01-7260

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JALIL ABDUL MUNTAQIM, a/k/a ANTHONY BOTTOM,

Plaintiff-Appellant,

v.

PHILLIP COOMBE, ANTHONY ANNUCCI, LOUIS F. MANN,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of New York

EN BANC BRIEF OF CENTER FOR COMMUNITY ALTERNATIVES, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NEW YORK ASSOCIATION FOR CRIMINAL DEFENSE LAWYERS, AND THE SENTENCING PROJECT AS _AMICI CURIAE_ IN SUPPORT OF PLAINTIFF-APPELLANT

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Case No. 01-7260
JALIL ABDUL MUNTAQIM V. PHILIP COOMBE, ET AL.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici Curiae* Center for Community Alternatives, National Association of Criminal Defense Lawyers, New York Association of Criminal Defense Lawyers, and The Sentencing Project certify that they are non-partisan, not-for-profit organizations. *Amici curiae* have no parent organization or corporation, and no publicly-held company owns 10% or more of their stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(cont.)

STATEMENT OF INTEREST

Amici Curiae Center for Community Alternatives (CCA), National Association of Criminal Defense Lawyers (NACDL), New York State Association of Criminal Defense Lawyers (NYSACDL), and The Sentencing Project are not-for-profit associations committed to ensuring the fair treatment of prisoners, parolees, and criminal defendants and to protecting against the unjust deprivation of prisoners' and parolees' civil rights. All four organizations therefore have a strong interest in guaranteeing that New York's felon disenfranchisement law does not disproportionately harm racial minorities.

CCA began in 1981 as the first private not-for-profit alternative to incarceration agency in New York State. The primary mission of CCA is to develop effective alternatives to incarceration and to foster a more responsive juvenile and criminal justice system in order to help youth and adults live more productive and safe lives. CCA operates community-based reentry programs in both New York City and Syracuse, New York for men and women returning to the community from incarceration. Through pioneering services as well as innovative research, policy analysis, and training, CCA fosters individual transformation, reduces reliance on incarceration, and promotes reintegration back into the community. CCA views voting and civic participation as essential elements in reintegrating people with felony convictions back into their communities.

NACDL is a not-for-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. NACDL was founded in 1958 to promote, study, and conduct research in the field of criminal law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's stated objectives is the promotion of the proper administration of criminal justice and the protection of the rights of the people that its members defend, including their rights while incarcerated and while on parole.

Similarly, NYSACDL, which is the New York State affiliate of NACDL, is a membership organization of more than 800 attorneys who practice law in the State of New York. NYSACDL's purpose is to assist, educate, and provide support to the criminal defense bar to enable its members to better serve the interest of their clients and to enhance their professional standing.

The Sentencing Project is a private, not-for-profit corporation, incorporated in 1986, and has become a national leader in the development of alternative sentencing programs an in research and advocacy on criminal justice policy. The Sentencing Project works for a fair and effective criminal justice system by promoting alternatives to incarceration, reforms in sentencing law and practice, and better use of community-based services and institutions. To these ends it conducts research and analyzes various aspects of the criminal justice system for the public, policy-makers, and criminal justice professionals. The Sentencing Project has previously examined the collateral consequences of criminal convictions. Its October 1998 report on felon disenfranchisement highlighted the issue for the American public; documented the extent to which some Americans were affected by the practice; and revealed the disparate impact that felon disenfranchisement has on racial minorities. The Sentencing Project's most recent research and publications further explores the impact felon disenfranchisement has on specific minority communities. The organization is considered a national resource for information on felon disenfranchisement.

INTRODUCTION

In its order of December 29, 2004, this Court invited *amicus curiae* participation from interested parties and requested briefing on, *inter alia*, whether "any statistical or other evidence of racial disparity [should] distinguish between the federal and state criminal justices systems or consider them together, and how [] a finding of discrimination in one and not the other [would] affect the ultimate determination on the vote dilution question." In response to this request, *amici curiae* Center for Community Alternatives, New York Association of Criminal Defense Lawyers, National Association of Criminal Defense Lawyers, and the Sentencing Project have prepared the following submission, and urge this Court to examine evidence of racial disparity in felony convictions in the federal and state criminal justice systems on a collective basis. Moreover, *amici curiae* further contend that, to the extent that this Court decides to consider the issue on a system-by-system basis, finding a Section 2 Voting Rights Act violation in one system should render New York's felon disenfranchisement law inapplicable across the board.

SUMMARY OF ARGUMENT

Plaintiff's theory of the case is straightforward – he contends that the present application of New York's felon disenfranchisement law, N.Y. Election Law § 5-106 (McKinney 2004), violates Section 2 of the Voting Rights Act ("VRA"), 42

U.S.C. § 1973, because of the effect that racial discrimination has on whether an individual is convicted of a felony. In other words, he contends that the felon disenfranchisement statute serves as a back-door method for disqualifying individuals from voting based on race. *See Farrakhan v. Washington*, 338 F.3d 1009, 1020 (9th Cir. 2003) ("To the extent that racial bias and discrimination in the criminal justice system contribute to the conviction of minorities for 'infamous crimes,' such discrimination would clearly hinder the ability of racial minorities to participate effectively in the political process, as disenfranchisement is automatic. Thus, racial bias in the criminal justice system may very well interact with voter disqualifications to create the kinds of barriers to political participation on account of race that are prohibited by Section 2[.]"). A critical component of this argument, however, is demonstrating that felony conviction rates are tainted by racial discrimination. That in turn requires a determination of what sort of evidence will be sufficient to make such a showing. Of course, in the context of Section 2 claims, Plaintiff does not need to provide evidence of intentional discrimination; rather, he merely needs to show that "as a result of the challenged practice or structure [he does] not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986); *see id.* at 47 ("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."). In other words, Plaintiff simply needs to demonstrate that, based on the "totality of the circumstances," New York's felon disenfranchisement statute "results in discrimination on account of race." *Farrakhan*, 338 F.3d at 1017.

Three categories of felons are disenfranchised by Section 5-106: (1) individuals convicted of a felony in the New York state criminal justice system; (2) individuals convicted of a felony in the federal criminal justice system; and (3) individuals convicted of a felony in another state's criminal justice system. Because each system makes its own ultimate decision on whether to convict an individual of a felony, it would seem, at first glance, that each system should be examined separately to determine whether that particular system is tainted by racial discrimination. Such an approach, however, ignores the reality of criminal justice systems. Whether an individual is convicted of a felony is not simply the product of whether he or she is found guilty at trial. Rather, it is the product of a series of decisions, not the least of which include whether the individual is arrested and the crime with which he or she is charged. If those acts are tainted by racial discrimination, that discrimination will in turn affect – indeed, significantly affect – overall felony conviction rates. And although the federal and state criminal justice systems are separate and distinct at the guilt and sentencing phases, they are often integrated when it comes to those initial decisions – *e.g.*, whom to arrest, whether they should be prosecuted, and for what crime are they charged. A combination of federal-state task forces and overlapping criminal jurisdiction has increasingly allowed federal and state authorities to make those decisions on a joint basis.

Accordingly, it is impossible to analyze the effect of racial discrimination on felony conviction rates for either the state or federal system in isolation. Because of their overlap, racial discrimination in the initial stages of the criminal justice process essentially leads to racially disparate felony conviction rates in both systems. Thus, in considering whether the application of Section 5-106 violates the Voting Rights Act, this Court should analyze any evidence regarding the effect of racial discrimination on felony convictions on a collective, rather than a system-by-system, basis.

However, even if this Court does choose to examine evidence of racial discrimination on a system-by-system basis, that choice should have little impact on this Court's determination of Plaintiff's vote dilution claim. Significant racial disparities in felony conviction rates are present in both the New York and federal systems, and there is substantial evidence demonstrating that those disparities are in large part the product of racial discrimination. Moreover, if this Court should conclude that racial disparities exist in one system, but not the other, that also should have no impact on this Court's ultimate resolution of the vote dilution question. Section 5-106 is not severable under New York law, and therefore a finding that the felon disenfranchisement statute violated Section 2 of the Voting Rights Act for one category of felons would necessarily mean that the statute could not be applied to any category of felons.

ARGUMENT

I. RACIAL DISPARITY IN FELONY CONVICTION RATES MUST BE ANALYZED ON A COLLECTIVE BASIS.

As an initial matter, it is clear that any evidence or statistical data regarding racial disparities in felony conviction rates should be analyzed on an integrated basis. Two recent trends have blurred the once distinct delineation between the federal and state criminal justice systems, rendering it impossible for a court to determine individually the effect that racial discrimination had on each system's felony convictions.

First, local, state and federal agencies increasingly have come together to participate in joint task forces and other collaborative crime fighting efforts. This extensive multi-jurisdictional cooperation has resulted in considerable integration of state and federal resources in the investigation and arrest stages of the criminal process.

Second, Congress' recent proclivity to create new federal criminal provisions covering historically state-prosecuted areas has resulted in an increasing federalization of criminal law. *See Chief Justice Raises Concerns on Federalization*, The Third Branch (Administrative Office of the Courts), June 1998, *at* http://www.uscourts.gov/ttb/jun98ttb/index.html. As a result of this federal encroachment, the same conduct now may be prosecuted in either state or federal courts. *See* Task Force on the Federalization of Criminal Law, American Bar Association, *The Federalization of Criminal Law* (1998) at 31 (hereinafter, "Task Force"); Malcolm L. Russell-Einhorn, *Fighting Urban Crime: The Evolution of Federal-Local Collaboration* (Nat'l Inst. of Justice, Dept. of Justice, Washington D.C.), Dec. 2003 (hereinafter, "Fighting Urban Crime").

This increase in prosecutors' ability to choose whether to indict under either state or federal criminal statutes, coupled with the increased collaboration of federal and state law enforcement personnel at the investigation and arrest stages, precludes this Court from specifically attributing racial disparities in convicted felon populations to either the state or the federal system.

A. The Pre-Indictment Stages Of The Federal And State Criminal Justice Systems Are Integrated.

In recent years, there has been an increasing level of collaboration between state, local and federal agencies during the investigation and arrest stages. Such collaborations have proven mutually beneficial – federal agencies are provided with additional manpower and local intelligence supplied by the local police, while local police forces gain access to nationwide criminal information, crossjurisdictional law enforcement powers and more sophisticated investigation methods. Fighting Urban Crime at 2.

Prior to the 1980s, such collaborations were quite rare. Now, "[h]undreds of Federal-local collaborations are addressing drug-, gang-, and violence-related crime in U.S. cities." *Id.* at 1. As a result, U.S. Attorneys increasingly have found themselves in a new role directing Federal and local law enforcement agents in strategic investigations." *Id.* at 6; *see also* JoAnne O'Bryant & Lisa Seghetti, *Crime Control: The Federal Response* (Congressional Research Service, Washington, D.C.), *updated* Sept. 12, 2002. For instance, Project Safe Neighborhoods is a coordinated offensive against gun violence, which President Bush hailed as "an unprecedented partnership among all levels of government." Fighting Urban Crime at 1. Project Safe Neighborhoods provides federal funds that are utilized to hire state and federal prosecutors, to support criminal investigations, and to provide training and community outreach programs. *Id.* The project also requires the U.S. Attorney to work with state and local authorities to develop a comprehensive gun violence reduction plan tailored to the needs of that area. *Id.*

These collaborations among federal and state law enforcement personnel are further enhanced by the growth of overlapping federal-state criminal jurisdiction. Over the past several decades, as a response to political pressure to be tough on crime, Congress has created a large number of federal crimes. In fact, over forty percent of the federal criminal provisions enacted since the Civil War have been enacted since 1970. Task Force at 7. Many of these new laws overlap with or duplicate state law provisions covering historically state-prosecuted matters such as drug and street crimes. Kathleen Brickey, *Criminal Mischief: The Federalization of American Criminal Law*; 46 Hastings L.J. 1135, 1145 (1995). Most significantly, as a result of these statutes, drug crimes – a traditionally state-prosecuted matter – now occupy one-third of the federal court caseload. Task Force at 20. Indeed, the Southern District of New York at one time even designated one day of the week as "federal day" where everyone arrested by local police that day was charged with a federal rather than state drug crime. Brickey, *Criminal Mischief*, 46 Hasting L.J. at 1159. In short, for many types of criminal activity, an individual can now be prosecuted in either state or federal court. It therefore falls to the prosecutors to decide where and on what charge the defendant will be indicted.

That decision is often made on a collective basis. The cooperation between federal and state officials generally breeds an atmosphere in which many key decisions are made jointly by both federal and local officials. For example, with respect to Project Safe Neighborhoods, "decisions to prosecute federally are rarely ad hoc unilateral decisions by U.S. Attorneys, but rather reflect consensus among representatives of different jurisdictions." Fighting Urban Crime at 10.

Furthermore, it is not inherently predictable how these federal and state prosecutors will decide. *See, e.g.*, Sara Sun Beale, *Reporter's Draft for the Working Group on Principles to Use When Considering the Federalization of Criminal Law*, 46 Hastings L.J. 1277 (1995); Harry Litman and Mark D. Greenberg, *Dual prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 The Annals of the American Academy of Political and Social Science 72 (1996). Although in many cases the criminal activity will be local in nature, prosecutors have a number of incentives to turn to federal law when confronted with the option of prosecuting an individual under either state or federal law. As a general matter, federal criminal provisions typically carry harsher penalties than their state counterparts. *See* Task Force at 30 (showing average estimated time to be served in state and federal prison by offense). For example, the Anti-Drug Abuse Act of 1986 included mandatory minimum sentences and required a mandatory life sentence for the third offense. *Id.* at 20. In fact, in selected cases, defendants can and are prosecuted for the same crimes in both state and federal court.

B. The Pre-Indictment Integration Of The Federal And State Criminal Justice Systems Requires That The Effect Of Racial Discrimination On Felony Conviction Rates Be Analyzed On A Cumulative Basis.

The integration of the pre-indictment stages of the federal and state criminal justice systems renders meaningless comparisons of the racial disparity rates between the two systems because racial discrimination in the criminal justice system is an incremental phenomenon present at every stage of the system.[1] Robert J. Sampson, and Janet L. Lauritsen, "Racial and Ethnic Disparities in Crime and Criminal Justice in the United States," in Michael Tonry (ed.), *Ethnicity, Crime and Immigration* (Chicago: University of Chicago Press, 1997). According to the American Bar Association's Justice Kennedy Commission, "opportunities to choose whether to be harsh or lenient exist at every stage of the process, and discretionary decisions are made every step of the way. The cumulative effect of discretionary decisions at each step of the process ultimately contributes to the racial disparity in our prisons and jails." American Bar Association Justice Kennedy Commission, *Report to the House of Delegates* 9, *at* http://www.abanet.org/media/kencomm/rep121b.pdf (hereinafter, "Kennedy Commission"). Because the initial stages of the process are infused with state and

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[1] *See* Kennedy Commission at 2-3 (noting that "the number of African-American and Latino men, women and juveniles in prisons and jails and at every stage of the criminal justice process is vastly disproportionate to their numbers in the overall population.").

federal collaboration, the racial disparity of felons in state prisons cannot be attributed solely to the state criminal justice process. Similarly, the federal disparity is not solely the result of federal practices.

Beginning with the investigatory phase and concluding with the sentencing decision, both the federal and state criminal justice processes as well as those in the juvenile justice system contain numerous points where the need to make discretionary decisions opens the door to disparate racial impact. The Kennedy Commission recognized this problem, and concluded that "no seasoned observer of the American criminal justice system can doubt that discretionary decisions are made at each stage of the process, from investigation, stops, and arrests to prosecution and sentencing. Given the vast amount of discretion that exists and the numerous opportunities for its exercise, it is undeniable that many African-American and Latino/a men, women, and juveniles in our nation's prisons and jails arrive there as a result not only of their criminal acts, but also because of the discretionary decisions made at various stages of the criminal process." Kennedy Commission at 8.

And indeed, substantial evidence demonstrates that the Kennedy Commission's concern was well-founded. Numerous studies have demonstrated the degree to which discretionary decisions at each stage of the process contribute to the disproportionate rate of minority felons. Studies of the juvenile justice system reveal that racial disparities are widespread and begin the path to disparities throughout the justice system. *See generally* Heidi M. Hsia, George S. Bridges & Rosalie McHale, *Disproportionate Minority Confinement: 2002 Update* (Office of Juvenile Justice and Delinquency Prevention, Washington, D.C.) 2004. And other studies have found that as much as 75-80% of the racial disparity in the prison population may be traced back to racial differences in arrests. *See, e.g.,* Alfred Blumstein, *Racial Disproportionality of U.S. Prison Populations Revisited*, 64 U. Colo. L. Rev. 743 (1993). For example, law enforcement practices such as racial profiling bring a disproportionate number of minorities into the system, while overlooking similarly situated whites who engage in the same criminal behavior. *See United States v. Leviner*, 31 F. Supp. 2d 23, 33 (D. Mass. 1998) ("Motor vehicle offenses, in particular, raise deep concerns about racial disparity. Studies from a number of scholars, and articles in the popular literature have focused on the fact that African American motorists are stopped and prosecuted for traffic stops, more than any other citizens. And if that is so, then it is not unreasonable to believe that African Americans would also be imprisoned at a higher rate for these offenses, as well.") (collecting studies). A New Jersey study showed that Blacks, despite comprising only 15% of the speeders on the New Jersey Turnpike, represented 35% of those stopped and a staggering 73.2% of those arrested. Deborah Ramirez et al., *A Resource Guide on Racial Profiling Data Collection*

Systems (Dept. of Justice, Washington, D.C.), Nov. 2000, at 7. In addition, a study by New York Attorney General Elliot Spitzer found that Blacks were six times more likely to be stopped and frisked than Whites, while Latinos were four times more likely. *Id.* at 8. Similar findings have been reported in studies of other jurisdictions. *See* David Cole, *No Equal Justice: Race and Class in the American Criminal Justice System* (The New Press, New York, 1999). These racially discriminatory practices ultimately have a pronounced effect on felony conviction rates. As the Kennedy Commission observed, "[w]hen there are more African-Americans and Latinos brought into the front end of the process, there are more at each successive stage and ultimately more in prison." Kennedy Commission at 13-14.

Furthermore, racial discrimination also can significantly affect outcomes at the charging stage. As previously noted, prosecutors enjoy significant discretion over what charges are filed against a particular defendant, and the extensive availability of overlapping state and federal criminal provisions "affords the [further] opportunity for selective prosecution of the same conduct in different ways." Task Force at 28-29. For example, almost all drug offenses may be charged either in state or federal court. Because federal sentencing laws typically are harsher than the state laws, this decision has "great consequences for criminal defendants." Kennedy Commission at 18. A study in Los Angeles demonstrated the impact of this distinction. Between 1988 and 1994, although many Black low-level dealers or accomplices were prosecuted for crack cocaine distribution in federal court, not a single white person was prosecuted for crack cocaine distribution in federal court. Meanwhile the hundreds of white offenders prosecuted for dealing crack cocaine in state court received sentences as much as eight years shorter than those offenders prosecuted in federal court. *Id.*

Thus, it is readily apparent that the gross disparity in felony conviction rates – and therefore felony disenfranchisement – between minority and non-minority communities is attributable, at least in part, to racial discrimination in discretionary decisions made at the pre-indictment stage of the criminal justice system. And because the federal and state systems are largely integrated at that point in the criminal justice process, racial disparities in felony convictions should be analyzed on a cumulative basis.[2]

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2 Moreover, even when initial decisions are made separately, past events in one racially biased system affect the outcome in a current case in another system. For example, the racial disparity found at local and state levels with respect to arrest, charging, and conviction will play a role in any subsequent federal sentencing, as the Guidelines are required to take into account any past criminal convictions. *See generally* Paul J. Hofer, Charles Loeffler, Kevin Blackwell & Patricia Valentino, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (U.S. Sentencing Commission, Washington D.C., Nov 2003) (hereinafter, "Fifteen Years"); *see also Leviner*, 31 F. Supp. 2d at 33 ("By counting the imprisonment that the defendant has received for the prior offenses, the [federal] system effectively replicates disparities in sentencing in the state system. This

II. EVEN WHEN VIEWED SEPARATELY, ALL EVIDENCE OF RACIAL DISPARITY POINTS TO SIMILAR PATTERNS OF INDIVIDUAL AND GROUP EXPERIENCES IN THE FEDERAL AND STATE CRIMINAL JUSTICE SYSTEMS.

As a practical matter, whether this Court views the evidence of racial disparities on a cumulative or system-by-system basis makes little difference in this case. The evidence in this proceeding, statistical and otherwise, overwhelmingly confirms that the state and federal criminal justice systems in New York, regardless of how they are analyzed, are diluting the voting strength of affected minority communities. A snapshot of the state correctional facilities shows that 79.5 percent of all inmates are African American and Hispanic, even though they comprise less than 30 percent of the voting-age population. *See* New York Department of Correctional Services, *Hub System: Profile of Inmate Population Under Custody on January 1, 2002* (2002); U.S. Census Bureau, Census 2000 Redistricting Data Summary File, *at* http://www.census.gov/census2000/states/ny.html. The numbers are similar in federal facilities where approximately 70 percent of inmates are African American and Hispanic compared to the 27 percent who are Caucasian. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, Pub. No. NCJ 198272, *Census of State and Federal Correctional Facilities, 2000* (2003). This disparity is not merely the

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would include not only the ordinary disparities between similarly situated defendants, but racial disparities.").

indirect byproduct of the criminal justice systems, but rather a direct outcome of the widespread race-based disparate treatment accorded to felons throughout the judicial process. *See* James F. Nelson, New York State Division of Criminal Justice Services, *Disparities in Processing Felony Arrests in New York State, 1990-1992* (1995) (hereinafter, "DCJS Study").

Reports and studies show widespread race-based disparities in sentencing in both the New York federal and state courts. *See* Jamie Fellner, *Cruel and Usual: Disproportionate Sentences for New York Drug Offenders*, Human Rights Violations in the United States, Vol. 9, No. 2(B) (1997), *at* http://www.hrw.org/summaries/s.us973.html. Simply put, white felons overwhelmingly receive probation or suspended sentences, while minority felons receive sentences of incarceration followed by parole. *See generally* DCJS Study. This disparity has a critical impact on voting rights. Section 5-106 disenfranchises all persons convicted of a felony, ***unless*** they have been pardoned or not sentenced to imprisonment, *i.e.*, if they received probation, discharge, or a suspended sentence. *See* N.Y. Election Law § 5-106(2)-(5). "A sizeable proportion of qualifying [minority] offenders do not get the benefit of an [incarceration] alternative, however, and there is some [evidence of] racial disproportionality in the use of these options." Fifteen Years at 130. Whether a result of "institutionalized unfairness" – in the form of disparate sentencing for different types of crime (drug versus white crime) or different mandatory sentence for different drug offenses (selling crack cocaine versus pure cocaine) – or individual discriminatory judgments, current sentencing policies undeniably produce a disparate "adverse impact on minority offenders." *Id.* at 135.

Furthermore, as is true throughout the United States, the largest category of these minority convictions in New York state and federal courts result from non-violent drug felonies. The facts show that African-Americans and Hispanics are three times more likely than whites to be sentenced for drug possession, which explains the fact that African-Americans and Hispanics represent over 85 percent of people indicted for drug felonies and 94.2 percent (47.6 percent and 46.6 percent respectively) of drug felons sentenced to state prison. *See* Fellner, *Cruel and Usual*, at 3 (providing extensive statistical data on state drug convictions). In the federal system, African-Americans comprise 57.7 percent of the drug felons in prison but only 40.4 percent of the arrestees, "so that they are overrepresented in prison by forty-three percent compared to their numbers of arrests." Alfred Blumstein, *Racial Disproportionality*, 64 U. Col. L. Rev. at 751. The problem is striking because "the presence of drug offenders has increased almost four-fold in the percentage of the prison population," more than any other crime type. *Id.* at 752. Thus, this evidence reflects a disparate treatment of minority groups in sentencing and incarceration in both the federal and state systems, which results in vote dilution and denial under Section 2 of the Voting Rights Act.

III. THIS COURT CANNOT SEVER SECTION 5-106 UPON A FINDING OF DISCRIMINATION IN ONE CRIMINAL JUSTICE SYSTEM BUT NOT THE OTHER.

Because the evidence described above overwhelmingly points to widespread race-based disparate treatment accorded to felons throughout the criminal justice process, this Court should not find disparity or discrimination in one system and not the other. But, even if this Court does find racial discrimination or disparity in either the state or federal criminal justice system alone, this Court still would be unable to apply Section 5-106 to any category of felons. Section 5-106 enunciates exclusions from voting qualification based on three related categories of felony conviction: (1) "convict[ions] of a felony pursuant to the laws of this state," (2) "convict[ions] in a federal court, of a felony, or a crime or offense which would constitute a felony under the laws of this state," and (3) "convict[ions] in another state for a crime or offense which would constitute a felony under the laws of this state." N.Y. Election Law § 5-106(2)-(4) (McKinney 2004). These three related exclusions are intended to treat the three categories of felons that reside in New York in an equal and like manner. Accordingly, without the like treatment, the exclusion provisions would defeat the legislature's intent, and more importantly, produce unequal and unconstitutional results.

Because the state legislature did not add a savings clause to this provision in anticipation of potential severance, the test for severability must be applied. The analysis requires a determination of "whether the Legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether. . . . [and] considering how the statutory rule will function if the knife is laid to the branch instead of at the roots." *See, e.g., Dalton v. Pataki*, 780 N.Y.S.2d 47, 78 (N.Y. App. Div. 2004) (quoting *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60, 129 N.E. 202 (1920), *cert denied*, 256 U.S. 702 (1921).) While severance is favored whenever possible, the entire statute must be rejected if an unconstitutional provision would result in a statutory scheme unintended by the Legislature. *Id.*

It is clear from the plain text of Section 5-106 that the legislature did not intend to distinguish between felony convictions "pursuant to the laws of [New York]" and those pursuant to federal or other state laws. N.Y. Election Law § 5-106 (McKinney 2004). In fact, the statute provides parallel scopes of exclusion for each class of persons to "felonies" or "crime[s] or offense[s] which would constitute a felony under the laws of this state." § 5-106(3)-(4). Thus, the clear import of the statutory language is that all classes of felons, regardless of the system from which their conviction arises, are to be treated in like fashion. But if Section 5-106 is deemed to be severable, this aspect of the statutory scheme is jeopardized. For example, if this Court found racial disparity in the state criminal justice system and it held the related subdivision to be unconstitutional, the remaining law would bar federal felons and parolees and felons and parolees who moved to New York from voting, but would not bar those felons convicted in the New York state courts. The resulting inequality would violate the affected groups' equal protection rights, especially in light of the federal movement to integrate the two criminal justice systems, and produce a result in stark contrast to that intended by the state legislature. Likewise, to sever the exclusion of federal felons but permit the continued disenfranchisement of persons convicted of state felonies, would create greater equal protection challenges based on irrational inequalities.

The rationale to prevent severance of the treatment of different incarcerated felons is distinguishable from other Equal Protection challenges to felon disenfranchisement statutes, such as the contention that practices of disenfranchising only felons sentenced to incarceration as opposed to those on parole would violate the equal protection clause of the Fourteenth Amendment. *Cf. Hayden v. Pataki*, No. 00 Civ. 8586 (LLM), 2004 WL 1335921, at *1 (S.D.N.Y. June 14, 2004) (denying an Equal Protection challenge to the second set of facts). In *Hayden*, the court noted that equal protection considerations do not pre-empt all "state-created classifications denying the right to vote . . . ." *Id.* at *4 (citation omitted). However, "when the state draws distinctions between similarly situated individuals it must show that the distinction is rational, not arbitrary." *Id.* (citations omitted). Courts have found rational justifications for treating different classes of offenders differently – for instance, the *Hayden* court considered the severity of the punishment and criminal history of the defendant, *id.* – but they cannot rationally distinguish between defendants charged with the same crime in different jurisdictions. Whether someone has committed felony armed robbery in New York or Alabama, that person – if a resident in New York – should not be denied the right to vote simply based on the jurisdiction that prosecuted him. No interpretation of Equal Protection would permit such an arbitrary distinction.

In short, merely severing a subdivision of the felon disenfranchisement statute, without removing the entire section, would create greater constitutional defects and defeat the plain legislative intent behind the law.

CONCLUSION

For the foregoing reasons, and for the reasons stated by Plaintiff-Appellant in his briefing, this Court should reverse the district court's grant of summary judgment and remand this case for trial.

February 8, 2005

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

As required by Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that this brief contains 5,217 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as calculated by Microsoft Word. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word 2000 in a 14-point font of Times New Roman type style.

Dated: February 8, 2005

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