UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

	*	**CIVIL ACTION**
AUDREY DOE, ET AL	*	
	*	**No. 11-388 "F" (5)**
VERSUS	*	
	*	**JUDGE FELDMAN**
BOBBY JINDAL, ET AL	*	
	*	**MAG. JUDGE CHASEZ**

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COURT ORDERED SUPPLEMENTAL MEMORANDUM BY SUPERINTENDENT SERPAS IN HIS OFFICIAL CAPACITY

MAY IT PLEASE THE COURT:

Defendant, Superintendent Ronal Serpas, in his official capacity as Superintendent of the New Orleans Police Department, respectfully submits this supplemental memorandum in accordance with the order of this Honorable Court.

This Honorable Court requested additional briefing, within five (5) business days of August 10, 2011, on three issues related to plaintiffs' claim that they have suffered a violation of the Equal Protection Clause: (1) prosecutorial discretion, (2) applicability to this matter of *Eisenstadt v. Baird*, 405 U.S. 438 (1972) and *Vacco v. Quill*, 521 U.S. 793 (1997), and (3) in light of

Eisenstadt, *Vacco* and other precedent, whether the effective date of Act 223 of the 2011 Regular Session of the Louisiana Legislature (which removed Crimes Against Nature by Solicitation from the list of offenses subject to sex offender registry requirements) created an Equal Protection issue and whether such an equal protection claim is cognizable under 42 U.S.C. §1983 in this case.

Insofar as the claims against *this* Defendant are concerned, only the issue concerning prosecutorial discretion has arguable applicability. With regard to the other issues, and out of an abundance of caution, Defendant herein adopts the arguments of able counsel for the State.

I. DEFENDANT HEREIN ADOPTS THE STATE'S ARGUMENTS

First and foremost, as with the original briefing in this matter and in the interest of maintaining continuity, Defendant, Superintendent Serpas, hereby adopts and incorporates herein by reference as if copied *in extenso* pursuant to Fed. R. Civ. P. 10(c) the arguments set forth in the supplemental brief of the State defendants.

II. PROSECUTORIAL DISCRETION

As summarized by counsel for the state, the plaintiffs allege that the existence of two statutes: prostitution (La. R.S. 14:82) and Crimes Against Nature by Solicitation (La. R.S. 14:89.2) provide arresting officers and prosecutors the ability to discriminate because they have the discretion to choose between the misdemeanor and felony when deciding how to charge a defendant. Generally, the plaintiffs allege their equal protection rights were violated because each was prosecuted for Crimes Against Nature by Solicitation rather than for Prostitution.

First, and again, Defendant adopts and incorporates herein pursuant to Fed. R. Civ. P. 10(c) the arguments set forth in the supplemental brief of the State defendants on this point. Second, Defendant herein would add that the analysis concerning the discretion to arrest by members of the NOPD is a bit different. Indeed, the standard governing an officer's decision to arrest is that of probable cause for the arrest, regardless of whether the statute pursuant to which the arrest is made is later determined to be unconstitutional. *See Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967).

The law is clear that a plaintiff challenging the propriety of his arrest must show that the officers could not have reasonably believed that they had probable cause to arrest the plaintiff for ***any*** crime. *Devenpeck v. Alford,* 543 U.S. 146, 153 (2004). The law is likewise supremely well-established that probable cause is an ***objective*** test.

> "Our cases make clear that an arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. As we have repeatedly explained, the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action. '[T]he Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.' '[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.'"

Devenpeck, at 543-594. The Court in *Devenpeck* further opined:

> Subjective intent of the arresting officer, *however* it is determined (and of course subjective intent is *always* determined by objective means), is simply no basis for invalidating an arrest. Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest.

Id.

More recently, in *Aschroft v. Al-Kidd,* -- U.S. --, 131 S.Ct. 2074 (May 31, 2011), the Supreme Court held:

> Fourth Amendment reasonableness "is predominantly an objective inquiry." We ask whether "the circumstances, viewed objectively, justify [the challenged] action." If so, that action was reasonable "*whatever* the subjective intent" motivating the relevant officials. This approach recognizes that the Fourth Amendment regulates conduct rather than thoughts, and it promotes evenhanded, uniform enforcement of the law.

Al-Kidd, 131 S.Ct. at 2080. The Court further expressly ***rejected*** the argument that courts are to "ignore subjective intent ***only*** when there exists "probable cause to believe that a violation of law has occurred…" *Id*. at 2082 (emphasis added). Thus, in the present case, the only relevant inquiry vis-à-vis the arrest of persons for any crime is whether probable cause existed for the offense, regardless of the subjective intentions of the arresting officer(s) and regardless of whether the underlying statute is later declared unconstitutional. Unfortunately, Plaintiffs are barred from raising this issue insofar as they have pled or were found guilty.

In *Heck v. Humphrey*, 114 S.Ct. 2364 (1994), the Supreme Court held that "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." 512 U.S. at 487, 114 S.Ct. at 2372. The Court further reasoned:

> One element that ***must be alleged and proved ... is termination of the prior criminal proceeding in favor of the accused.*** This requirement avoids parallel litigation over the issues of probable cause and guilt ... and it precludes the possibility of the claimant [*sic*] succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction. Furthermore, to permit a convicted criminal defendant to proceed with a malicious prosecution claim would permit a collateral attack on the conviction through the vehicle of a civil suit. (citations omitted)).

In the present case, as asserted by learned counsel for the state, any relief based upon a finding that it was unconstitutional to charge Plaintiffs with Crimes Against Nature implies the invalidity of the plaintiffs' convictions. Therefore, absent a termination in plaintiffs' favor of their

Crimes Against Nature convictions, the Supreme Court's decision in *Heck* bars all §1983 claims of selective prosecution.

Respectfully submitted,

/s/ Jim Mullaly
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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2011, I electronically filed the foregoing using the court's CM/ECF system which will provide a notice of electronic filing to All Counsel of Record. I further certify that all parties are represented by CM/ECF participants.

/s/ Jim Mullaly
JAMES B. MULLALY