the Voting Rights Act. Record at 34.

B. Maryland's Denial Of The Right To Vote To Persons Convicted Of A Second Or Subsequent Violent Felony Resulted In A Denial Of The Respondent's Right To Vote On Account Of His Race, Giving Rise To A Claim For Relief Under The Voting Rights Act, 42 U.S.C. § 1973.

To prevail on a claim for relief under the Voting Rights Act, a plaintiff must only prove that the challenged practice employs a qualification or prerequisite that results in a situation where the political process is "not equally open to participation by" members of the race of the plaintiff "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." 42 U.S.C. § 1973(b). The test that is to be applied to the situation to determine if such a result did occur is the "totality of the circumstances" test established by *Thornburg v. Gingles*. See *Thornburg v. Gingles*, 478 U.S. 30 (1986). Referring to the Voting Rights Act, the Court in that case held that "the essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg*, 478 U.S. at 47.

In the instant case, the Respondent, Jeffrey Coolidge has been a resident of Baltimore, Maryland his entire life. Record at 10. Mr. Coolidge is an African American. Record at 10. Mr. Coolidge was first convicted of an infamous crime in 1982 for

possession with intent to distribute a controlled substance. Record at 10. He was then convicted of robbery in 2004. Record at 11. Since he had previously been convicted of an infamous crime and subsequently convicted of a violent crime, Mr. Coolidge is now permanently ineligible to vote under Md. Code Ann., Election Law § 3-102(c) (Bender 2005). Record at 12.

Although only 1% of white Maryland residents are permanently ineligible to vote, nearly four times as many African Americans suffer that fate. Record at 12. Similarly, only 0.25% of white Maryland residents, and nearly four times as many African American residents, are in prison. Record at 12. These statistics and others indicate that African American residents in Maryland are apprehended, charged, and convicted of infamous crimes at a disproportionately high rate when compared to white residents.

In short, the Respondent is in possession of evidence that, when viewed through the lens of the totality of the circumstances test, can indeed show that African Americans in general, and Mr. Coolidge in particular, are suffering the result of having their voting rights abridged on account of race. Therefore, the main issue becomes that, while Mr. Coolidge should be afforded the right to present this evidence in the District Court for the District of Maryland, the lower courts have disagreed on whether the Voting Rights Act actually governs

State felon disenfranchisement laws. Thus, both the Petitioners and the Respondent are asking this Court to rule on whether the Voting Rights Act governs State felon disenfranchisement laws.

C. The Voting Rights Act Governs State Felon Disfranchisement Laws.

The District Court correctly stated that neither this Court nor the Fourth Circuit has ruled directly on whether the Voting Rights Act governs felon disenfranchisement laws. Record at 26. Of the three Circuit Courts which have heard the issue, only the Ninth Circuit, in *Farrakhan v. Locke*, ruled that the Voting Rights Act did govern felon disenfranchisement law. *Farrakhan v. Locke*, 338 F.3d 1009, 1014-15 (9th Cir. 2003), *reh'g denied*, 359 F.3d 1116 (9th Cir. 2004), *cert. denied*, 160 L.Ed.2d 365, 125 S.Ct. 477 (2004). The Eleventh Circuit ruled, in *Johnson v. Bush*, that the Voting Rights Act did not govern felon disenfranchisement laws. *Johnson v. Bush*, 405 F.3d 1214, 1234 (11th Cir. 2005). The Second Circuit, in *Muntaqim v. Coombe*, initially had taken the same stance as the Eleventh Circuit, but has since decided to revisit the issue and rehear the case en banc. *Muntaqim v. Coombe*, 366 F. 3d 102, 124 (2d Cir. 2004), *cert. denied*, 160 L.Ed.2d 356, 125 S.Ct. 480 (2004), *vacated pending reh'g*, 396 F.3d 95 (2d Cir. 2004).

Although the Second Circuit has chosen to rehear the issue regarding the scope of the Voting Rights Act, the District Court

found that Circuit's arguments persuasive in ruling the Voting Rights Act inapplicable to Maryland's felon disfranchisement law. Record at 26. In particular, the court in *Muntauqim* held that § 2 of the Fourteenth Amendment limits Congress's powers and authorizes the States to disfranchise felons. *Muntauqim*, 366 F.3d at 108. Although § 2 of the Fourteenth Amendment dictates that a State that abridges the right to vote will have its representation reduced, the clause also seemingly provides an exemption from that penalty for denial of the right to vote to those engaged in "rebellion, or other crime." U.S. Const. amend. XIV, § 2. This Court also stressed such limitations on Congress's powers by § 2 of the Fourteenth Amendment in *Richardson v. Ramirez* where the Court held that felon disfranchisement "was expressly exempted from the less drastic sanction of reduced representation which § 2 imposed for other forms of disenfranchisement." *Richardson v. Ramirez*, 418 U.S. 24, 55 (1974).

However, it is important to note that *Richardson* was a Due Process Clause case and not one involving the Voting Rights Act. For this Court later clarified in *Hunter v. Underwood*, another Due Process Clause case, that "we are confident that § 2 was not designed to permit the purposeful racial discrimination . . . which otherwise violates § 1 of the Fourteenth Amendment." *Hunter v. Underwood*, 471 U.S. 222, 233 (1985). Although this

Court, in *Hunter*, did not overrule *Richardson*, it did dispel the myth that § 2 of the Fourteenth Amendment so limited Congress's powers as to allow States to pass legislation, even through felon disfranchisement laws, that was intended to abridge the right to vote based on race. Further, this Court has held that the "ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch." *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003) (quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000)). Therefore, this Court has properly held open the ability to question the validity of State disfranchisement laws in relation to racial discrimination.

Further, as the court stated in *Farrakhan*, "Congress specifically amended the Voting Rights Act [in 1982] to ensure that, 'in the context of all the circumstances in the jurisdiction in question,' any disparate radical impact of facially neutral voting requirements did not result from racial discrimination." *Farrakhan*, 338 F.3d at 1016 (quoting S.Rep. No. 97-417, at 27 (1982)). In regards to § 2 of the Fourteenth Amendment, the court held in *Farrakhan* that, even though "states may deprive felons of the right to vote without violating the Fourteenth Amendment, when felon disenfranchisement results in denial of the right to vote . . . on account of race or color, Section 2 [of the Voting Rights Act] affords disenfranchised

felons the means to seek redress." *Farrakhan*, 338 F.3d at 1016.

In addition to the Ninth Circuit, the Sixth Circuit, without directly passing judgment on whether the Voting Rights Act governs state felon disfranchisement laws, has implicitly recognized that a claim for relief from felon disfranchisement law under the Voting Rights Act is valid in *Wesley v. Collins*. See generally *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986). In that case, the court did ultimately affirm the lower court's decision to dismiss the claim, but only because the Circuit Court found that the plaintiff was denied the right to vote because he committed a crime and not because of his race. *Wesley*, 791 F.2d at 1262.

Another important fact that indicates that the Voting Rights Act is not foreclosed by the Fourteenth Amendment in regards to felon disfranchisement laws is that the Voting Rights Act was enacted in order to enforce the Fifteenth Amendment. Congress enacted the Voting Rights Act purposefully to "rid the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966). Further, legislative history indicates that many versions of the Fifteenth Amendment were introduced, including one from Mr. Warner of Alabama which included a clause that allowed the abridgment of voting rights based on felon disfranchisement. Cong. Globe, 40th Cong., 3d Sess. 1041 (1869). That version and others with such provisions

were rejected by Congress. Rather, they settled on the text of the Fifteenth Amendment as it is today, which provides that “[t]he 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.” U.S. Const. amend. XV. It further states that “Congress shall have the power to enforce this article by appropriate legislation.” *Id.* Nowhere in the text of the Fifteenth Amendment is an exemption found regarding felon disfranchisement laws.

The District Court also pointed out that the Fourth Circuit has already ruled that plaintiffs can not challenge disfranchisement laws that use “classifications based on specific crimes.” *Allen v. Ellisor*, 664 F.2d 391, 397 (4th Cir. 1980). In fact, the District Court for the District of Maryland has already dismissed a claim that was based on Maryland’s list of infamous crimes. *Thiess v. State Administrative Bd. of Elect. Laws of Md.*, 387 F. Supp. 1038, 1039, 1041 (D. Md. 1974). However, as this Court ruled in *Hunter*, if the classification of laws, such as only convictions of crimes involving moral turpitude, reflects racial discrimination, then that classification practice is still rendered unconstitutional. *Hunter*, 471 U.S. at 233.

The final argument against the applicability of the Voting Rights Act to State felon disfranchisement laws is that such an

application would exceed Congress's enforcement powers under the Fourteenth and Fifteenth Amendment. The Second Circuit, in *Muntaqim*, was cautious of shifting the balance of power between the federal and state governments without a finding of constitutional violations and absent a "clear statement" from Congress that it was the Legislature's intent. *Muntaqim*, 366 F.3d at 124, 126. Further, as this Court held in *City of Boerne v. Flores*:

There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect. The need to distinguish between remedy and substance is supported by the Fourteenth Amendment's history and this Court's case law.

City of Boerne v. Flores, 521 U.S. 507, 530 (1997). Therefore, a legislative remedy cannot be enacted prior to a finding of constitutional violations and that remedy must be congruent and proportional to harms suffered in those violations. *City of Boerne*, 521 U.S. at 530; *Nev. Dep't of Human Res.*, 538 U.S. at 728; *Tennessee v. Lane*, 541 U.S. 509, 520 (2004).

However, this Court has already held in *Katzenbach* that "in addition to the courts, Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *Katzenbach*, 383 U.S. at 326. In addressing the Voting Rights Act itself, this Court stated:

Two points emerge vividly from the voluminous legislative history of the Act contained in the committee hearings and floor debates. First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.

Katzenbach, 383 U.S. at 309. In fact this Court went on to hold that “[a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting. *Katzenbach*, 383 U.S. at 324.

In addition to *Katzenbach*, this Court held in *Nev. Dep’t of Human Res.*, that “Congress may, however, abrogate such [State] immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment.” *Nev. Dep’t of Human Res.*, 538 U.S. at 726. “In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.” *Id.* at 727-8.

In ruling on *Katzenbach* and *Nev. Dep’t of Human Res.*, this Court has already examined the vast history of the practice of

denying the right to vote to individuals on account of race. It is a practice that remained pervasive even after the passage of the Fifteenth Amendment in 1870 and for the nearly hundred years until the enactment of the Voting Rights Act in 1965. The legislative history is clear on these points. Racial discrimination in voting practices was prevalent and pervasive and the only way to provide a realistic mechanism for curtailing that discrimination was through a stern enforcement of the Fifteenth Amendment. Given this knowledge, the plain text of the Voting Rights Act and the Fifteenth Amendment, and the noticeable absence of any exemption of felon disfranchisement laws in their text, Congress has indeed made its intention unmistakably clear: the practice of racial discrimination in voting, including felon disfranchisement laws that effectively deny persons the right to vote on account of race, cannot be tolerated.

The Respondent is a United States citizen whose right to vote was ultimately denied, in effect, due to his race. His case is most similar to the plaintiffs in *Farrakhan*, who were disproportionately disfranchised as African Americans under Washington's state felon disfranchisement scheme. Just as in *Farrakhan*, Maryland's voting practice interacts with external factors in society and history to result in the denial of the right to vote on account of race.

II. PERMANENTLY DISFRANCHISING JEFFREY COOLIDGE AS A RESULT OF HIS STATUS AS A VIOLENT FELON HAVING HAD A PRIOR CONVICTION OF AN INFAMOUS CRIME IS CRUEL AND UNUSUAL PUNISHMENT AS CONTEMPLATED BY THE EIGHTH AMENDMENT.

In order for a state action to qualify as cruel and unusual punishment under the Eighth Amendment, that action must be in fact a punishment, and not serve some other regulatory state purpose. Once the state action is determined to be punitive in nature, it must then be shown to be cruel and unusual according to the contemporary standards.

A. *Richardson v. Ramirez* Does Not Hold That The Disfranchisement Of Felons Is Per Se Constitutional.

Richardson v. Ramirez set out the proposition that permanent felon disfranchisement did not violate the equal protection clause, however its statement that the "exclusion of convicted felons from the franchise violates no constitutional provision," went beyond the issue that was at the time before this Court and is mere dicta. 418 U.S. 24 (1974). This Court there made no ruling that the permanent disfranchisement of felons is per se constitutional, only that it is not per se unconstitutional. M.E. Thompson, *Don't do the the Crime if you Ever Intend to Vote Again: Challenging the Disfranchisement of Ex-Felons as Cruel and Unusual Punishment*, 33 Seton Hall L. Rev 167 (2002). This Court has in the past ruled that a practice is constitutional under one section of the Constitution only to

later deem it unconstitutional under another constitutional clause. *Id.* at 185. Nothing in the *Richardson* decision precludes this Court from doing so again. *Richardson*, 418 U.S. at 24.

Since the practice of disfranchising felons is not per se constitutional, it must be further analyzed to see if it the practice passes constitutional muster.

B. Permanently Disfranchising A Citizen Of A Democratic Nation As A Result Of His Felon Status Is A Punishment.

In order for a state act to qualify as cruel and unusual punishment it must first be determined that such an act is in fact a punishment.

In deciding whether or not a law is penal, this 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 nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.

Trop v. Dulles, 356 U.S. 86, 96 (1958).

In *Trop*, this Court there went on to say that deprivation of a criminal's right to vote is not a punishment, however that issue was not at the time before this Court and should be considered dicta. This Court was less than thorough in its analysis of that situation, as evidenced by the complete lack of reasoning supporting its conclusion, and that conclusion should be given little persuasive weight. *Id.* at 96.

When discussing what rises to the level of punishment, it was further held by this Court that there is no need for physical punishment to be considered a punishment. In *Trop* this Court ruled that revoking the citizenship of a war time deserter is cruel and unusual punishment under the Eighth Amendment. See *Id.*

In order to avoid being classified as a punishment a state action must serve another state interest. No such interest exists here. Any potential interest other than punishment is illusory and invented to hide the true motivation behind the statute.

Washington v. State, posited the idea that felon disfranchisement served the non-punitive purposes of preventing voter fraud, and preventing felons from voting in a manner that might "hazard the welfare of communities, if not that of the State itself." 75 Ala. 582, 585 (Ala. 1884). Neither of those interests stands up to the scrutiny of logical review.

The first claim that disfranchising felons serves to prevent voter fraud is unconvincing for two reasons. Firstly, modern technology and election reforms have "radically diminished the possibility of election fraud." *Ramirez v. Brown*, 9 Cal. 3d 199, 214 (Cal. 1973). Secondly, the only type of election fraud that disfranchisement of felons may possibly prevent is that of a felon selling his single vote, all other

types of fraud may be committed just as easily by a franchised felon as one who is disfranchised. The effect of such an act is so miniscule that to prevent it in no way qualifies as a legitimate state interest. See Thompson, *supra*, at 190.

The second claim that felons can not be trusted to vote because they may either not vote responsibly or that they may vote so as to fundamentally weaken the criminal code, can not be considered to rise to the level of a state interest. See *Id.* at 195. Such a claim flies in the face of democratic values. As this Court stated in *Carrington v. Rush*, 380 U.S. 89, 94 (1965), the right to vote cannot be taken away on the basis of a fear of the political views of a particular group. *Id.* In a democratic society the views of the majority must be allowed to rule, regardless if they are contrary to the status quo. See Thompson, *supra*, at 197.

The argument made by the district court that since other groups, such as minors, mentally incompetent, and short-term residents are disfranchised when they are clearly not being punished is proof that disfranchisement is not a punishment is unconvincing. Record at 27. Simply because there are groups similarly situated that are not being punished does not mean that inflicting a restriction on a different group is not punishment. Mental patients are interned without being punished, but yet internment of criminals is punishment. Borrowers from a

bank are forced to pay a monetary sum without being punished but yet fines for criminal acts are punishment. It does not follow that because a restriction exists in certain non punitive situations that it can not be used as punishment when used to deprive a group of a right they would otherwise be guaranteed.

Since there is no other state interest in disfranchising felons, it must be determined that any act that serves to disfranchise felons does so for the purpose of punishment, and as a punishment it must pass constitutional muster under the Eighth Amendment's prohibition on cruel and unusual punishment.

C. By The Standards Of Contemporary Society The Permanent Disfranchisement Of Felons Is Cruel And Unusual Punishment.

This Court in *Trop* while discussing the implications of the Eight Amendment's prohibition on cruel and unusual punishment stated, "Fines, imprisonment and even execution may be imposed depending on the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect." *Trop*, 356 U.S. at 100. Disfranchisement falls outside of those traditional penalties, and it therefore must necessarily be scrutinized under the Eighth Amendment's prohibition on "cruel and unusual punishment." U.S. Const. amend. VIII.

What determines cruel and unusual must be determined from a contemporary point of view, not a view that may have existed at

the founding of our nation. "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101. This Court further re-iterated the same point in saying, "the proscription of cruel and unusual punishments 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'" *Furman v. Georgia*, 408 U.S. 238, 242 (U.S. 1972) (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)).

In *Atkins v. Virginia* this Court pointed to recent decisions of the legislature and approaches in the world community as helpful guideposts in determining what constitutes a breach of contemporary standards. 536 U.S. 304 (2002).

This Court in *Solem v. Helm* developed guidelines for evaluating whether a sentence is permissible under the Eighth Amendment. There this Court declared that a punishment must be proportional to the crime for which it is prescribed. 463 U.S. 277, 290-291 (U.S. 1983) ("First we look to the gravity of the offense and the harshness of the penalty.") This Court gave further guidance on how that determination should be made by stating that, "courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 291.

This Court had previously laid helpful guidelines for

determining what constitutes cruel and unusual punishment by saying:

The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.

Furman v. Georgia, 408 U.S. 238, 282 (U.S. 1972).

When discussing the severity of permanent disfranchisement the court in *McLaughlin v. City of Canton*, stated that a citizen of a democratic nation who has been permanently disfranchised has been "severed from the body politic and condemned to the lowest form of citizenship . . . [he] must sit idly by while other elect his civil leaders and while other choose the fiscal and governmental policies which will govern him and his family." 947 F. Supp. 954, 971 (S.D. Miss. 1995).

It is clear that the tides of public opinion are shifting away from the disfranchisement of felons. Only thirteen states currently permanently disfranchise felons, since 1997 twelve separate states have relaxed their rules on disfranchisement, and even Maryland itself since 1972 has twice amended its disfranchising laws to lessen their harsh impact. Record at 14. However such laws may have been viewed by our nation's founders,

public opinion, as gauged by the actions of our legislatures, has disavowed the permanent disfranchising of felons.

The approach of the democratic nations in the world community is overwhelmingly that permanent felon disfranchisement is an unacceptable form of punishment. Few practice any form whatsoever, only one, Armenia, permanently disfranchise felons, and thirteen, including Japan, Canada, and France even allow incarcerated prisoners to vote. Record at 14. The European Court of Human Rights has gone so far as to declare the practice a violation of human rights. *Hirst v. United Kingdom*, App. No. 74025/01 (Eur. Ct. H.R. Oct. 5, 2005).

In light of the changing views of so many legislatures both in the United States and abroad, it has become apparent that modern views of human dignity are no longer compatible with forever denying a person their say in the shaping of their government. Such a widespread denial of the practice surely rises to the level of being "substantially rejected by contemporary society" as contemplated by *Furman* 408 U.S. at 282.

Since disfranchisement serves no penal purpose other than inflicting suffering on its victims. It can hardly be argued that it would deter future criminal behavior to any extent beyond which is already accomplished by incapacitation. It clearly serves no rehabilitative function; in fact it does quite the opposite by alienating the felon from society. And since it

serves no incapacitating function, its only purpose can be to punish. It is thus a practice that inflicts needless suffering on a convict who has already been punished through the deprivation of liberty.

As the statute now stands the crime of the misrepresentation of kosher products could serve as the prerequisite infamous crime to permanently ban a person from voting. Where as the same person who had previously been convicted of harboring an escaped inmate, intent to distribute, or both, could be disfranchised for as little as three years. Record at 45. Such a disparity in time is arbitrary and fails to meet the requirement in *Solem* that the punishment be proportional to the crime. See *Solem*, 463 U.S. at 277.

The Maryland law is arbitrary in a way so as to make it further suspect under this Court's *Furman* analysis. Both in the crimes the state classifies as felonies and those that are not, and the criteria for the combination of crimes that lead to disfranchisement. In the case at hand if Mr. Coolidge had simply committed his crimes in reverse order (if the violent crime was committed before the non-violent one) he would not be subject to this penalty. There can be no rational reason for such a distinction and surely any punishment that is dependent on the order of the very same violations is arbitrary as contemplated by this Court in *Furman*.

When these factors are viewed as a whole, following the guidelines set by this Court in *Furman*, their combined effect is to rise to the level of an uncivilized punishment that this Court there determined to be in violation of the Eighth Amendment's ban on cruel and unusual punishment.

For these reasons Maryland's disfranchising of violent felons, predicated on prior conviction of an infamous crime is a cruel and unusual punishment and is in violation of the Eight Amendment.

CONCLUSION

For the foregoing reasons, Respondent requests that this Court affirm the judgment of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

ID: 10878

Counsel for Respondent

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