

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA
ERIE DIVISION**

JoAnn Curley , et al.

Plaintiffs

v.

No. A-1:07 CV 145

Judge Sean J. McLaughlin

Magistrate Judge Susan Baxter

Amended Complaint

Catherine C. McVey, et al.

Electronically Filed

Defendants

Jurisdiction and Venue

1. Jurisdiction is conferred by 28 U.S.C. § 1331 (i.e. cases concerning federal questions), and by 28 U.S.C. § 1343(a) which authorizes federal courts to hear actions brought under 42 U.S.C. § 1983 [hereafter § 1983]. Plaintiffs seek the injunctive and declaratory relief available through § 1983.

2. Jurisdiction is further conferred by 28 U.S.C. § 1332, the diversity statute. Pursuant to the Class Action Fairness Act of 2005 (hereafter the *Fairness Act*), diversity jurisdiction for class actions has been expanded. Under this Fairness Act, diversity jurisdiction is satisfied if any member of the class, named or not named, has diverse citizenship from any one Defendant.¹

¹ See 28 U.S.C. § 1332 (d)(2).

3. The principles of pendant jurisdiction are hereby engaged for combining remedies under § 1983 with state law remedies for state law claims.

4. Venue is proper in this Court because Defendants are Pennsylvania residents, as well as officers and employees of Pennsylvania, acting in their official capacities and under color of state authority. The business of these Defendants is conducted throughout Pennsylvania, including the Western District. Many proposed class members are held in custody in the Western District of Pennsylvania. Thus, their claims arise in the Western District as well. Venue is appropriate in this Court pursuant to 28 U.S.C. § 1391(b) (1).

Applicable Federal Statutes

5. Under the Fairness Act, this Court's jurisdiction is no longer limited to questions suitable for consideration under §1983. Once diversity jurisdiction has been engaged, this Court becomes vested with authority to entertain all claims predicated upon state law, as well as all claims arising under §1983.

6. The Prison Litigation Reform Act, 42 U.S.C. § 1997 (e)(a) stipulates that no action shall be brought with respect to prison conditions under § 1983 until available administrative remedies are exhausted. Under the Pennsylvania Code, the term *adjudication*² does not include a parole hearing. The right to an administrative appeal applies to proceedings qualifying as *adjudications*.

² See 2 Pa. C.S.A. § 101, Administrative Law, Procedure, General Provisions, Chapter One, Definitions, for the term "adjudication" on p. 232.

Since parole hearings are not considered *adjudications*, there is no right to an administrative appeal.³ No exhaustion of administrative remedies can be required where the relevant administrative procedure lacks authority to provide relief or take any action whatsoever in response to a complaint.⁴ Accordingly, the Prison Litigation Reform Act's exhaustion requirement does not apply, because Pennsylvania inmates have no administrative remedies to exhaust.

Parties

7. Plaintiffs are persons who have been convicted of felonies carrying a minimum term of two or more years. Plaintiffs further include persons that have been released and are currently under supervision. Plaintiffs anticipate continually adding new class members until they number into the thousands.

8. Defendants Catherine C. McVey, Chairman, Michael L. Green, Jeffrey R. Imboden, Matthew T. Mangino, Benjamin A. Martinez, Gerard N. Massaro, Charles Fox [succeeding Michael M. Webster in the Original Complaint], Lloyd A. White and Judy Viglione [filling a vacancy left open when the Original Complaint was filed] are members of the Pennsylvania Board of Probation and Parole [hereafter collectively referenced as *Parole Board Members*]. These Parole Board Members are being sued solely in their official capacities. Under Fed.R.Civ.Proc. 25(d)(1), as these parties leave

³ LaCamera V. Com. Bd. of Prob. and Parole, 317 A.2nd 925, 926-27 (Pa. Cmwlth 1974)

⁴ Booth v. Churmer, 532 U.S. 731, 736 (2001) [hereafter *Booth*]

office, their successors automatically take their place in this litigation. The Parole Board is vested with authority to make decisions regarding the granting and revoking of paroles and setting conditions for release from prison.

9. Defendant Dr. Jeffrey A. Beard is Secretary of the Pennsylvania Department of Corrections and its chief executive. Dr. Beard is being sued in his official capacity. Through his duties, Dr. Beard is conducting business throughout the state. Because Dr. Beard is sued only in his official capacity, the Pennsylvania Department of Corrections is the real party in interest.

10. Defendant John S. Shaffer is Executive Deputy Secretary of the Pennsylvania Department of Corrections. Defendant Shaffer is being sued only in his official capacity. Acting in his official capacity, Mr. Shaffer has authority to implement and enforce policies, rules and regulations governing the Pennsylvania Department of Corrections. Through his duties, Mr. Shaffer is conducting business throughout the state. Like Dr. Beard, the real party in interest is once again, the Pennsylvania Department of Corrections.

11. Defendant Abdrea Priori-Meintel [replacing previous Defendant Judy Viglione] is sued only in her official capacity as Director for the Bureau of Inmate Services. Like Dr. Beard and John Shaffer, the real party in interest is the Pennsylvania Department of Corrections. Ms. Priori-Meintel is responsible for the inmate classification system, inmate records, and the

classification process. The Bureau of Inmate Services provides administrative and technical support for all state prisons.

Class Action Request

12. In accordance with Local Rule 23.1(B), Plaintiffs, acting through the undersigned counsel, respectfully ask this Court to permit this action to proceed as a class action pursuant to Fed. R. Civ. P. 23(a) and (b)(2). The grounds for this class action will be set forth in a Class Action Petition.

Allegations Common to all Claims

13. Pennsylvania has an indeterminate sentencing law for felony offenders, meaning that every prisoner is given a minimum and maximum sentence. Inmates with a minimum two year sentence and maximum sentence are all eligible to become class members. Offenders serving life sentences are not eligible, because they do not have minimum sentences.

14. With every indeterminate sentencing scheme, there is necessarily a parole statute. Parole provides a buffer for the harsh maximum sentence and the mechanism for rewarding an inmate's good behavior. This penological philosophy also contemplates an independent entity (i.e. the Parole Board) with the power to grant a parole even if the prison warden disagrees.

15. Pennsylvania's General Assembly created a classic indeterminate sentencing and parole scheme, embracing all of the fundamental tenets of its

underlying penological philosophy, including its embedded bias favoring rehabilitation while simultaneously acknowledging incorrigibility.

16. The Parole Act requires the Parole Board to consider an offender's prison conduct.⁵ Candidates participating in rehabilitative and educational programs⁶ and reflecting no serious misconduct reports and either none or only a few minor misconduct reports are to be rewarded with a parole.⁷ The Parole Act further requires a parole recommendation from the confining institution, but said recommendation is not an essential prerequisite for earning a parole.⁸

17. If parole is denied, the Parole Act allows for reconsideration a year after a decision is issued.⁹ If granted, reconsideration is equivalent to a new minimum sentence. By affording opportunities for reconsideration after a year, the Parole Act has set out a powerful incentive for *continuing* to encourage behavior modification calculated to avoid the debilitating maximum term.

⁵ See 61 P.S. §331.19

⁶ See Jackson v. Walters, 733 F.Supp. 33 (W.D. Pa. 1989)

⁷ See Hibbard v. Pa. Bd. of Probation and Parole, 816 A. 2nd 344, 347 (Pa. Cmwlth 2003).

⁸ See 61 P.S. §331.19. See also Rummings v. Commonwealth, Pa. Bd. of Probation and Parole, 814 A. 2nd 795, 799 (Pa. Cmwlth. 2002).

⁹ See 61 P.S. §331.22.

18. The Parole Board is required to consider *the nature and circumstance of the offense*, plus recommendations made by the judge and prosecuting attorney for parole.¹⁰

Parole Board Jurisdiction and Scope of Authority

19. By statute, parole is discretionary and considered a privilege, offered as a matter of grace. If parole is denied, there is no administrative appeal and there is no statutory right of appeal to a judicial court.

20. The Pennsylvania General Assembly has granted the Parole Board broad discretion in parole matters.¹¹ It is widely acknowledged that the decision to grant parole is a subjective undertaking, involving a predictive judgment of future behavior. For these reasons, courts have given the Parole Board wide latitude and exercised deferential restraint on occasions when asked to review parole orders.

Parole Suitability Criteria

21. The Parole Act sets forth six factors for determining whether an offender is suitable for parole: (1) an offender's prison conduct¹²; (2) the

¹⁰ See 61 P.S. §331.19

¹¹ Bradshaw v. Pa. Bd. of Probation and Parole, 461 A. 2nd 342 (Pa. Cmwlth. Ct. 1983).

¹² See 61 P.S. §331.19

recommendation of the confining institution,¹³ (3) the nature and circumstance of the offense, any recommendation made by the judge and prosecuting attorney, and the prisoner's general character and background¹⁴; (4) if there is any prior criminal history¹⁵; (5) for offenders granted parole, the result on a drug test administered prior to their anticipated release¹⁶; and (6) submission of a satisfactory parole plan.

22. Of these six factors, four can be influenced by the offender. The inmate can influence their institutional record, the recommendation of the confining institution, achieve a negative result on a drug test and submit a parole plan. If weight is attached to these factors, and an inmate has influenced these factors in a positive way, they should be worthy of parole.

23. Two factors cannot be influenced by an offender; (1) the nature of their crime and (2) their prior criminal history. These are *unchanging factors*, meaning they are forever fixed and rigid. If great weight is attached to these factors, a much smaller number of offenders will be paroled.

24. All six suitability factors are to be grounded in facts and evidence. There is nothing in the Parole Act contemplating or encouraging the use of subjective judgments relating to an offender's mind-state for denial of parole.

¹³ See 61 P.S. §331.19

¹⁴ See 61 P.S. §331.19

¹⁵ See 61 P.S. §331.19

¹⁶ See 61 P.S. §331.21

25. When an offender accepts a plea agreement, the terms of this plea incorporate the milieu of Pennsylvania statutes, administrative rules and Parole Board policies and practices impacting upon prison terms *at the time of the crime*. These statutes, rules and parole practices establish what is expected from the defendant, and what the defendant can expect in return from the state.

26. In 1996, the Pennsylvania legislature made material modifications to the mission of the Parole Board. Instead of placing priority upon rehabilitation, the Parole Board was told to place the public's safety first and foremost.¹⁷

27. The 1941-1996 statute made no mention of public safety. Instead of placing first priority upon the public's safety, this earlier version emphasized "their rehabilitation, adjustment and restoration to social and economic life and activities shall be aided and facilitated" by the Parole Board.¹⁸ Many class members were convicted when this earlier statute was in force.

28. Prior to 1996, the Parole Board weighed all six factors in the Parole Act. After enacting this 1996 statute, the Parole Board has taken the command to *first and foremost seek to protect the safety of the public* very literally, by viewing themselves as a last chance safety net. Post-1996 decision-making reflects a sentry mind-state which focuses exclusively upon the public's safety.

¹⁷ See § 1 Pennsylvania Parole Act, 61 P.S. § 331.1.

¹⁸ See Pre -1996 version, now repealed, of 61 P.S. § 331.1

29. A shift from factors that can be molded to factors that cannot change had a profound impact upon parole decision-making. Previously, parole denials were grounded in facts. After this shift, subjective judgments, grounded in mental perceptions instead of evidence, served as a substitute for evidentiary facts. Evidence previously worthy of earning a parole became trumped by subjective judgments in the post-1996 decision-making process.

The Parole Decision – Making Process

30. During reception, every inmate is given a prescriptive plan of programs calculated to address their anti-social behavior. Implicit in this program is the assurance that if they stay out of trouble and take their courses, this conduct will improve their chances for earning a parole.

31. As part of this process, every parole candidate has an interview. In the interview, rhetorical questions are asked which carry no right or wrong answers. For example, “why did you go through a jury trial.” The inmate may answer that they were told they had a constitutional right to a trial by their lawyer. In the context of a parole / prison setting, going through a jury trial is viewed as a failure to acknowledge wrongful behavior and a waste of taxpayer money. After the interview, candidates must await their parole decision.

32. Parole is typically denied for the following reasons; (1) subjective judgments relating to the nature of their crime or past crimes; (2) failure to

take prescriptive courses; (3) because of a bad interview with the examiner or Board Member; and (4) a general statement that denial of parole *is necessary for achieving the fair administration of justice*. In some cases, denials will reference matters from two, three or even all four subjects.

33. There is nothing in this parole decision noting the crime committed, the minimum and maximum sentence, how much time has been served to date, courses taken to address antisocial behavior, the date when their crime occurred, or which set of guidelines (the 1941 to 1996 statute or the post -1996 statute) apply. Absence of this information reflects no consideration given to laws in force at the time of the crime; no consideration given for the portion of the sentence served; and no consideration given for the court sentence.

Claim 1 – Due Process

34. The civil rights statute (42 U.S.C. § 1983) has been broadly construed and invoked as a remedy against all violations of federally protected rights committed by state actors. In 2005, the U. S. Supreme Court explicitly found that inmates have the right to challenge parole decisions under § 1983.

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35. Violating the Due Process Clause qualifies as a constitutional violation in satisfaction of the Prison Litigation Reform Act of 1996.²⁰

¹⁹ See *Wilkinson v. Dotson*, 544 U.S. 74 (2005) [hereafter *Wilkinson*].

²⁰ Pub. L. No. 104-134, 110 Stat. 1321 *codified* 42 U.S.C. § 1997 (e).

36. Under a subjective Due Process standard (i.e. a right springing from the Due Process Clause itself), a state statute may not vitiate the fundamental due process right to be free from arbitrary governmental action.²¹ All prisoners have a liberty interest flowing from the Due Process Clause itself in not being denied parole for arbitrary or constitutionally impermissible reasons.²²

37. Defendants have a practice of relying upon subjective judgments such as *lack of remorse, lack of insight into their criminal behavior, failure to accept responsibility and minimization of their role* for denying parole. These statements only become meaningful when applied to the crime. Subjective judgments of this kind are merely euphemisms for *nature of the offense*.

38. Under the Parole Act, the Parole Board is required to take into account the existence of other factors beyond the nature of their crime such as their prison record, their educational achievements and acquisition of skills.

39. With a reading of many parole decisions at a single sitting, it becomes apparent that the Parole Board is denying parole due to the nature of the crime without articulating what it is about the crime that allows it to overpower every other factor which the Parole Act requires to be considered.

²¹ Block v. Potter, 631 F. 2nd 233, 236 (3rd Cir. 1980) *citing* Meachum v. Fano, 427 U.S. 215, 230, 96 S.Ct. 2532, 2541, 49 L.Ed.2d 451 (1976) (Stevens, J., dissenting)

²² Block v. Potter, 631 F. 2nd 233, 236 (3rd Cir. 1980)

40. Plaintiffs submit that these dismissals are dictated by an unforgiving, no exception policy and this policy has served as a substitute for the exercise of discretion. At the same time, Parole Board discretion has served as a smokescreen, enabling it to hide these machinations.

41. Plaintiffs' submit that Defendants have adopted a policy and an executive agenda which has dismantled parole as it is envisioned in the Parole Act. Instead of contemplating a balancing of interests – the liberty interest of an inmate counterbalanced by societal interests in prevention of violent crime – governed by principles of equity, these Defendants are looking exclusively at the crime and at nothing else. As a result, an inmate's liberty interest is being held captive to a factor that will never change and cannot be influenced.

42. While parole is a privilege, the State may not arbitrarily abrogate an offender's right to parole. When an inmate's liberty interest, although attenuated, becomes captive to a factor that can never change and can never be influenced by the candidate, contrary to a legislative enactment requiring the consideration of factors which can be positively influenced, a right to parole has been arbitrarily abrogated in violation of the Due Process Clause. Plaintiffs further state that these practices are pervasive and deeply embedded.

Claim 2 – Ex Post Facto Clause

43. Article I, § 10 of the U.S. Constitution provides, “no State ... shall pass any ... ex post facto law.” This Clause declares a constitutional absolute. Congress and the States may not enact any law which imposes additional punishment to that then prescribed.

44. The Supreme Court has held that the presence of discretion does not displace the protections of the Ex Post Facto Clause. The danger of disfavoring certain persons after the fact is present in the parole context and the *Ex Post Facto* Clause guards against such abuse.²³

45. Violating the Ex Post Facto Clause qualifies as a constitutional violation in satisfaction of the Prison Litigation Reform Act of 1996.²⁴ When evidence indicates the Parole Board has violated the U.S. Constitution, the matter may be reviewed by a Federal court pursuant to §1983.

46. To prove an Ex Post Facto claim, three elements are necessary; (1) state action resembling the force of law; (2) applied retroactively; and (3) inflicting a greater punishment than required by the law annexed to the crime when it was committed.

47. The U.S. Supreme Court has held that parole policies and practices constitute state action resembling the force of law. Per *Garner*, federal courts are to examine whether, as a practical matter, retroactive application of parole

²³ *Garner v. Jones*, 529 U.S. 244, 253 (2000) [hereafter *Garner*].

²⁴ Pub. L. No. 104-134, 110 Stat. 1321 *codified* 42 U.S.C. § 1997 (e)

practices creates a significant risk of prolonging an inmate's incarceration.²⁵

To determine whether an ex post facto act has been performed, courts are to examine the inherent wording of the rule as well as its practical impact.²⁶

1st Violation – Applying Public Safety Standard to Pre-1996 Offenses

48. For crimes occurring prior to the 1996 amendment, offenders are to be subject to the milieu of Pennsylvania statutes, administrative rules and Parole Board policies and practices impacting upon prison terms *at the time of their crime*. The institutional record and verifiable rehabilitation progress should still be considered first and foremost for these plaintiffs.

49. Under the pre-1996 Parole Board statute, offenders are to receive *serious release consideration* at their first review. The term *serious release consideration* means that the Parole Board visits the place where they plan to live, they examine their parole plan and, in general, they view the parole candidate as a person returning to society. Inmates know when they are not receiving *serious release consideration*. There is no visit to the place where they plan to live, and there are no questions asked about their parole plan.

50. Defendants have a practice of applying the Parole Act's 1996 amendment to all plaintiffs, regardless of when their crime took place. For

²⁵ Fletcher v. Reilly, 433 F. 3d 867, 869-870 (D.C. Cir. 2006)

²⁶ Dyer v. Bowlen, 465 F. 3rd 280, 288 (6th Cir. 2006).

plaintiffs with crimes preceding this 1996 Amendment, this constitutes a retroactive application of the 1996 statute.

51. Since enactment of the 1996 amendment, the *kind of discretion* contemplated by the Parole Act is no longer being exercised. Instead of a balancing of factors governed by principles of equity, one unchanging factor, the nature of the crime, dictates the result.

52. *As applied*, the 1996 criteria has an increased risk for substantially disadvantaging parole candidates. Defendants justify added time by relying exclusively upon the crime and ignore rehabilitation and institutional factors.

53. Under the 1941 statute, offenders with good institutional records and verifiable rehabilitation progress could count upon earning parole in closer proximity to their minimum sentence. Since enactment of the 1996 statute, these same offenders are being held and released in closer proximity to their maximum sentence. Expanding the custody portion of a trial court sentence from releases closer to the minimum sentence to releases closer to the maximum sentence has altered the quantum of punishment and exposed Plaintiffs to a substantial risk of serving a longer prison term.

54. This first Ex Post Facto claim applies to all plaintiffs committing crimes prior to the adoption of the 1996 amendment to the Parole Act.

2nd Violation – Vindictive Acts Imposed upon post-1996 Offenders

55. The ex post facto clause is there to restrain the enactment of arbitrary or vindictive legislation.²⁷ The ex post facto clause is violated if a change in law creates “a sufficient risk of increasing the measure of punishment attached to the covered crimes.”²⁸ The risk is apparent from the face of the changed regulations if, after comparing the two regulatory schemes as a whole, it is apparent that the new regulations are detrimental.²⁹

56. Parole eligibility is part of the “law annexed to the crime” for ex post facto purposes.³⁰ Repealing parole eligibility previously available presents a serious question under the Ex Post Facto Clause of Art. I, §9 cl.3 of the Constitution, which prohibits imposing “greater or more severe punishment than was prescribed by law at the time of the ...offense.”³¹

57. To violate the ex post facto clause, a new rule or practice must be applied retroactively and there must be a risk, readily apparent from examining the face of the rule or the practice, making it self evident that the sole purpose served by the rule or practice is to make the granting of a parole more difficult.

58. Any altering of rules governing parole eligibility, making the task of earning a parole more difficult, is functionally equivalent to the repealing of

²⁷ See *Calder v. Bull*, 3 Dall. 386, at 389 (1798) (Chase, J.) [hereafter *Calder*]

²⁸ See *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 510 (1995)

²⁹ See *Himes*, 336 F.3d 848, slip opinion at p. 11 (9th Cir. 2003).

³⁰ See *Warden v. Marrero*, 417 U.S. 653, 663 (1974). [hereafter *Marrero*] "...a repealer of parole eligibility previously available to imprisoned offenders would clearly present a serious question under the ex post facto clause of ... the Constitution" 417 U.S. at 663.

³¹ *Marrero*, 417 U.S. at 662-663.

parole eligibility under terms in force at the time of conviction; and adversely impacts “the law annexed to the crime” in violation of the ex post facto clause.

59. Title 37, Chapter 61.1 of the Parole Board’s regulations defines a *parole panel* as either two members of the Board or a Board Member and an examiner.³² Two *yes* votes will result in a parole. No distinction is drawn between a panel for a non-violent and a violent offender in this regulation.

60. Since 1998, the Parole Board has a practice and an established state procedure of requiring five *yes* votes instead of *two* when considering parole eligibility for a violent offender. Three *yes* votes must be cast by Board Members. The rule requiring five decision-makers (and three Board Members) to vote *yes* as compared to *two* decision-makers is clearly calculated to make granting a parole more difficult.

61. This decision-making rule and practice repeals parole eligibility as described in the regulation (i.e. the normal channel) and imposes a new rule and practice adversely impacting the odds for achieving parole, thereby increasing the law annexed to the crime for violent offenders. It is also evident that this expanded voting requirement will equally disadvantage every applicant to which this heightened requirement is applied.

³² See 37 P.S. § 61.1 “Panel – Two members of the Board or a Board Member and an examiner.”

62. Many first time adult offenders convicted of non-violent crimes have a juvenile record reflecting a crime of violence. While the Parole Board certainly has the right to consider an offender's juvenile record when it is time to formulate conditions for release, this juvenile record should not become the centerpiece of the decision. The Parole Board has a practice of looking beyond the non-violent current offense (i.e. the normal channel) and reviewing instead, juvenile convictions. If there is a violent juvenile conviction, these candidates are considered violent offenders notwithstanding their non-violent crimes.

63. Treating a parole candidate as a violent offender when the current crime is non-violent, adversely impacts the terms of parole eligibility. This practice increases the "law annexed to the crime" for plaintiffs with bad juvenile records. The adverse impact is self evident. Finally, this practice disadvantages every applicant with a violent juvenile record.

64. The Parole Board actively solicits comments from victims prior to reviewing an offender for parole. Prior to the 1996 amendments, the victim was only considered when formulating parole conditions, to avoid any contact. Since the 1996 amendment and heightened emphasis upon public safety, the Parole Board has adopted a practice and an established state procedure of giving victims the equivalent to a veto power over an offenders' parole. This practice has been applied retroactively to all plaintiffs.

65. The Parole Act contemplates soliciting and considering a victim statement. The Parole Board has a practice of acting *sub silentio* (i.e. in silence, without formal notice being taken) when a victim statement forms the basis for denying parole. The decision gives no hint that a victim statement was considered, let alone found to be controlling.

66. The Parole Act does not envision making parole captive to a forgiving or neutral victim statement. Secrecy and a heavy weight assigned to the victim statement makes an otherwise regular channel, irregular *as applied*.

67. Soliciting a victim impact statement, granting the victim a veto power but refusing to reveal the weight given to this single factor collectively repeals parole eligibility as described in the Parole Act (i.e. the normal channel) and imposes a new channel, cloaked in secrecy, calculated to serve but one purpose, and this is to make the granting of a parole nearly impossible. This practice increases the “law annexed to the crime” for parole candidates with adverse victim statements. The adverse impact is self evident and disadvantages every plaintiff with a hostile victim.

68. Since 1996, when correctional professionals on the Parole Board were replaced with political appointees, the Parole Board has become vulnerable to political pressures. Before releasing inmates convicted of certain stigmatizing crimes, such as crimes against children and certain sex crimes, the

political consequences of the decision are contemplated. The politicizing of parole decision-making repeals parole eligibility as outlined in the Parole Act (i.e. the normal channel) and replaces it with perceptions of public opinion.

69. Causing a parole candidate's parole to be held captive to political forces, namely the public's perception of the crime as disgraceful, adversely impacts the prospects for parole and increases the "law annexed to the crime" for plaintiffs with stigmatizing crimes. The adverse impact is self evident. Finally, this practice disadvantages every plaintiff with a stigmatizing crime.

70. At time of sentencing, violent offenders were never informed that the parole panel deciding their fate would need five *yes* votes, not *two*, and that three Parole Board Members would have to vote *yes* for a parole. At time of sentencing, non-violent adult offenders with violent juvenile histories were not told that they would be reviewed as violent offenders due to their juvenile history. At time of sentencing, offenders were not told that their release could become dependent upon a forgiving or neutral letter from their victim. At time of sentencing, offenders with stigmatizing crimes were not told that their parole prospects depended on the political climate at the time of their review.

71. An offender is entitled to know not only his maximum punishment, but also their chances of receiving early release, for this is also a relevant factor in the plea bargaining process. An adverse change in one's parole

prospects disadvantages a prisoner just as surely as an upward change in the minimum duration of the sentence.³³

72. After peeling away the pretense that these policies and practices are necessary for protecting the public, and exposing them to the harsh glare of sunlight, it is abundantly obvious that these policies and prejudicial practices possess one common denominator; they are pandering to and dripping with vindictiveness. All of these policies and prejudicial practices have been formulated to serve one purpose; to make the granting of a parole increasingly difficult. The result is a diminished opportunity for achieving a parole.

73. By their terms, each factor adversely affects prospects for parole, making those prospects appear to be very remote, creating a significant risk of increasing the punishment. These practices are applied retroactively, because they were not contemplated at time of sentencing. *As applied* and by the nature of their terms, these practices are all prohibited by the ex post facto clause.

State Claims

Claim 1 – Breach of Parole Contract

74. Upon granting parole, the Parole Board is stating that the offender no longer poses a threat to society and has become sufficiently rehabilitated to be free on conditional liberty. These findings alter the parole – prisoner

³³ Mickens-Thomas, 321 F. 3d at 392.

relationship. Parole is a privilege until it is granted. Once granted, parole is no longer a privilege. The prisoner is no longer an inmate, but a parolee, and a parolee is entitled to their conditional freedom.

75. Upon being released from an institution, a parolee must check in with a supervising parole officer and sign a supervision agreement. The exchange of consideration supporting this contract consists of permitting the offender to be at liberty, provided the offender complies with terms in the contract. At this point, parole has evolved into a contract and this contractual relationship runs two directions. While all supervision terms are followed, the State is obligated to continue allowing the offender to be at liberty.

76. The Parole Board has a practice and an established state procedure of granting a parole, and then allowing certain offenders to languish for years in a correctional institution while waiting for a bed to become available in a halfway house or treatment center.

77. Just as a parole triggers a contract between an offender and their parole officer, the granting of a parole triggers a covenant between the State and the parolee, and obligates the State to treat the parolee as though they are in fact on parole. Continuing incarceration is incompatible with this covenant.

78. The State has a legal obligation to find a bed for a paroled offender in a reasonable time (i.e. 90 to 120 days). Holding parolees extended periods of time waiting for a bed constitutes a breach of the parole covenant.

Claim 2 – Misfeasance and Nonfeasance

79. Defendants have a practice of: (1) refusing to offer programs on an offenders' prescriptive list; (2) refusing credit for a completed program because it was not taken at *their* institution; and (3) requiring programs carrying a stigma which are unrelated to an offender's crime (i.e. ordering a sex offender course for an inmate never convicted of a sex crime). Parole is denied for failure to take prescriptive programs, when the program is in fact unavailable, not counted or not related to their anti-social behavior.

80. Defendants have a propensity to collect and generate negative records and ignore or bury good reports. This applies to disciplinary actions, courses taken and successful court appeals. The result is that an offender's accomplishments go unnoticed or undocumented, while anything negative is captured and inflated. The result is an unbalanced, untruthful institutional record. Errors of this kind frequently become reasons for denying parole.

81. Misfeasance and nonfeasance are ancient common law offenses used to describe acts and non-acts by public officials. In modern usage, these claims have become a species of tort liability. It is no coincidence that civil

rights violations are inextricably intertwined with claims for misfeasance and nonfeasance. § 1983 claims are “a species of tort” and must be interpreted against the background of tort liability.³⁴ Tort actions lie from the breach of duties imposed as a matter of social policy.

82. Defendants are under a duty to provide suitable programs and grant credit when courses are taken. Prescriptive programs are not intended to become vehicles for fabricating false pretenses for denying parole cloaked by a superficially unassailable rationale (i.e. failure to take a prescribed course). Defendants are under a duty to keep accurate records, and to purge errors when brought to their attention. These duties have all been socially imposed upon these public officials.

83. In all of the above cases, Plaintiffs civil rights are being violated and parole is being denied due to malfeasance, misfeasance or nonfeasance. Denial of parole for any of these reasons compromises the integrity of public service.

84. Plaintiffs have no administrative or judicial remedies to exhaust. Indeed, the duty to correct this behavior is particularly acute, because these plaintiffs have no avenues open for appeal and no devices available to them for calling attention to these violations of a socially imposed duty.

85. The Plaintiffs demand a jury trial.

³⁴ Continental Casualty Co. v. County of Chester, 244 F. Supp. 2d 403, 410 (E.D. Pa. 2003).

Prayer for Relief

§ 1983 Remedies - Declaratory and Injunctive Relief

WHEREFORE, Plaintiffs request the following relief.

1. Issue an order adjudging and declaring that the practice of making an inmate's liberty interest under the Parole Act captive to a factor that can never change and which can never be influenced by the inmate, to be arbitrary, rendering the opportunity for parole illusory, in violation of the Due Process Clause of the Fifth Amendment, as applied by the 14th Amendment of the U.S. Constitution.

2. Issue a permanent injunction perpetually enjoining and restraining Defendants and all those in active concert or participation with Defendants from denying parole due to the nature of the crime, without articulating how this crime justifies overruling every other factor contained in the Parole Act, and specifically the factors which an inmate can positively influence.

3. Issue an order adjudging and declaring the practice of applying the post-1996 amendment to the Parole Act to inmates with crimes occurring before this was enacted, to be a violation of the ex post facto clause because this has been applied retroactively and inmates have been substantially disadvantaged by the application of this law and decisions made pursuant to it.

4. Issue a permanent injunction perpetually enjoining and restraining Defendants and all those in active concert or participation with Defendants from applying the 1996 Parole Act amendment relating to public safety and its attendant decision-making practices to inmates with crimes prior to 1996.

5. Issue an order adjudging and declaring the following practices in violation of the ex post facto clause because they are clearly vindictive and applied retroactively; (1) requiring violent offenders to secure more than two *yes* votes for parole; (2) judging non-violent adult offenders as violent due to a juvenile crime; (3) holding parole hostage to a forgiving or neutral victim statement; and (4) causing parole for stigmatizing crimes to being held hostage to the political climate at the time of their review.

6. Issue a permanent injunction perpetually enjoining and restraining Defendants and all those in active concert or participation with Defendants from applying the vindictive policies and practices enumerated in the second ex post facto claim.

7. Declare that the State, in granting a parole, necessarily warrants that: (1) the recipient of a parole is sufficiently rehabilitated to be given their freedom and (2) they are no longer a threat to society. Further declare that upon issuing a parole and making these findings about an offender, the State has a contractual obligation to release these offenders within a reasonable time

after granting parole. Further find that the State is violating its parole agreement with all inmates issued a parole and still in prison waiting for a bed more than six months after being granted parole and invoke any contractual remedies deemed reasonable and prudent for resolving this problem and which are calculated to eliminate this problem and make sure it does not return.

8. Declare the State in violation of the torts of misfeasance and nonfeasance and invoke any tort remedies deemed reasonable and prudent for resolving these problems, calculated to eliminate these problems and make sure they do not return.

9. Certify this lawsuit as a class action.

10. Appoint a Master to supervise Parole Board activities, to assist in fashioning remedies and to monitor the implementation of these remedies.

11. Counsel for Plaintiffs seeks reimbursement of full attorney fees pursuant to federal law for all claims cognizable under 42 U.S.C. §1983.

12. Plaintiffs seek any other relief, developed by the evidence and consistent with the allegations pled herein, which is necessary or expedient for implementing any corrective action that has been specifically requested.

Respectfully submitted;

/s/ Norman L. Sirak

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Certification of Service

A copy of the foregoing will be sent to Scott A. Bradley, Senior Deputy Attorney, Attorney General's Office of Pennsylvania, 6th Floor, Manor Complex, 564 Forbes Avenue, Pittsburgh, Pa. 15219 via the Court's electronic filing system and by first class mail.

/s/ Norman L. Sirak

By Norman L. Sirak