01-7260-cv

04-3886-pr

In the

United States Court of Appeals

For the Second Circuit

JALIL ABDUL MUNTAQIM, a/k/a Anthony Bottom, Joseph Hayden, on behalf of himself and all individuals similarly situated; Lumumba Akinwole-Bandelle, Wilson Andino, Gina Arias, Wanda Best-Deveaux, Carlos Bristol, Augustine Carmona, David Galarza, Kimalee Garner, Mark Graham, Keran Holmes III, Chaujuantheyia Lochard, Steven Mangual, Jamel Massey, Stephen Ramon, Nilda Rivera, Mario Romero, Jessica Sanclemente, Paul Satterfield and Barbara Scott,

Plaintiffs-Appellants,

v.

PHILLIP COOMBE; ANTHONY ANNUCCI, LOUIS F. MANN, George Pataki, Governor of the State of New York; Carol Berman, Chairperson, New York State Board of Elections; Glenn S. Goord, Commissioner of the New York State Department of Correctional Services,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

AMICUS CURIAE BRIEF OF PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK IN SUPPORT OF DEFENDANTS-APPELLEES, AND IN SUPPORT OF AFFIRMING THE DISTRICT COURT DECISION

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CORPORATE DISCLOSURE STATEMENT

The Patrolmen's Benevolent Association of the City of New York (PBA) is the duly certified representative of all members of the New York City Police Department (NYPD) in the rank of police officer. The PBA is a non-profit corporation and, as such, has no parent corporation and does not issue stock.

STATEMENT OF AMICUS

The Patrolmen's Benevolent Association of the City of New York (PBA) is a representative organization consisting of the members of the New York City Police Department (NYPD) in the rank of police officer, active and retired. The PBA works to improve the terms and conditions of employment of its 50,000 members in numerous ways. In addition to being the certified collective bargaining unit responsible for contractual negotiation with the City of New York, the PBA protects the rights of its members by initiating, defending and overseeing legal matters in Federal and New York State Courts and administrative tribunals.

The PBA provides its members with legal guidance and representation in labor matters, investigation of on-duty incidents (i.e. NYPD, District Attorney or Civilian Complaint Review Board investigations), NYPD administrative disciplinary proceedings and defense of civil suits involving incidents arising from the scope of employment.

The PBA acts pro-actively to seek redress for all types of wrongs against its members. See, e.g. Patrolmen's Benevolent Association v. City of New York, 310 F.3d 43 (2d Cir. 2002)(affirming jury verdict award of damages to individual police officers in action brought against City of New York for

unlawful race-based transfers of officers). See, also Scarangella v. LaBorde, 12 A.D.3d 660 (2nd Dept. 2004) (affirming denial of motion to dismiss complaint in action brought under New York State's Son of Sam Law [Executive Law §632-a] for wrongful death by widow of slain police officer against convicted murdered who obtained assets while in prison years after his conviction).

The PBA has supported civil lawsuits brought by police officers against perpetrators causing injury in the line of duty. (e.g. $1 million judgment against defendant who shot police officer with his own gun during struggle at arrest; $3.4 million judgment against defendant for knee and internal injuries caused by tackling police officer down a flight of stairs). As stated by PBA President Patrick J. Lynch, "The PBA will use every legal means at our disposal to make [these defendants] pay for the damage [they've] done."[1]

The PBA has engaged in a coordinated effort relating to New York State Parole Board proceedings distributing petitions and drafting and filing letters urging that the convicted murderers and attackers of police officers be denied parole release and be required to serve the maximum period of incarceration authorized

[1] Mark Daly, Million Dollar Award - Court Rules Cop Shooter Must Pay, The Chief-Leader, New York (February 13, 2004).

by law.[2]

Amicus strongly believes that if one person denies another the right to live, the right to love, the right to raise a family and, ultimately, their right to vote, then as part of their punishment, society must take away the right to participate in the process of selecting those who make the laws we are governed by.

This brief is being filed pursuant to the Order of the Court of December 29, 2004, inviting amicus curiae briefs from interested parties, and the Motion of the PBA for leave to file this brief.

SUMMARY OF ARGUMENT

Amicus respectfully submits this brief in support of affirming the District Court's decision granting Appellees' motion for summary judgment and dismissing Appellant's complaint. New York State's disenfranchisement statute [Election Law 5-106], limited to incarcerated felons,[3] is clearly punitive in nature

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[2] e.g. The Battle of Herman Bell, New York Post, New York (January 19, 2004), pg. 26.

[3] Consistent with this Court's decision, the term "incarcerated felons" will refer to disenfranchised felons on parole as well as incarcerated felons.

and, thus, serves a valid penological purpose. No Court has ever interpreted the Voting Rights Act (VRA) to prevent State disenfranchisement of incarcerated felons and Amici respectfully submit that such application would impermissibly infringe upon New York State's power to punish violators of the law considered serious enough to require incarceration. The lack of a clear statement in the VRA suggesting Congress's intent to impinge on the State's traditional power to enforce its criminal laws mandates that New York State's narrowly drawn statute be left undisturbed by this Court.

ARGUMENT

APPLICATION OF THE VOTING RIGHTS ACT TO NEW YORK STATE'S FELON DISENFRANCHISEMENT STATUTE WOULD IMPERMISSIBLY INFRINGE UPON THE LEGITIMATE PENOLOGICAL INTERESTS OF THE STATE IN DEPRIVING INCARCERATED FELONS OF THE RIGHT TO VOTE

A. THE NEW YORK STATE LEGISLATURE HAS THE ABSOLUTE POWER TO ENACT LAWS IN FURTHERANCE OF ITS PENOLOGICAL OBJECTIVES

Under our system, "the States possess primary authority for defining and enforcing the criminal law." United States v. Lopez, 514 U.S. 549, 561 n. 3 (1995). See, also Harmelin v. Michigan, 501 U.S. 957, 999 (1991)(Kennedy, J., concurring in judgment) (citing the Supreme Court's longstanding tradition of deferring

to state legislatures in making and implementing penological decisions).

Consistent with its role in defining and enforcing the criminal law, the State is responsible for determining the consequences for violators. A punishment imposed may involve a variety of justifications, including incapacitation, retribution, deterrence and rehabilitation. See, 1 W. LaFave & A. Scott, Substantive Criminal Law §1.5, pp.30-36 (1986)(explaining theories of punishment). Incapacitation is by far the most persuasive form of punishment for felonious conduct and must be considered the primary penological tool of the State. Individuals who have engaged in serious or violent criminal behavior must be isolated from society to protect the public safety. Retribution, or just deserts, recognizes the role of vengeance in punishing an offender. Some or all of these justifications may play a role in a State's sentencing scheme. Selecting the sentencing rationales is generally a policy choice to be made by State legislatures, not Federal courts. Ewing v. California, 538 U.S. 11 (2003).

Incarceration by its very nature entails confining criminal offenders in a facility where they are isolated from the rest of society. This isolation or separation is, and must remain, an integral part of the punishment imposed. See, Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 129

(1977)(Prisons are populated, involuntarily, by people who have been found to have violated one or more of the criminal laws established by society for its orderly governance). Although "[p]rison walls do not form a barrier separating prisoners from the protection of the Constitution," Turner v. Safley, 482 U.S. 78, 84 (1987), "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights."[4] Pell v. Procunier, 417 U.S. 817, 822 (1974)(quoting Price v. Johnson, 334 U.S. 266, 285 (1948). While not forfeiting all, a prisoner retains only those rights "that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the correction system." Pell, supra, at 822. In analyzing the appropriateness of a particular limitation or restriction, the Supreme Court has cautioned the federal courts to avoid "second guessing" the decisions of State legislatures and administrators in this "sensitive" area except in extraordinary circumstances. See, Jones, 433 U.S. at 137 (Burger, C.J., concurring).

[4] The lawfulness of Muntaqim's incarceration and indeterminate sentence of 25 years to life imprisonment has been judicially determined and is not an issue.

B. NEW YORK STATE'S DISENFRANCHISEMENT STATUTE IS A PENOLOGICAL TOOL DESIGNED TO PUNISH INCARCERATED FELONS

Historically, States have punished felons by disenfranchisement. See, Richardson v. Ramirez, 418 U.S. 24, 48 1974)(At the time of the adoption of the Fourteenth Amendment, "29 [of 36] States had provisions in their constitutions which disenfranchised, or authorized the legislature to disenfranchise convicted felons)"; see also id. at 48 n. 14 (collecting constitutional provisions). The New York State statute in question dates back to 1829 in its original form. Muntaqim v. Coombe, 385 F.3d 793,794 (2d Cir. Oct 1, 2004)(internal citations omitted)(Cabranes, J. concurring to denial of reh'g in banc). As determined by this Court, the prevalence of this practice prior to the Reconstruction Amendments indicates that felon disenfranchisement was not an attempt to evade the requirements of those Amendments or to perpetuate racial discrimination forbidden by those Amendments. (See, Muntaqim v. Coombe, 366 F.3d 102,123 (2d Cir. 2004).

Moreover, the power of the State to disenfranchise convicted felons is affirmed in the text of the Fourteenth Amendment itself. See, Richardson, 418 U.S. at 43-52 (detailing the history surrounding the adoption of § 2 of the Fourteenth Amendment). See

also, Baker v. Pataki, 85 F.3d 919,928-929 (2d Cir. 1996)(discussing felon disenfranchisement as a widespread historical practice that has been accorded explicit recognition in § 2 of the Fourteenth Amendment).

New York State's disenfranchisement statute dates back to 1829, more than thirty years before the Civil War. See, 1 N.Y. Rev. Stat. 6, tit. 1, § 3 (1829); see also N.Y. Const. Art. 2, § 2 (1829). The existence of such a law before the Civil War indicates is strong evidence that it was not enacted to circumvent the Fourteenth and Fifteenth (Reconstruction Amendments). This view is further supported by the 1971 amendment to former Election Law § 152, the predecessor to § 5-106, to eliminate disqualification after a felon has been released from prison and has been discharged from parole. See, New York Laws of 1971, c. 310 § 1.

It is evident that the punitive roots of felon disenfranchisement rests upon Locke's "social contract", which argues that a person who commits a crime is also violating the social covenant that underlies political society. As a consequence, the offender forfeits not only his right to liberty but also his rights to property and participation in the

political process.[5] More pragmatically, it is not "unreasonable for the state to decide that perpetrators of serious crimes shall not take part in electing the legislators who make the laws, the executives who enforce these, the prosecutors who must try them for further violations, or the judges who are to consider their cases." Green v. Bd. of Elections, 380 F.2d 445, 451-52 (2d Cir. 1967).

Amicus urge the Court to recognize and uphold the concept of social contract. Colloquially speaking, "do the crime, do the time." We, as citizens have a compact with each other – obey the laws of the land and enjoy all the privileges and rights of freedom. Disobey the laws and forfeit those rights – it's that simple. Amicus further argue that the case for disenfranchisement of an incarcerated murderer, such as Appellant, is particularly compelling. When one kills, the murderer has effectively silenced the victim's voice and has permanently stricken the victim's opinion from the political process. "In killing two brave New York City police officers, [Appellant] denied them their right to 'life, liberty and the pursuit of happiness.' He killed their opinions and killed their votes. [Appellant] has voted with

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[5] Pinaire, Heumann & Bilotta, Barred from the Vote: Public Attitudes Toward The Disenfranchisement of Felons, Fordham Urban Law Journal, pp. 1525-1526 (Vol. XXX 2003).

bullets and doesn't deserve to vote again."[6]

Remaining consistent with its penological objectives, the New York State Legislature amended the statute in 1971, removing the disqualification of the franchise after a felon has been released from prison or discharged from parole. See, New York Laws of 1971, c. 310 § 1. "This change was made, according to the Senate Sponsor, because the Legislature had decided that the 'general philosophy of corrections' is not 'to continue punishment after a person has accounted.'" Hayden v. Pataki, 2004 WL 1335921 (S.D.N.Y.)(internal citations omitted). Irrespective of whether Amicus agree that restoring the franchise is in the public's interest or not, the amendment proves the penological intent of § 5-106.

Since New York State uses disenfranchisement "merely as a tool to punish people who violate its laws, the application of § 1973 [the VRA] to § 5-106 [the disenfranchisement statute] would upset 'the sensitive relation between federal and state criminal jurisdiction.'" United States v. Enmons, 410 U.S. 396, 411-12 (1973)(internal citations omitted).

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[6] Patrick J. Lynch, Should N.Y. Felons Vote? (No), The New York Daily News, New York (February 13, 2005).

CONCLUSION

The District Court's decision granting Appellees' motion for summary judgment and dismissing Appellant's complaint should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Rule 32 (a) (7) (B) (i) of the Federal Rules of Appellate Procedure. It was prepared using WordPerfect 2002 in Courier New Font 12. According to WordPerfect 2002, this brief contains 1,848 words, exclusive of those parts of the brief exempted by Rule 32 (a) (7) (B) (iii).

Mitchell S. Garber

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Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

JALIL ABDUL MUNTAQIM, a/k/a Anthony Bottom,

No. 01-7260

Plaintiff-Appellant,

v.

PHILIP COOMBE, ANTHONY ANNUCI, LOUIS F. MANN,

Defendants-Appellees.

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MOTION FOR LEAVE OF THE PATROLMEN'S BENEVOLENT ASSOCIATION TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF AFFIRMING THE DISTRICT COURT DECISION

The undersigned proposed Amicus Curiae hereby move the Court for leave to appear and file the accompanying Brief for Amicus in support of affirming the District Court's decision granting Appellees' motion for summary judgment and dismissing Appellant's complaint.

The Patrolmen's Benevolent Association of the City of New York (PBA) is a representative organization consisting of the members of the New York City Police Department (NYPD) in the rank of police officer, active and retired. The PBA works to improve the terms and conditions of employment of its 50,000 members in numerous ways. In addition to being the certified collective bargaining unit responsible for contractual negotiation with the City of New York, the PBA protects the rights of its members by initiating, defending and overseeing legal matters in Federal and New York State Courts

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The PBA acts pro-actively to seek redress for all types of wrongs against its members. See, e.g. Patrolmen's Benevolent Association v. City of New York, 310 F.3d 43 (2d Cir. 2002)(affirming jury verdict award of damages to individual police officers in action brought against City of New York for unlawful race-based transfers of officers). See, also Scarangella v. LaBorde, 12 A.D.3d 660 (2nd Dept. 2004) (affirming denial of motion to dismiss complaint in action brought under New York State's Son of Sam Law [Executive Law §632-a] for wrongful death by widow of slain police officer against convicted murdered who obtained assets while in prison years after his conviction).

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The PBA has engaged in a coordinated effort relating to New

York State Parole Board proceedings distributing petitions and drafting and filing letters urging that the convicted murderers and attackers of police officers be denied parole release and be required to serve the maximum period of incarceration authorized by law.

Proposed Amicus strongly believe that the concept of punishment of incarcerated felons must extend to the denial of the franchise and that the matters asserted in the attached brief will assist the Court in showing the penological objective of Election Law § 5-106, New York State's disenfranchisement statute.

Proposed Amicus submit this motion and attached brief pursuant to the Order of the Court of December 29, 2004, inviting amicus curiae briefs from interested parties.

Dated: New York, New York
March 2, 2005

Respectfully submitted,

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