IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

DENNIS MICHAEL, et al.	Case # 3:01CV7436
Plaintiffs	Judge James G. Carr
vs.	**Answer and Cross Claims for Summary Judgment**
MARGARETTE GHEE, et al.	
Defendants	

Plaintiffs Answer and Motions for Summary Judgment

Plaintiffs, acting through counsel, respectfully file their responsive Answer to Defendants Rule 56(C) Motions.

Plaintiffs, acting through counsel, move the Court for summary judgment pursuant to Rule 56(C) for Abuse of Discretion, Arbitrary and Capricious Decision-making, Violation of Separation of Powers, Bad Faith, Violations of the Ex Post Facto Clause and violations of the Equal Protection Clause. The factual portion of Plaintiffs responsive Answer has been incorporated into Plaintiffs Motions for Summary Judgment, which follow immediately after the Answer. For good cause, Plaintiffs attach a Memorandum in Support of Summary Judgment.

Respectfully submitted,

Norman L. Sirak #0038058
4035 Cinwood Street N.W.
P.O. Box 7468
Canton, Ohio 44705
(330) 478 1947

Peter Wagner #0034083
5th 3rd Center - 14th Floor
608 Madison Ave.
Toledo, Ohio 43604
(419) 242 1400

Certificate of Service

A copy of the foregoing has been mailed to the Office of the Attorney General, Corrections Litigation Section, to the attention of Todd Marti, at 140 East Town Street, 14th Floor, Columbus, Ohio 43215, this 28th day of June, 2002.

_____
By Norman L. Sirak

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A N S W E R

Introduction

Rule 56(C) provides that the granting of summary judgment is proper if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Defendants have established two sets of facts relevant to this case.[1] The first factual matter involves the parole review process.[2] The second matter involves the background and operation of the Parole Guidelines adopted in 1998.[3] In establishing these facts, Defendants have relied primarily upon the Affidavit of Richard Spence [hereafter the *Spence Affidavit*][4] and secondarily upon Department of Rehabilitation and Correction Policy 501-36,[5] 501-38,[6] and upon the Parole Board's Guidelines.[7] There is also an extended discussion of the law relating to these issues.

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[1] *See* Defendant's Memorandum in Support of Motion for Summary Judgment, at p. 7 [hereafter *Defendant's Memorandum in Support or Opposing Counsel's Memorandum*].

[2] Defendant's Memorandum in Support at p. 8.

[3] Defendant's Memorandum in Support at p. 7.

[4] *See* Defendant's Exhibit A.

[5] *See* Defendant's Exhibit B.

[6] *See* Defendant's Exhibit C.

[7] *See* Defendant's Exhibit D.

In considering a motion for summary judgment, before looking at the law, the court must view all facts and inferences in a light most favorable to the nonmoving party. Sims v. Memphis Processors, Inc., 926 F.2d 524, 526-27 (6th Cir. 1991).

> "The moving party has the burden of showing the absence of any genuine disputes over facts which, under the substantive law governing the issue, might affect the outcome of the action." Harris v. Adams, 873 F.2d 929, 931 (6th Cir. 1989). "If this burden is met, the nonmoving party must present 'significant probative evidence' showing that genuine, material factual disputes remain to defeat the summary judgment." *Sims* at p. 526.

Our task is to present significant probative evidence demonstrating that material factual disputes exist. If this burden can be carried, a Motion for Summary Judgment can be defeated and an extended discussion of the law becomes unnecessary.

Introductory Note Regarding Our Evidence

Plaintiffs are challenging the complete process of reviewing and deciding upon granting or denying parole to an Ohio inmate convicted under Ohio's prior sentencing law. Given the sweeping nature of this subject, it has been necessary to reduce parole review to its core elements so that it can be resurrected in real time and analyzed within a legal framework. This requires compiling an enormous amount of data, then packaging and reducing this data into a reader friendly form so it can be readily understood.

To accomplish this task, we have assembled graphs and charts which summarize Parole Board decision-making and client experiences. Each chart has been generated by data from hundreds of cases and this back-up data follows each chart. These charts are more than just exhibits. These charts represent the crystallization and assembly of our evidence. With every reference to a chart, we are also referring to the chart's back-up data. From this point forward and throughout this filing, every reference to a chart also incorporates by reference the accompanying back-up data which follows this chart.

These charts are organized as a distinct set of exhibits with tabs, so they can be readily consulted. References to our charts appear in the main body of the text and not in footnotes. We consider the contents of these charts to be equivalent in probative value to pages of text. We encourage consulting these charts while reading the pertinent

text.

To generate the data reflected on these graphs, we have created a primary data base of three hundred Named Plaintiffs. Information on these Named Plaintiffs has been installed in a computer program on Microsoft Access. To generate our charts, this information is transferred to Microsoft Excel, where the actual chart is composed. The Named Plaintiffs making up this primary data base include offenders convicted of crimes ranging from aggravated murder to child endangerment. Their hearings have occurred over at least a seven year period. Our purpose was to find a cross section of the Old Law inmate population, so as to faithfully represent this population to this Court.

As we progressed, the need to create a second data base population became apparent. There are 193 Named Plaintiffs in this second data base. About one hundred of these Named Plaintiffs are in both data bases, but the rest are new additions. In all, about four hundred Named Plaintiffs are included in one or both of these data bases.

This second data base is selective. Only Named Plaintiffs with two-page Ohio Parole Board Decisions or Parole Board Hearing Records that clearly tracked the current Guidelines, could be qualified. We also omitted Named Plaintiffs convicted of Aggravated Murder from this second data base. The purpose for this second data base was to track the decision-making of parole board panels. Since aggravated murder convictions place an offender in the highest available bracket, there is no discretion to exercise concerning the placement of these offenders. We were specifically attempting to pin down the number and frequency of guideline departures in this second data base.

To act as a check upon ourselves, we hired Dr. Martin Schwartz. Dr. Schwartz has written extensively in the area of corrections and he is a Presidential Research Scholar at Ohio University in Athens. We made all of our files accessible to Dr. Schwartz and we specifically asked him to conduct his own survey of Named Plaintiffs that were not included in our data bases. We have about nine hundred Named Plaintiffs at the present time. Next, we asked Dr. Schwartz to compare his sample of Named Plaintiffs that are not in our data bases, to the data generated from Named Plaintiffs included in this data base. Dr. Schwartz found that our original three hundred member data group is similar to the sample of cases that he pulled and analyzed, and that statistics generated on these three hundred Named Plaintiffs can be considered representative for the entire group of cases, now numbering about nine hundred. The affidavit of Dr. Schwartz is attached as Plaintiffs Exhibit 1.

PLAINTIFFS STATEMENT OF FACTS

Parole Review - Preparing for and Conducting the Hearing

The parole review process begins during an inmate's orientation. Department of Rehabilitation and Correction Policy #501-36 titled *Parole Board Hearing Policy* requires an inmate to be notified of their first legal eligibility date for a release hearing as well as the maximum expiration of their sentence within ninety days of admission.[8] A pamphlet must also be provided along with a verbal explanation of the Ohio Parole Board Guidelines.[9] The message is subtle but clear. If you can impress the Parole Board with a good institutional record and positive programs, you stand a chance of getting released on your first date of eligibility instead of later. In effect, a carrot is dangled in front of every offender when they enter prison. The possibility of Parole is used as a tool by the Department of Rehabilitation and Correction to manage the behavior of inmates.[10]

All but the most hardened offenders take this message to heart. They work hard, engage in positive programs and strive to maintain a clean record with one purpose in mind. They want to impress the Parole Board. For their families and loved ones, the date of their first parole board hearing hangs like a lodestone over their lives. They think about it, plan for it, worry about it and prepare for it for years.

When the date approaches, they receive a computer print-out from the prison record office showing their name upon a report called a *Call Sheet*.[11]

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[8] Department of Rehabilitation and Correction Policy #501-36, titled Parole Board Hearing Policy, VI Procedure, A (1) [hereafter DR&C Policy #501-36 or Policy #501-36].

[9] DR&C Policy 501-36, VI Procedure, A (2).

[10] In paragraph 5 of Richard Spence's Affidavit, Defendant's Exhibit A, reference is made to parole, and its diminishing utility as a tool for managing the behavior of incarcerated offenders, due to the Parole Board's policy of lengthening the periods of time between parole hearings.

[11] *See* Testimony of Thomas C. Schneider, Executive Assistant for the Adult Parole Authority [hereafter *Executive Assistant*], conducted by the State Highway Patrol, Incident #97-10709-0300, Officers J. Wernecke and R. McGough, on April 6, 1998, at p. 3. Hereafter, all references to this State Highway Patrol investigation shall reference merely the witness, the date of the testimony and the page

> "... they tell us who's eligible for parole that month, for furlough, for any type... They tell us the type of hearing and how many cases per panel, like what we call a panel makeup. It's a computer generated list, and I get those *counts*, what we call a *count* to let me know we may have 40 first hearing cases, 30 continued cases and maybe 20 furloughs and 10 shock hearings."[12] [Ital added.]

A panel makeup will generally include between 15 and 25 inmates, sometimes more.[13] The generation of this *Call Sheet* initiates the Parole Review Process.[14]

Records must be retrieved from three sources for every name on a *Call Sheet.*[15] There is the Master File maintained in a vault inside the prison Records Office, a Microfilm File maintained in Columbus and an Institutional Unit File [hereafter *Unit File*] maintained in another vault located inside the Unit Management Office at the prison.[16]

First Issue of Fact - Based upon the files to be reviewed, the time frames allowed for conducting these reviews and the specific information captured upon forms utilized by Parole Board staff to prepare for parole eligibility hearings, can this review be characterized as exhaustive?

Second Issue of Fact - What is the Parole Board reviewing? Are they reviewing work evaluations, mental health reports, efforts to address and correct anti-social behavior, acquisition of a marketable skill, education levels achieved, family support and similar matters bearing upon his or her likelihood of success in making the transition back into free society? Or, is the Parole Board ignoring matters bearing

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of the transcript where the matter referenced is discussed.

[12] *See* Testimony of Executive Assistant Thomas C. Schneider on April 6, 1998 at p. 3.

[13] Two examples of panels are attached as Exhibit 2. These panels were conducted at the Northeast Pre-Release Center in Cleveland on August 2 and 3, and on September 5 and 6, 2001.

[14] Testimony of Executive Assistant Thomas C. Schneider, April 6, 1998, at p. 3.

[15] *See* Testimony of Executive Assistant Thomas C. Schneider on April 6, 1998 at p. 5.

[16] *See* Testimony of Executive Assistant Thomas C. Schneider on April 6, 1998 at p. 5.

upon release completely and focusing instead, exclusively upon the current crime, their past criminal history and the disciplinary record?

Parole Board Member Richard Spence states, in Paragraph 17 of his Affidavit:

> "The APA undertakes an exhaustive review of an offender's file before his parole hearing. Pursuant to ODRC Policy 501-36, a parole official reviews the offender's complete parole file, his institutional master and unit files, the records of any meetings held with the offender's family, and his mental health file, *twenty-one days before his scheduled hearing with the panel* considering his potential release..."[17] [Ital added for emphasis.]

Twenty-one days before a scheduled hearing, there is only one person looking at an inmate's file and this is a clerical employee, not a decision-maker.[18] In every prison, there is a parole officer inside the prison Records Office.[19] It is the parole officer's job to pull the Master File maintained on each inmate whose name appears on the *Call Sheet* and fill out a two page form.[20] Both pages are titled *Ohio Parole Board Information Sheet*. The top of the form contains boxes for specific information such as the admission date, age, security status and the committing county. When these boxes end, there is a large box devoted to the subject *Details of Crime(s)*. In this box, the parole officer writes the most grisly details of the offense.[21] Below this box, there is a smaller box with the notation *Codefendants (name, number, conviction, sentence, status)*. The last box on the first page is left blank by the parole officer. This is reserved for comments by

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[17] *See* Paragraph 17, Affidavit of Richard Spence, Defendant's Exhibit A, Appendix to Motion for Summary Judgment.

[18] *See* Testimony of Hearing Officer Michael Keith on April 7, 1998 at p. 6.

[19] *See* Testimony of Hearing Officer Michael Keith on April 7, 1998 at p. 6.

[20] S*ee* Plaintiff's Exhibit 3, a two page form filled out for Michael Wolfe A304853. This is technically referred to as form DRC 3257 and DRC 3257 page two.

[21] *See* Affidavit of Named Plaintiff R. Dean Omar A169464, dated January 3, 2002, Plaintiff's Exhibit 4. Mr. Omar describes his hearing before Parole Board Member Constance Uppers. It was obvious that she was reading from a paper prepared by someone else, and that the recitation of facts was punctuated with words and phrases chosen to convey negative emotion so as to incite hostility toward him.

the parole board decision-maker during the hearing. All of the information captured on page one relates exclusively to the offender's latest crime and their codefendants.

The entire second page of this form is devoted to prior criminal history.[22] It has three sections. The first section is titled *Juvenile*, the second is titled *Adult Misdemeanors* and the third is titled *Adult Felony*. In the first two boxes, there is space for listing the arrest date, age, offense, sentence, disposition and supervision. The third box for adult felonies has a number of narrow columns in addition to the arrest date and offense. These columns relate to the status of each offense. For example, *Furl* is short for *furlough* in one of these columns. *TFV/TPV* for *Technical Parole Violator* heads another column. There is no room reserved for remarks. Page two of this form is devoted exclusively to prior criminal history.

Mr. Spence states that *the Adult Parole Authority undertakes an exhaustive review of an offender's file before his parole hearing*. This exhaustive review must be a reference to this two page *Ohio Parole Board Information Sheet* because that is the only review undertaken by parole board staff before the date of the hearing. There is nothing on this form reserved for meetings held with the offender's family. There is nothing on this form reserved for comments about the offender's mental health. There is no space for entering the education level of the inmate and whether or not their education has been advanced while in prison.[23] There is no place for self improvement programs taken to ascertain what efforts, if any, have been taken to correct their anti-social behavior. There is nothing on this form relating to any skills acquired while in prison. Nothing on this form even discusses release and providing a plan for the transition back into society. Nothing on this form suggests any reason whatsoever for releasing an offender. Instead, the space is used to highlight the most gruesome aspects of their crime.[24] Rather than being exhaustive, the queries on this preparatory form present a distorted picture that is intended and calculated to provide good cause for denying an inmate's release.

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[22] *See* Plaintiff's Exhibit 3, second page of form filled out for Michael Wolfe A304853.

[23] *See* Affidavit of Charles Oswalt A204095, dated May 20, 2002, Plaintiff's Exhibit 5. Mr. Oswalt earned his Bachelor's Degree and graduated with honors. This was never noted at his hearing and he received no credit for this. His clean institutional record, outstanding work evaluations and a parole plan to rejoin his wife of 33 years was also not considered. Instead, he was given a three range upward departure.

[24] *See* Affidavit of R. Dean-Omar A169464, Plaintiff's Exhibit 4.

To fill out this *Ohio Parole Board Information Sheet*, the parole officer examines an inmate's Master File. The Master File contains information such as the police report, the indictment and sentence, their FBI report, an Ohio Bureau of Criminal Investigation Report, trips to court, serious rule violations and whether or not their security level has been raised or lowered. None of the germane information related to whether or not an inmate is ready to be released back into society can be found in the Master File. What the parole board really wants to know is apparent from the questions on this Information Sheet. They are interested in the crime and the prior criminal history. Nothing else.

Proof of this shift in direction can be gleaned from the form that preceded the current *Ohio Parole Board Information Sheet*. This form was titled *Ohio Parole Board / Parole Candidate Evaluation*.[25] On this form, the box reserved for *Details of Crime(s)* is located at the bottom and occupies a much smaller space. Room has been reserved for prior criminal history but it is also smaller. There is also room reserved for Supervision Experiences, Infractions, Programs, Job Assignment, Personality Evaluation (including IQ and Grade Level achieved), Psychological and Psychiatric. There is another box for Personal History Factors which include marital status, work skills, dependent children. There is a box for Comments from the Judge, the Prosecutor, the Sheriff and a victim comment. These subjects have all been deleted from the current Information Sheet.

An inmate's mental health file is maintained in the Mental Health Offices. Access to these files is restricted. Mental health files are *never* reviewed by the Parole Board before a scheduled hearing. This applies, regardless of whether the offender is being considered for a continuance or for a projected release date. The Parole Board only considers an offender's mental health status *after* they have determined the inmate has served enough time. A review of this file 21 days before the hearing will not happen.

To find out whether or not an inmate has advanced their education by acquiring their high school equivalency certificate or a Bachelor's Degree from an Ohio university, you need to consult the file maintained in the education department.[26] These records are only copied upon request from the inmate.[27] Typically, evidence of educational

[25] *See* Exhibit 6 attached. This was technically known as DRC 3039 (revised 9-92).

[26] *See* Affidavit of Jenny Warwick, Plaintiff's Exhibit 7.

[27] *See* Affidavit of Jenny Warwick, Plaintiff's Exhibit 7.

achievement stays in the education department and can be found nowhere else.[28]

If you are truly interested in knowing what an inmate has done during their term of their incarceration, the Unit File needs to be consulted. Unit Files are kept inside a sealed vault maintained in the Unit Manager's Office. These records are confidential. With only a few exceptions, they cannot leave the Unit Office of the housing unit where the inmate locks. One of these exceptions is parole week. And, then the Unit File only leaves the Unit Office on the day prior to the date of the parole hearing.[29]

Although more informative than Master Files, these Unit Files are often incomplete.[30] Much of the educational and program information will be missing. Inmates expect their educational certificates and evidence of program accomplishments to be transferred to this Unit File automatically. It does not happen that way. An inmate must ask to have a copy made and placed in their Unit File, and then they must follow up to be sure it gets done. The Unit File does hold the offender's work assignments and evaluations. Disciplinary history can be found here. Despite these shortcomings, this Unit File is still the best single place to look, to find out how an offender has served their time. Conducting an exhaustive study for a parole hearing without consulting the Unit File is impossible.

Typically, only Unit Staff and the Warden have access to Unit Files. Parole officers could consult these files, but they never do. Consequently, the information compiled by the parole officer twenty-one days before the hearing is void of information from the Unit File. Parole officers are also under no duty to discover program information, and no efforts are made to find out whether or not an inmate has advanced their education or attempted to correct their behavior problems.[31] All of the effort undertaken by an inmate to impress the Parole Board by maintaining a clean institutional

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[28] *See* Affidavit of Jenny Warwick, Plaintiff's Exhibit 7.

[29] *See* Panel Memos, attached as Plaintiffs Exhibit 8. Note how Unit Managers are instructed on the first memo to have the Unit Files in the Record Office no later than Noon, August 1, 2001 and on the second memo to the Record Office no later than Noon, September 4, 2001. In both cases, this is the day prior to the hearing. If panels are being conducted on a Monday, then Unit Files would be collected on the prior Friday.

[30] *See* Affidavit of Jenny Warwick, Plaintiff's Exhibit 7.

[31] *See* Affidavit of Jenny Warwick, Plaintiff's Exhibit 7.

record and actively participating in their rehabilitation is for naught. The parole officer's comments on the Information Sheet are taken from only the Master File, and nowhere else. The resulting portrait captures the inmate at their worst moment and stops.[32]

Staff at the prison fill out a form called *Institution Summary Report* for the Parole Board.[33] The first item listed reads: *Disciplinary Record: List all class 2 violations resulting in DC (Disciplinary Control), LC (Local Control) or AC (Administrative Control) since last parole hearing or admission.* There are more words connected to this first item, *Disciplinary Record*, than on the rest of the page for the remaining 4 items.[34] The Unit File can provide information on supervision experiences, but this is not requested. The Unit File holds information relating to the inmate's personal situation, whether or not they are married and if they have young children. None of this information is requested. Many items previously captured on the *Ohio Parole Board / Parole Candidate Evaluation* form could be included on this Institution Summary Report, but it is not requested. There is a good reason for these deletions. This information is no longer necessary. There is no place on the *Ohio Parole Board Decision Form* for recording any of this information.

Because the Unit File must stay in the Unit Office, the three sets of records necessary for making a parole review decision do not converge until a day or two before the hearing date.[35] When they do converge, they come in mass. It is not just one inmate's file that comes up to the Records Office. If there are thirty people on a panel for the next business day, thirty Unit Files come up at once. And, even with all of these files, the records are still incomplete. Educational documentation and program certifications, two of the most important items bearing upon how hard the inmate has worked to improve himself, are usually missing.[36]

The task of scheduling hearings falls upon the Executive Assistant for the Ohio

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[32] *See* Affidavit of Charles Oswalt A204095, Plaintiff's Exhibit 5.

[33] A copy of the *Institution Summary Report* is attached as Exhibit 9. This form is filled out by an inmate's Case Manager and then approved by their Unit Manager.

[34] 19 words are employed for Item 1. Only 15 words appear in the lower four categories.

[35] *See* Panel Memos, Plaintiffs Exhibit 8.

[36] *See* Affidavit of Jenny Warwick, Plaintiff Exhibit 7.

Department of Rehabilitation and Correction in the Central Office.[37] This Executive Assistant must assign Parole Board Members and Hearing Officers to the panels set up at the various prisons where these hearings are conducted.[38] This list is completed near the end of the month and released to Parole Board Members and Hearing Officers a few days before or on the first of the month in which these hearings are to be conducted.[39]

On this list of assignments, an asterisk star appears next to the name of one Parole Board Member.[40] This Parole Board Member is held responsible for assigning cases and coordinating logistics with institution staff.[41] In the vernacular of the Parole Board, this person is designated the *star*.[42] They are in charge of getting the hearings done.[43]

On the day of the hearing, neither a Parole Board Member nor a Hearing Officer knows for sure which cases they will be hearing that day.[44] And they really do not care.

"When they go to the institution that day, that's you know, the call

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[37] *See* Testimony of Hearing Officer Kathy Hilbert on April 22, 1998 at p. 4. See also Testimony of Executive Assistant Thomas C. Schneider on April 6, 1998 at p. 3.

[38] *See* Testimony of Thomas C. Schneider on April 6, 1998 at p. 3.

[39] *See* Testimony of Hearing Officer Kathy Hilbert on April 22, 1998 at p. 4; *See also* Testimony of Hearing Officer Ronald Stevenson on April 22, 1998, at p. 2. Testimony of Parole Board Member Constance Upper on April 7, 1998 at p. 2; Testimony of Hearing Officer Michael Keith on April 7, 1998 at p. 3.

[40] *See* Testimony of Hearing Officer Michael Keith on April 7, 1998 at p. 7.

[41] *See* Department of Rehabilitation and Correction Policy 501-36, Part VI Procedure, Paragraph B(2).

[42] *See* Testimony of Hearing Officer Ronald Stevenson on April 22, 1998 on p. 3.

[43] *See* Testimony of Parole Board Member Larry Matthews on April 6, 1998 at p. 2. *See also* Testimony of Hearing Officer Ronald Stevenson on April 22, 1998, at p. 3; Testimony of Kathy Hilbert on April 22, 1998 at p. 4.

[44] *See* Testimony of Parole Board Member Constance Upper on April 7, 1998 at p. 2-3. *See also* Testimony of Hearing Officer Ronald Stevenson on April 22, 1998 at p. 3; Testimony of Hearing Officer Michael Keith on April 7, 1998 at p. 3; Testimony of Hearing Officer Kathy Hilbert on April 22, 1998 at p. 5.

> sheet ... that's when they'll find out where they're going, who they're working with and what inmates they're going to hear. It's not that they couldn't pull up a call sheet or have a call sheet pulled up ahead of time to see who's on a certain panel, they could do that, but in my mind there'd be no reason for them too. *Because who cares who you see.* You know what I mean, *who's on your panel is who you see, you got to get the job done*."[45] [Ital added for emphasis.]

When Mr. Schneider referred to inmates on *Call Sheets* as *counts*, he was serious. To him, they are *counts*, a widget to be processed. Mr. Schneider's statement completely contradicts Richard Spence's affidavit, *"The APA undertakes an exhaustive review of an offender's file ... twenty-one days before his scheduled hearing with the panel..."* According to Mr. Schneider, there is no reason to conduct any advance review because *you do not care*. This is also apparent from the information captured in their preparatory forms. They have no interest in doing thorough evaluations. No individual attention is given to these cases. You simply work your way through the *counts* until the job is done.

Decision makers finally learn which cases they are going to review when panel assignments are made.[46] The actual assignment of a decision-maker to an inmate's case occurs when the *star* decides which Parole Board Member and Hearing Officer will staff each panel created by the *Call Sheet*.[47]

The first time *all* of the files and *all* of the decision makers converge at the same place is on the day of the hearing.[48] Consequently, there is no opportunity for any

[45] *See* Testimony of Executive Assistant Thomas C. Schneider on April 6, 1998 at p. 32.

[46] *See* Memos from Liann Bower, Record Supervisor at Northeast Pre-Release Center in Cleveland, to Unit Managers, regarding Parole Board Hearings August 2 & 3, 2001, dated July 25, 2001 and September 5 & 6, dated August 3, 2001, attached as Plaintiffs Exhibit 8 [hereafter referred to as the *Panel Memos*]. Note the absence of names for Parole Board Members and Hearing Officers on page 2 of each memo, althought names of inmates are known and listed for both. These memos were issued seven days before the scheduled hearings. The *Panel Memo* regarding the August 2 & 3, 2001 Parole Board hearings, dated July 25, 2001 was also attached as an Exhibit to our Complaint.

[47] *See* Testimony of Hearing Officer Michael Keith on April 7, 1998, at p. 3. *See also* Testimony of Kathy Hilbert on April 22, 1998 at p. 5.

[48] *See* Affidavit of Robert J. Allen A159045, dated June 10, 2002, paragraph 17, Plaintiff's Exhibit 10.

review of an inmate's file by any decision maker until the day of the hearing.[49] And when these elements do converge, it is not just one inmate's file that is given consideration. Every inmate on the panel must compete for consideration on this given day. Twenty and sometimes thirty decisions will be issued *that day*, and the amount of time that can be allotted to each file must necessarily reflect these time constraints.[50]

To complete this picture, it is necessary to comprehend the size of these files. Master Files and Unit Files can be eight inches thick and more. They contain a person's entire life story for the term of their incarceration, and our Named Plaintiffs average more than twelve years. The size of these files, coupled with the pressure to generate twenty to thirty decisions by the end of the day, more or less forces decision-makers to rely upon the Information Sheet written by the parole officer and Institution Summary written by the inmate's Case Manager. The parole officer's written summaries are not always accurate.[51] Decision-makers find mistakes.[52] Frequently, parole officers lack training and do not fully understand the job they are doing.[53] Because the work of parole officers lacks reliability, even the summary needs to be checked for accuracy.[54]

Typically, one Parole Board Member and one Hearing Officer will be assigned to

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[49] *See* Testimony of Hearing Officer Michael Keith on April 7, 1998 at p. 3; *See also* Testimony of Hearing Officer Ronald Stevenson on April 22, 1998 at p. 3; Testimony of Parole Board Member Constance Upper on April 7, 1998 at p. 2-3; Testimony of Kathy Hilbert on April 22, 1998 on p. 5.

[50] *See* Affidavit of Named Plaintiff Douglas Lawson A209547, dated June 12, 2002, Plaintiff's Exhibit 11, attesting to the fact that his hearing was between five and eight minutes in duration and that the hearing officer was rushed, hurried and rude.

[51] *See* Michael Wolfe's Ohio Parole Board Information Sheet (Plaintiff's Exhibit 3)

[52] *See* Testimony of Hearing Officer Ronald Stevenson on April 22, 1998 at p. 4. For Michael Wolfe's Ohio Parole Board Information Sheet (Plaintiff's Exhibit 3), a mistake has been caught by Parole Board Member Constance Uppers (whose identity is known because of her distinctive handwriting). The parole officer filled out Mr. Wolfe's Criminal History Risk Score and assigned him a score of 0. Mr. Wolfe had three Driving Under the Influence of alcohol citations [DUI's]. The Parole Board's Guidelines permit counting DUI's as felonies. [See Criminal History Risk Scoring Manual; Item A, A.3 (a) at p. 61.] Parole Board Member Uppers caught this error and corrected the score from 0 to 3.

[53] *See* Testimony of Hearing Officer Kathy Hilbert on April 22, 1998 at p. 10.

[54] *See* Testimony of Hearing Officer Ronald Stevenson on April 22, 1998 at p. 4.

one panel. On occasion, a Hearing Officer will handle cases by themselves.[55] Since panel assignments are made on the morning of the hearing, these decision-makers do not know the other decision-maker assigned to their panel until the day of the hearing.[56] In addition to the term *star*, another hierarchal term is used between Parole Board Members and Hearing Officers serving on the same panel. If there are twenty-six cases to be reviewed, the stack will be divided evenly between the two decision-makers. At this point, each person taking a file becomes known as the *primary* for that case.[57]

Only the *primary* decision-maker becomes acquainted with each file.[58] The *primary* decision-maker conducts their hearing while the other panel member prepares for the next case.[59] Only the *primary* decision-maker reads past the prepared summaries.[60]

> "I'm interviewing the inmate, I read all the file information. The person I'm working with doesn't really read all that because they're preparing their next case."[61]

Although two people sign off on a Parole Board decision, one person trusts the other to

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[55] *See* Testimony of Executive Assistant Thomas C. Schneider on April 6, 1998 at p. 9. *See also*, Testimony of Parole Board Member Larry Matthews on April 6, 1998 at p. 7; Testimony of Hearing Officer Ronald Stevenson on April 22, 1998 at p. 6. The number of Parole Board Members will decline. Hearing Officers acting alone may become more prevalent.

[56] *See* Testimony of Thomas C. Schneider on April 6, 1998 at p. 32.

[57] *See* Testimony of Hearing Officer Kathy Hilbert on April 22, 1998 at p. 10. *See also* Testimony of Hearing Officer Ronald Stevenson on April 22, 1998 at p. 21.

[58] *See* Testimony of Parole Board Member Constance Upper on April 7, 1998 at p. 7; *See also* Testimony of Hearing Officer Ronald Stevenson on April 22, 1998 on p. 25

[59] *See* Testimony of Executive Assistant Thomas C. Schneider on April 6, 1998 at pp.'s 4, 9.

[60] *See* Testimony of Hearing Officer Michael Keith on April 7, 1998 at p 42. *See also* Testimony of Hearing Officer Ronald Stevenson on April 22, 1998 at p. 25.

[61] *See* Testimony of Executive Assistant Thomas C. Schneider on April 6, 1998, at p. 9. *See also* Testimony of Hearing Officer Ronald Stevenson on April 22, 1998 at p. 20; *See also* Exhibit 4 - Affidavit of R. Dean Omar A169464.

come to the right decision and gives the file only a cursory review, if that.[62] Particularly if cases are continued, the other decision-maker will sign off in rapid succession.[63] If the *primary* on a file has misrepresented something or made an error, this file is likely to be processed with that error because the other decision-maker on the panel does not have the time or the inclination to review the other panel member's work thoroughly before signing off.[64]

Richard Spence is an experienced Parole Board Member. He has been with the Parole Board long enough to remember using the *Ohio Parole Board / Parole Candidate Evaluation* form. He has looked at enough *Ohio Parole Board Information Sheets* to know that these forms are strictly interested in the crime and the criminal history and make no attempt to present an exhaustive review. Mr. Spence also knows that the people qualified to make parole decisions have no clue as to what cases they will be reviewing twenty-one days before the scheduled hearing, nor do they care. These decision makers will only know what cases they are to decide on the day of the hearing. Mr. Spence is aware of when and where the decision makers *and* all the required files coalesce, and he knows it occurs on the morning of the hearing and not twenty-one days in advance. Mr. Spence also knows that if he sits on a panel, he will review only half of those files, even though his initials will appear on all of them. Mr. Spence knows the time constraints imposed upon decision-makers between acquiring these files and rendering decisions. This time frame can be better measured in minutes, as opposed to hours or days. In truth, there is no exhaustive review of an inmate's file and Mr. Spence knows it. They are reviewing their crime, their prior criminal history and their disciplinary record. And that is it.

Richard Spence's statement in paragraph 17 of his affidavit is a deliberate misrepresentation to this Court, made with full knowledge of the statement's falsity and done for the purpose of misleading and misrepresenting the parole review process.

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[62] *See* Testimony of Hearing Officer Ronald Stevenson on April 22, 1998 at p.20. *See also* Testimony of Parole Board Member Constance Uppers on April 7, 1998 on p. 7.

[63] *See* Testimony of Parole Board Member Larry Matthews on April 6, 1998 on p. 9. *See also* Testimony of Parole Board Member Constance Upper on April 7, 1998 on p. 7; Testimony of Hearing Officer Ronald Stevenson on April 22, 1998 at p. 6,7.

[64] *See* Testimony of Hearing Officer Michael Keith on April 7, 1998 at p. 43.

Third Issue of Fact - What is being decided at a parole review eligibility hearing? Is it whether or not the inmate is worthy of being granted parole; or, is it something else?

Fourth Issue of Fact - If parole is not the real subject of this parole eligibility hearing, then what exactly is the purpose for this hearing, conducted under the pretense of parole eligibility? Has the current committing offense replaced parole as the primary subject?

Fifth Issue of Fact - How is a parole eligibility hearing conducted? Is it to be conducted in a fair, professional manner; or, is it to be inquisitorial in nature?

Sixth Issue of Fact - Can a parole board panel change an offender's conviction? Can a parole board panel increase the measure of punishment considered appropriate under its Guidelines, based upon a finding that the offender is guilty of criminal conduct beyond his or her offense of conviction?

Seventh Issue of Fact - What due process requirements have been incorporated into Policy No. 501-36 for the protection of an offender if a parole board panel elects to find an offender guilty of new criminal conduct by deviating from the offense of conviction?

Department of Rehabilitation and Correction Policy 501-36 states:[65]

> Each interview or hearing will include a discussion or presentation to the inmate of the factual information upon which the decision is to be based. This information shall include but is not limited to: a. Brief details of the committing offense; b. The offender's role when co-defendants are involved; c. The offender's prior record; e. This offender's institutional record (disciplinary and rehabilitative); and f. the parole board guidelines applicable to the inmate's case.[66]

This provision drives home the point that a parole eligibility review hearing has nothing whatsoever to do with *parole* as we have traditionally thought of this term, and

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[65] *See* Defendant's Exhibit B. Policy 501-36 at Part VI Procedure, paragraph 5.

[66] *See* Defendant's Exhibit B. Policy 501-36 at Part VI Procedure, paragraph 5.

an inmate's readiness to return to society. That subject is not even on the agenda.[67]

What does Policy 501-36 focus upon?

It discusses *the committing offense*. It discusses the role of co-defendants which is another way of saying *the committing offense*. It discusses the offender's prior criminal record, a topic similar to *the committing offense*. Disciplinary materials will be placed in front of the file,[68] and rehabilitation programs will usually be absent.[69] Finally, it discusses placement of the offender in the current guidelines.

These Guidelines are Defendants Exhibit D.[70] The Parole Board Guidelines Manual has 89 numbered pages. Of this number, 66 pages [74%] are devoted to discussing crimes and offense categories; 11 pages [12%] are devoted to Criminal History Risk Score; 12 pages [13%] are devoted to Guideline Application Procedures, which involves computations and instructions for filling out Parole Board Decisions; another 2 pages [2%] are devoted to Reparole and Rescission. The last section discusses an Outstanding Program Credit. This is barely more than one page and granting this credit is discretionary.

There is nothing in this manual about maintaining an excellent institutional record. There is nothing about credit for acquiring job skills or earning good evaluations from staff supervisors. There is nothing in this manual about family support or progress in rehabilitation efforts. There is nothing about an inmate's ability and readiness to assume obligations and undertake responsibilities. This manual is silent about an inmate's employment history and assembly of a placement plan with a stable family and good job.

In addition to this manual, there is a two dimensional grid.[71] This consists of a vertical axis and a horizontal axis. The vertical axis is used to rate the seriousness of the

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[67] *See* Affidavit of Thom Hoffman A137592, dated May 28, 2002, Plaintiff's Exhibit 12.

[68] *See* Affidavit of R. Dean-Omar A169464, Plaintiff's Exhibit 4.

[69] *See* Affidavit of Jenny Warwick, Plaintiff's Exhibit 7.

[70] *See* Appendix, filed by Defendants to support their Motion for Summary Judgment.

[71] This is also page 1 of the Guidelines.

offense. There are thirteen offense categories. As numbers progress, the amount of time to be served increases. Incremental amounts of time also increase until you reach Category 10. At this level and above, the incremental amount of time is five years per category. On the horizontal axis, there is another score designed to gauge recidivism. For purposes of this grid, offenders are grouped in one of four slots along the horizontal axis. As numbers progress, the time to be served on this axis also increases. By taking an offenders crime, and then their recidivism rating, you can determine their two scores. The point on this grid where these two scores intersect determines the proper guideline.

Given these Guidelines, this is still another way of saying *the committing offense*. In Department of Rehabilitation and Correction Administrative Rule 5120:1-1-07[72] [hereafter *Rule 5120:1-1-07],* the parole board is obliged to examine and investigate any reports of physical, mental or psychiatric examination of the inmate;[73] the inmate's ability and readiness to assume obligations and undertake responsibilities;[74] the inmate's family status;[75] the inmate's employment history and occupational skills;[76] the inmate's vocational, educational and other training;[77] and the availability of community resources to assist the inmate in making the transition back into society.[78] These are topics that inmates want to discuss. These subjects relate to a prisoner's release. None of these topics are even broached in Policy 501-36. And, they are not "discussed or presented" during the hearing.[79] The parole board panel has decided the question of parole before the hearing began. The inmate will be doing more time. The only real question is how much.

Since the current Guidelines were adopted, the nature and atmosphere of a parole

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[72] *See* Plaintiff's Exhibit 13, Rule 5120:1-1-07.

[73] *See* Plaintiff's Exhibit 13, at Rule 5120:1-1-07(B)(5).

[74] *See* Plaintiff's Exhibit 13, at Rule 5120:1-1-07(C)(1).

[75] *See* Plaintiff's Exhibit 13, at Rule 5120:1-1-07(C)(2).

[76] *See* Plaintiff's Exhibit 13, at Rule 5120:1-1-07(C)(4).

[77] *See* Plaintiff's Exhibit 13, at Rule 5120:1-1-07(C)(5).

[78] *See* Plaintiff's Exhibit 13, at Rule 5120:1-1-07(C)(10).

[79] *See* Affidavit of Thom Hoffman, Plaintiff's Exhibit 12.

review hearing has undergone a total metamorphoses. It is no longer the hearing envisioned by Rule 5120:1-1-07. It has become the place and the time when an offender's current offense is reviewed and, if found deficient, corrected. The committing offense is more than just the primary subject of the parole review hearing. *It is the hearing.*

According to Policy 501-36, parole board members and hearing officers are supposed to conduct themselves in a professional manner.[80] In response to paragraph 5 of the Spence Affidavit and a reference to parole board resentment, Bev Seymour states:

> "Resentment and resistance also came as a result of extremely harsh, unprofessional, cruel treatment at parole hearings by those doing the interviews. I have personally seen women so emotionally upset from the ordeal they were put through, and the frustration of degrading treatment, that women had broken down emotionally and had to be assisted to the mental health department for counseling after their interviews."[81]

There is good cause for this emotional trauma. Offenders have worked hard for years to change themselves. They are justifiably proud of their accomplishments. But, good records mean nothing to the Parole Board.[82] This includes good records generated by staff.[83] The parole board is only interested in bad records. You can maintain an impeccable institutional record for ten straight years, and the parole board will penalize you for a bad conduct report that occurred twelve years ago.[84] The atmosphere inside a parole review hearing room is entirely inquisitorial and venomous. Offenders are berated and degraded.

Something else traumatizing is taking place during a parole review hearing. Parole board panels routinely find offenders guilty of new criminal conduct. There is a

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[80] *See* Policy 501-36, Part V Policy at p. 4.

[81] *See* Affidavit of Bev Seymour W025777, dated June 15, 2002, Plaintiff's Exhibit 14.

[82] *See* Affidavit of Bev Seymour, Plaintiff's Exhibit 14.

[83] *See* Bev Seymour's Affidavit, Plaintiff's Exhibit 14.

[84] This occurred to Eric Davis A163633. He was in an honor camp, when a hearing officer penalized him for a bad conduct report that was twelve years old.

term employed by the parole board, which permeates its entire decision-making process. It is called *total offensive behavior*. A trial court may find an offender guilty of gross sexual imposition. This is termed the *offense of conviction*. A parole board panel will look at this same identical behavior and conclude that it is rape.[85] Next, the Ohio Parole Board Decision form will reflect the fact that the offender's total offense behavior includes rape. Finally, because they have found this behavior to be rape, the parole board panel will engage section 231 of its Guidelines, titled rape, and place the offender in the offensive category appropriate for rape, instead of Gross Sexual Imposition. In this manner, the offender's conviction has been changed and their sentence has been significantly lengthened. And, this all happens in the course of an interview that lasts ten or fifteen minutes, sometimes less. To understand the impact of having your conviction changed from gross sexual imposition to rape, the former crime falls within offense category 5 of the parole board's grid and requires two to three years. Rape may engage offense category 9 or 10, and this will require a minimum of 7 and as much as 15 years.

Changing an offender's conviction and expanding a criminal sentence should not be clerical exercises. At minimum, due process protections apply. What due process protections are contained in Policy 501-36 for the protection of inmates, when they are confronted with committing new crimes by a parole board panel at this hearing?

There is nothing.

The prospect of facing additional prison time, beyond the original sentence issued by a judge, gives rise to due process concerns and invokes due process protections under Ohio's current sentencing law [hereafter referred to as Ohio's *New Law*]. If an offender has been given post release conditions, and these post release conditions are violated, one consequence can be a return to prison for up to half of the court issued sentence. This does not require a finding of new criminal conduct. It only requires a finding that these post release conditions have been violated. Before the manacles can be applied, Ohio R.C. §2967.28(E)(5)(d) requires the parole board to conduct a hearing and "ensure procedural due process to an alleged violator." This due process is spelled out in Ohio Administrative Rule 5120:1-1-43(I), which states:

> (I) If the adult parole authority reports the violation of post release control to the parole board for a hearing pursuant to division (F)(3) of section 2967.28 of the Revised Code, then the hearing shall be conducted

[85] This actually happened to Gerry Stewart W037211 and Hoy McCormick A303554.

in accordance with specific procedures adopted by the division of parole and community services which include the following guidelines:

(1) The hearing shall be conducted by a parole board member or by a hearing officer of the parole board.

(2) With respect to the hearing, the offender has the following rights:

(a) The right to receive prior to the hearing a written notice setting forth the date, time and location of the hearing and the specific violations the releasee is alleged to have committed.

(b) The right to be heard in person and present relevant witnesses and documentary evidence;

(c) The right to confront and cross examine adverse witnesses ...

(d) The right to disclosure of evidence presented against the releasee.

(e) The right to request representation by counsel. If the releasee cannot afford to retain counsel, assistance, upon request, will be provided by the office of the state public defender.

(f) The right to a written digest of the proceedings by the hearing officer is requested.

This is what Ohio's Revised Code requires, if a person violates post release controls. The term of incarceration for violating a post release condition varies with the underlying criminal conviction, but under no circumstance is it longer than five years.[86] In a parole review hearing, something far more serious is taking place. These offenders are being adjudicated of new criminal behavior. If they are found guilty by a parole board panel of new criminal conduct under their total offensive behavior criteria, they can be moved upward to an offense category commensurate with this more serious offense behavior and required to do a prison sentence appropriate for this misconduct. This can add ten more years to their sentence. And under the Old Law, these inmates have no due process rights whatsoever.[87] Nothing even remotely comparable to Rule 5120:1-1-43(I).

Eighth Issue of Fact - Given how the term Review Panel is expressed in Policy

[86] *See* R.C. 2967.28(B).

[87] Policy 501-36 states only the inmate can be present for these hearings and that confidential information shall not be released. *See* Policy 501-36, Part VI Procedure, paragraphs 4 and 7.

501-36, and its conflicting practical interpretation, can we be certain that the terms set forth in Policy 501-36 reflect what, in fact, the clear language purports to express.

Both Parole Board Members and Hearing Officers have discretion to depart from the guidelines.[88] If a decision maker wants to depart from the guidelines and give an offender more time, they simply need two signatures on the Ohio Parole Board Decision form and it is done.[89] No further review is necessary. This bias toward continuing an offender permeates the entire parole hearing process. If a Parole Board Member has not participated in the decision and the offenders are being continued against the guidelines, the Parole Board Member will trust the hearing officer's judgment and initial their approval, *if* they are recommending more time.[90] If they are recommending a release, then the file gets a more thorough review before approval is granted.[91]

If a decision-maker wants to depart from the guidelines and grant an offender a release, an additional layer of review and approval is required.

> "... then you need to get two other board members and one other hearing officer to buy into that recommendation - it's called a *review panel*. And that sometimes can be done right at the institution, if we have a lot of people there to do that - if not, it comes back into Central Office. When the board is doing other full board open hearing matters, or other type of hearings, then we get two board members and one hearing officer to sign off on that then."[92]

Mr. Schneider's explanation for a *review panel* and the definition of a *Review Panel* set forth in Department of Rehabilitation and Correction Policy 501-36 [hereafter *Policy 501-36*], Paragraph R do not agree.[93] The definition in Policy 501-36 reads;

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[88] *See* Testimony of Parole Board Member Larry Matthews on April 6, 1998 at p. 10. *See also* Testimony of Hearing Officer Kathy Hilbert on April 22, 1998 at p. 10; Testimony of Executive Assistant Thomas C. Schneider on April 6, 1998 at p. 11.

[89] *See* Testimony of Executive Assistant Thomas C. Schneider on April 6, 1998 at p. 10.

[90] *See* Testimony of Parole Board Member Constance Uppers on April 7, 1998 at p. 7.

[91] *See* Testimony of Parole Board Member Constance Uppers on April 7, 1998 at p. 8.

[92] *See* Testimony of Executive Assistant Thomas C. Schneider on April 6, 1998 at p. 11.

[93] *See* Department of Rehabilitation and Correction Policy 501-36, IV Definitions, Paragraph R on

> R. *Review Panel*: Three parole board members, as designated by the parole board chair on a rotating basis, responsible to review certain parole board panel decisions with authority to approve the panel decision or reject the panel decision and refer the case for further review.

This presents a material issue of fact in an unusual place. Policy #501-36 Paragraph R does not stipulate a *Review Panel* is required for a release against the guidelines; but, it is not required for departures denying parole against the guidelines. The definition states *certain parole board decisions*. Of course, this is malleable language and the Parole Board can infuse this meaning into this phrase through practical usage. But there is no hint of this adversarial posture in the literal wording of this definition.

Review Panel affords us an example of why Policy 501-36 and Policy 501-38 cannot be trusted to mean, what they apparently purport to say. *Review Panel* has been converted into another barrier blocking offenders from freedom. This impediment to freedom is invisible. No such understanding can be gleaned from this paragraph based upon the natural meaning of the words employed. This is not an aberration.

In Part V of Policy 501-36, it states:

> "The Ohio Parole Board will conduct hearings in a fair and consistent manner while recognizing *the unique individuality* of each offender." [Ital added.]

Compare this sentence to testimony of Parole Board Executive Assistant Thomas Schneider before the State Highway Patrol, *who cares who you see. You know what I mean, who's on your panel is who you see, you got to get the job done.* Mr. Schneider, a former Senior Hearing Officer before becoming Executive Assistant, has no interest in recognizing the unique individuality of each offender.

In paragraph (C) (5) of Part VI, Procedure, it states that the interview will consist of "brief details of the committing offense." These details are not covered briefly. They are the subject of intense interrogation.

The literal meaning and the practical meaning of these policy statements are not the same. Later, we shall see this occurring routinely as Parole Board Guidelines are applied to cases. There is an enormous schism between published words and practice.

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p. 3. It is also Defendant's Exhibit B.

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Ninth Issue of Fact - Is Ohio's parole administration worthy of being recognized as a national leader?

In the Affidavit of Richard Spence, Paragraph 9, he states:

> "Ohio is one of only six states whose parole system is accredited by the American Correctional Association. Ohio is widely recognized as a national leader in parole administration."[94]

The affidavit of Named Plaintiff Thom Hoffman is included as an exhibit to give this Court an understanding of what happens when the American Correctional Association comes to do an accreditation audit.[95] Prior to this appointed day, extraordinary measures are taken to clean up the grounds, hide materials lacking Safety Data Sheets and not in inventory, post chemical issue sheets and neatly arrange items in inventory. On audit days, normal work stops. When examiners pass through, they see a picture of perfect compliance. After they leave, safety data sheets disappear, hidden materials come out of hiding and tool cages and cabinets remain open throughout the day. Much the same occurred on the day that Ohio's Parole Board was examined for accreditation.

Ohio's State Highway Patrol visited the Parole Board and caught them on a normal day. The picture *was not* perfect compliance. Every Parole Board Decision, even those handled by only a Hearing Officer, requires the signature of a Parole Board Member.[96] When the State Highway Patrol reviewed Ohio Parole Board Decisions, they found 4 out of 19 or 20 decisions had *not been signed* by a Parole Board Member.[97] We have 63 decisions which have not been signed by a Parole Board Member, and all of these decisions were decided *after* the State Highway Patrol

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[94] *See* Paragraph 9, Affidavit of Richard Spence, Defendant's Exhibit A.

[95] *See* Exhibit 15, Affidavit of Thom Hoffman, dated May 28, 2002.

[96] *See* Testimony of Hearing Officer Kathy Hilbert on April 22, 1998 at p. 27-28; *See also* Testimony of Parole Board Member Constance Uppers on April 7, 1998 at p. 7.

[97] *See* Testimony of Hearing Officer Kathy Hilbert on April 22, 1998 at pages 28-29, statement of Officer Randy McGough.

completed the audit portion of its investigation in 1998.[98] If a decision-maker is not present for part of the hearing, they will sign off on the decision and put a circle around their initials.[99] We have four Ohio Parole Board Decisions reflecting circles around initials.[100] The decision for one of our Named Plaintiffs has circles around *both* signatures.[101]

After conducting 36 interviews with Parole Board Members and Hearing Officers, the State Highway Patrol concluded that it is possible for a Parole Board Member or a Hearing Officer to grant a parole and to have the file processed without getting caught.[102] This is a serious indictment of the Parole Board's administrative procedures. As our collection of unapproved decisions indicates, these problems have not been fixed.

We challenge the statement *Ohio is widely recognized as a national leader in parole administration*. If any hearing officer or parole board member can grant a parole and get an offender released without getting caught, this strikes us as inadequate, bordering on dangerous.

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There are unwritten policies followed by decision-makers at parole hearings.[103] At a first hearing, there must be two decision-makers.[104] Also at a first hearing, an offender will always be continued.[105] Even without the laborious procedure involving a

[98] *See* Exhibit 16. Parole Board decisions lacking the signature of a Parole Board Member.

[99] *See* Testimony of Hearing Officer Kathy Hilbert on April 22, 1998 at p. 27.

[100] *See* Exhibit 17. Parole Board decisions with circles around initials.

[101] At Mr. William Clark's hearing, he was continued eight years, with both decision makers apparently in absentia.

[102] *See* Synopsis, Case 97-10709-0300 Bribery / Theft in Office, by Trooper James Wernecke.

[103] *See* Testimony of Executive Assistant Thomas C. Schneider on April 6, 1998 at p. 22.

[104] *See* Testimony of Parole Board Member Constance Uppers on April 7, 1998 at p. 6.

[105] *See* Testimony of Hearing Officer Michael Keith on April 7, 1998 at p. 3-4, Statement of Officer James Wernecke. This statement has been corroborated by the experiences of more than nine hundred Named Plaintiffs. Nobody has been granted a release, the right to walk out of the prison in the next sixty to ninety days, after this initial hearing. This explains why 100% of the plea agreements have been

review panel, the likelihood of an offender getting released early against the guidelines is rendered practically nonexistent by this first unwritten rule, an automatic continuance at the first hearing. With the additional layers of approval necessitated by the *review panel* coupled with the automatic first continuance, early releases contrary to the guidelines are few and far apart. On the other hand, *going against* the guidelines to continue an offender occurs 90.6% of the time.[106]

There is another unwritten rule relating to sex offenders and homicides.

> "... we find that sex offenders and murder cases are life cases, usually very low in the guidelines, very obviously, normally we don't parole those type of people at the first statutory hearing, they're usually very serious crimes and say we'll give them a continuance the first time we see them, well beyond what the guidelines suggest because they say they're supposed to be paroled."[107]

The term "low in the guidelines" is a reference to the risk score or recidivism gauge, a subject discussed in the section devoted to documents. Two familiar and disturbing chords are struck in this quote by the Parole Board's Executive Assistant, which we will point out later as we discuss Parole Board documentation. Our evidence indicates that these mental processes are pivotal to the parole review process, and can be found driving parole board decision-making. First, the predilection to prejudge all offenders in two crime categories and determine that these offenders deserve life sentences. Second, the jaundiced view of the guidelines. Parole Board decision-making is out of sync with the guidelines for sex offenders and homicides, but this is tolerable, even insignificant. The tendency to prejudge *and* a jaundiced, disdainful attitude toward guidelines as well as the authority of the judiciary in general are attributes which occur throughout the

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violated among Old Law inmates.

[106] *See* Plaintiff's Exhibit 18, Compilation of 193 offenders reviewed under the current parole board guidelines, reflecting the fact that 175 of 193 are out of compliance and reflect upward departures, and only 18 are in compliance and reflect no departure. Compliance assumes that the Offense of Conviction dictates the Offense Category. Named Plaintiffs convicted of Aggravated Murder are not included, because an upward departure is not possible. *See also*, Plaintiff's Exhibit 19, Letter from Luis V. Hamer from Orient Correctional Institution dated November 30, 2000, signed by 12 inmates at this institution, attesting to being raised outside their guideline.

[107] Testimony of Executive Assistant Thomas C. Schneider on April 6, 1998 on p. 5.

parole review process and surface repeatedly in Parole Board decisions. This is particularly true of Full Board Hearings, called COBR[108] decisions.

Parole Review - the Guidelines

The Ohio Department of Rehabilitation and Correction issued a news release when it published its new Parole Guidelines.[109] In this News Release, Defendant Reginald Wilkinson proclaimed:

> "These guidelines are designed to better identify the risk of inmates reoffending. Our goal is to utilize state of the art techniques so that decisions on whether or not to release offenders are made with public safety uppermost in our minds."[110]

Tenth Issue of Fact - Have the current guidelines provided benefits, in terms of lowering recidivism rates?

Parole Board Member Richard Spence states, in Paragraphs 7 and 8 of his Affidavit:

> 7. "The present Parole Board Guidelines became effective in 1998 and have yielded significant benefits. Release rates increased dramatically at first, almost doubling in the first years of operations. The surge in releases during the first few years under the present parole guidelines mostly involved less serious offenders, and release rates later came down somewhat, to approximately thirty percent, still significantly higher than the 15.3 percent increase rate prevailing before the adoption of the present parole guidelines. That reduction in release rates is largely attributable to the fact that the initial surge under the present guidelines involved less

[108] The acronym *COBR*, pronounced *COBRA*, stands for Central Office Board Review.

[109] *See* News Release, dated January 13, 1998, attached as Exhibit 20.

[110] *See* News Release, opening paragraph. Exhibit 20.

serious offenders, leaving a pool of potential parolees comprised of more serious offenders who are hence poorer parole risks.

8. "The current guidelines have increased the accuracy of parole success predictions. That is evident by the fact that the number of parole violations did not markedly increase following the surge in parole releases that followed the implementation of the current guidelines."

In support of this statement, the Appendix submitted for Defendants contains an Item E, also marked Exhibit E. This is two pages of statistics and tables titled *Calendar Year 1999 Summary of Institution Statistics*.[111] There is no commentary to accompany these statistics, but we assume this is the statistical data that has been provided to back up the statement made by Mr. Spence in paragraphs 7 and 8. It is Calendar Year 1999, the first full year for applying these new guidelines. The Regular Parole rate reflected in the bottom pie graph is 27%,[112] which is close enough to be considered *approximately 30%*. The chart does reflect the number of paroles for Calendar Year 1997 and it is half the number reflected for Calendar Year 1999.[113] That roughly corresponds to the 15% figure quoted in paragraph 7. Finally, this is the *only* statistical data provided.

On page two, of all the different methods listed for releases, only one applies to our Named Plaintiffs. This is Regular Parole.[114] Richard Spence states, *the number of parole violations did not markedly increase following the surge in parole releases that followed the implementation of the current guidelines.*

Where does Mr. Spence find his support for this statement in these statistics?

We see a pie graph at the bottom of this page reflecting the fact that 27% of releases occurred through Regular Parole. Next to this graph, we see a second pie graph

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[111] We are also including this as an exhibit. To avoid confusion, we will call this Defendant's Exhibit E exclusively. *See* Plaintiff's exhibit labelled "Defendant's Exhibit E".

[112] *See* Plaintiff's Exhibit labelled "Defendant's Exhibit E", page 2, lower left pie graph.

[113] *See* Plaintiff's Exhibit labelled "Defendant's Exhibit E, last column, upper box of data, page 2, titled *CY 1997 Total*.

[114] Our Named Plaintiffs can also be released through the Expiration of their sentence and because of death; but, the Parole Board is not responsible for these releases.

reflecting the various reasons for inmates returning to prison. Inmates under the Old Law cannot qualify for Judicial Release or for Post Release Control. It follows, Old Law inmates cannot return to prison for violating the terms of their Judicial Release or Post Release Control. These categories do not apply to Old Law inmates.

The largest category for returning inmates is *Technical Parole Violations*. Every Old Law inmate leaves prison and becomes subject to supervision. When any of these inmates violate their supervision terms, they become *Technical Parole Violators*. There is *every* reason to believe that the 53% segment appearing in the lower pie graph of Defendant's Exhibit E, labeled *Technical Parole Violators*, consists entirely of Old Law inmates. A similar violation committed by a New Law inmate results in the violation of their Post Release Control, *and not parole.*

The statistical information provided by Defendants does not support the statement of Mr. Spence appearing in ital above and in paragraph 8 of his Affidavit. In fact, it proves the opposite. *Technical Parole Violators* are the largest group of returning inmates. They are more than double the number of returning inmates under the New Law counterpart, post release control violations. They are more than half of *all* returning inmates for 1999, although their Regular Paroles account for roughly a quarter of releases. Using Defendants' own statistical data, these guidelines are failing miserably.

Instead of proving his point, these facts challenge his statement. Regular Parole equals roughly a quarter of releases, but accounts for more than half of the returning inmates. That is awful. This does not have the ring of *yielding significant benefits* to us.

Mr. Spence can be charged with the knowledge reflected in these statistical charts, particularly when this chart is offered to support his proposition. His statement in paragraph 7 that these new guidelines have *yielded significant benefits* and his statement in paragraph 8, that *parole violations did not markedly increase* after implementation of these guidelines, are both deliberate misrepresentations, made with actual knowledge of their falsity and submitted for the purpose of misleading this court as to the true efficacy of the Parole Board's new guidelines.

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Eleventh Issue of Fact - Are there only minor differences between the Federal Guidelines and Ohio Guidelines; or, are these differences fundamental and pronounced?

In Richard Spence's affidavit, paragraph 6, he states:

> "ODRC [for Ohio Department of Rehabilitation and Correction] responded to those problems by forming a committee of senior parole officials charged with developing new, more effective parole guidelines. They enlisted the help of the National Institute of Corrections ("NIC") and also hired Dr. Peter Hoffman, formerly Director of Research and Chief Administrator of the United States Parole Commission. That committee, NIC staff, and Dr. Hoffman studied the federal parole system, other states' parole agencies, and Ohio's own practices, conducted a statistical analysis of what type of offense behavior and risk factors correlated to success on parole, and developed a new guideline system that largely tracked the federal parole guidelines. That system, with minor modifications, became the present Ohio Parole Guidelines. The process for developing those guidelines took three to four years." [Ital added for emphasis.]

If you have reviewed a finished piece of work and you like it, you do not need three or four years to further refine it. If you want to tinker with it, that is another matter. The Federal Guidelines for Decision-making [hereafter *Federal Guidelines*] were finished when the task of developing Ohio's Parole Board Guidelines [hereafter *Ohio Guidelines*] began. There are some superficial similarities between the Federal and Ohio Guidelines. Section numbers for the two manuals match one another for the principal crime categories. There is some borrowed language from the Federal Guidelines that appears in Ohio's Guidelines. But conceptually, the two guidelines are polar distances removed from one another.

The Federal Guidelines track the Offense of Conviction. This is so endemic to these guidelines, it is not even stated. The Federal judiciary's offense of conviction sets the Offense of Behavior for placing an offender in the guidelines. The Federal Parole Board reserves the right to depart from this guideline and move an offender upward or downward, depending upon the presence of aggravating or mitigating circumstances.[115] But there is no mistaking the central fulcrum in this process. It is the offense of conviction. The Federal Parole Board does not review the final judgment of the trial court to determine whether or not the judgment is correct. This would be unthinkable.

The following paragraphs are pivotal to the differences between the Federal

[115] *See* Federal Guidelines, 28 CFR § 2.20 (c) and (d).

Guidelines and Ohio's Guidelines. Ital has been added for emphasis. These provisions appear in Part D: Guideline Application Procedures, 104 (a) (pp.'s 71-72), which read:

> (a) Offense Seriousness Category. The offense category shall reflect the nature and circumstances of the current offense behavior *as determined by the Parole Board*. The offense category selected must be explained on the hearing record by a brief statement of the specific findings that justify the seriousness rating.
>
> (b) Determining the Offense Category. The Parole Board shall begin its determination of the appropriate offense category *by considering* the conduct and circumstances established by the offense of which the defendant was convicted (offense of conviction).
>
> *Information describing conduct or circumstances that establish a higher offense category than the offense category applicable to the offense of conviction shall be relied on by the Parole Board in establishing the appropriate offense category only if (1) the Parole Board finds the information reliable, (2) the offender is informed of the information and given an opportunity to respond, and (3) the Parole Board, after considering the offender's response, finds that, taking the record as a whole, the conduct of circumstances in question are established by a preponderance of the evidence.*

Nothing close to this language appears in the Federal Guidelines. In paragraph (a), the last word for placing an offender into an offense category has been reserved for the Ohio Parole Board. These provisions provide Ohio's Parole Board with a license to review an Ohio trial court's judgment *de novo* and, if the Parole Board can find good cause to depart from the offense of conviction, they may move an offender to a higher offense category, even if this means *changing their conviction*. Ohio's Guidelines are tailored to support another legal conclusion called *Total Offensive Behavior*. This is not a technicality. This is tantamount to conversion of Ohio's Guidelines into something that is different *in kind*. Nothing less than a closet judiciary has been created within the Ohio Department of Rehabilitation and Correction under the auspices of its Parole Board. This explains why these guidelines required three or four years to develop.

A case in point is Involuntary Manslaughter. *[Please see Chart A, Federal Guidelines Compared to Ohio Guidelines.]* Under the Federal Guidelines, an Involuntary Manslaughter conviction requires placement in one offensive category, Category 4.[116] There is no decision for the Federal Parole Board to make. The Federal Parole Board can look at the crime and do a departure based upon aggravating or mitigating circumstances, but they cannot change the conviction. Ohio's Guidelines for Involuntary Manslaughter employ five offensive categories.[117] Placing an offender into one of these five offensive categories necessarily engages discretion. The highest of these offensive categories is Category 11, which has been reserved primarily for murder. If Ohio's Parole Board decides to place this offender in Category 11, they have effectively changed their court conviction from Involuntary Manslaughter to Murder *without* departing from their guidelines.

In the prior section, we described the advance preparations and the attention to detail that occurs preparatory to these parole board hearings. Helen McNeil W021848 was convicted of Involuntary Manslaughter after a jury trial. At her parole hearing, Harold Miller, a Hearing Officer sitting alone, found the word *restraint* in a police report. Charges of kidnapping or attempted kidnapping were never presented to the jury impaneled to hear Ms. McNeil's case. Hearing Officer Harold Miller ruled that Helen McNeil's underlying conduct consisted of kidnapping and placed her in Category 11. This offensive category begins at 15 years and runs to 20 years. Helen McNeil's jury did not find aggravating circumstances attached to her crime and she was acquitted of the charges of Aggravated Murder and Felonious Assault. She is a first time offender with a minimum criminal history risk score of 0. Under Federal Guidelines, Ms. McNeil's case would require at most, 1.5 years. Because she is subject to Ohio's Guidelines, Ms. McNeil is being required to do 20 years. She would disagree with Mr. Spence that, *with only minor modifications*, Ohio's Guidelines are just like the Federal Guidelines.

Besides embracing competing legal concepts, *offense of conviction* and *total offensive behavior*, there are other differences between the Federal and Ohio Guidelines grounded in numbers and time-served charts. By no stretch of any imagination can these differences be called *minor modifications*.

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[116] See Federal Guidelines, 28 CFR § 2.20 Chapter Two, Subchapter A, § 203.

[117] *See* § 204 (A) engaging Category 11, (B) engaging category 10, (C) engaging Category 8, (D) engaging Category 7 and (E) engaging Category 6.

(1) Time charts on Federal Guidelines reach their high end at 100 and 180 months (8.3 and 15 years respectively). The high end of time charts for Ohio's Guideline extends to 300 and 390 months (25 to 32.5 years). Differences between 8.3 to 15 years, and 25 to 32.5 years *are not minor modifications*. Ohio's maximum time for offenders with low recidivism scores is *three times* as much as the Federal maximum time, and *more than twice* as much for offenders with high recidivism scores as the Federal guideline.

(2) Ohio's Guidelines employ four additional offensive categories that do not exist under the Federal Guidelines: Category 9, Category 10, Category 11 and Category 12.[118] In the next section, we will show how almost all our Named Plaintiffs have been placed in these newly created guidelines. Nobody is still in one of the first seven categories which run parallel to the ranges for Federal offenders. Rejecting all of the sentencing ranges created under Federal Guidelines and moving Ohio offenders into four newly created and longer guidelines *is not* a minor modification.

(3) The four newly created offensive categories employed by Ohio include sex offenses,[119] Involuntary Manslaughter,[120] Voluntary Manslaughter,[121] Aggravated Burglary and Aggravated Robbery.[122] All of these offenses come within the lower seven Federal offensive categories.[123] These newly created offensive categories build in

[118] Category 8 in the Federal Guidelines is comparable to Category 13 in the Ohio Guidelines. These categories are both reserved for life sentences.

[119] Sex offenses primarily fall within Categories 9 and 10.

[120] Involuntary Manslaughter is primarily Categories 10 and 11.

[121] Voluntary Manslaughter is Category 9.

[122] Aggravated Burglary and Aggravated Robbery come within Category 9.

[123] *See* Federal Guidelines, 28 CFR § 2.20 Voluntary Manslaughter is Category 7 (§202). Involuntary Manslaughter is Category 4 (§203). Assault causing serious bodily injury is Category 7. Kidnapping, with the exception of kidnapping for ransom or terrorism, is Category 7. Rape is category 7. (§231). Arson causing serious bodily injury is Category 7, and without bodily injury, Category 6. (§301) Robbery and Burglary is category 5 (§311 and §321). These offenses cover most of the crimes committed by our Named Plaintiffs.

tremendous sentence disparities between Ohio offenders and Federal offenders convicted of the same crime. Helen McNeil is an example. This is not a minor modification.

(4) Federal guidelines do not hold an offender accountable for the activities committed by associates whom the offender cannot control and could not have reasonably foreseen.[124] Ohio's Guidelines hold an offender accountable for the conduct of others that the offender aided or abetted, whether intended or not, and whether reasonably foreseeable as probable or likely to result from the jointly undertaken offense.[125]

(5) In the Preface of Ohio's Guidelines, it states that no projected release dates will be given for people convicted of sex offenses. There is nothing in the Federal Guidelines which singles out this kind of special treatment for sex offenders.

Mr. Spence is aware of the differences outlined above between Federal and Ohio Guidelines. His statement, that *with only minor modifications*, the Federal Guidelines *became the present Ohio Parole Guidelines*, constitutes another example of a deliberate misrepresentation, made with full knowledge of the statement's falsity and done for the purpose of misleading and misrepresenting Ohio's Parole Guidelines to this Court.

Parole Review - the Decisions and Documentation

Twelfth Issue of Fact - What respect and deference has been accorded to the offense of conviction by the parole board?

In Paragraph 12 of his affidavit, Richard Spence states;

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[124] *See* Federal Guidelines, 28 CFR §2.20, Chapter Thirteen, 4.

[125] *See* Part D: Guideline Application Procedures, 104 (g), Offender and Accomplice Liability, at pp.'s 73-74. For examples of this principal being applied to our Named Plaintiffs, see Coy Downey A259971 (trial court conviction for drug abuse and aggravated robbery converted to aggravated murder); Marilyn Lowery W015896 (murder converted into aggravated murder). There are many other examples, too numerous to identify.

> "It is very important to have an accurate understanding of the true nature of the conduct leading to an offender's incarceration in order to accurately gauge the risk involved in early release, much like a physician must accurately diagnose a patient's condition before he or she can determine an appropriate course of treatment. The offense of conviction leading to an offender's incarceration may not be a complete, or accurate, description of his actual conduct in the incident giving rise to that conviction, particularly in plea bargained cases. The APA must therefore look at all reliable information describing that conduct in order to accurately classify an inmate's offense behavior, just as a physician must examine all reliable data in order to accurately diagnose a patient's condition. As important as it is for the APA to be able to do so in appropriate cases, the APA does not frequently depart from the offense of conviction in classifying offense behavior."

The Parole Board currently uses a two page form titled *Ohio Parole Board Decision*.[126] This form has blanks for handwritten answers to fifteen questions. About half of these questions are clerical in nature, and require only the transfer of a note or a number from another record to this decision sheet.[127] With one exception, every one of these fifteen entries is related to either the current criminal offense, their prior criminal history or their disciplinary record. Item 11, titled Optional Outstanding Program Achievement, is the exception. Granting this credit is discretionary. On Item 13, there is space for a recommendation. This can mean either a continuance or granting a Preliminary Release Date three, five or even ten years into the future.

There are two places for writing comments. On the first page, the open space is devoted to a description of the crime. This is invariably a jaundiced description peppered with terms intended to elicit revulsion. On the second page, the open space is part of Question 9, which deals with the guideline to be applied. This is where a decision-maker must set out reasons to support their sentencing recommendation.

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[126] A blank Ohio Parole Board Decision form was attached to our Complaint as Exhibit 17 and it is being attached as an Exhibit to our Memorandum in Support as Plaintiff Exhibit 21.

[127] Questions of a clerical nature include the Criminal History Risk Score, the Guideline Range, the Total Time Served, and whether or not new criminal activity has been committed in prison, or if there have been any other kinds of disciplinary problems (questions 5 through 8).

Arguably, this is the most important part of the form. Every prior question has been devoted to history. This is the first question which looks into the future. In cases where no decision outside the guidelines is warranted, this space is often left blank. When this space is filled out, there is another account of the crime within the context of the guidelines.

There is a third open space on the second page of this form, much smaller than the two spaces discussed above. This open space, which is discretionary, relates to credit for an outstanding program achievement. In this area, you can find a number of brief abbreviations set out much like a laundry list, one following another in no particular order. For example, the high school equivalency test will be denoted by G.E.D.; alcoholics anonymous will be denoted by A.A. Earning a college degree might be one word, *college*. Although it could be much more, this question is also a clerical exercise. It is the transfer of information from another form to this one in no particular order.

No space has been reserved on this decision form for recording the offense of conviction. Not one of the fifteen questions inquires about the offense of conviction. None of the identifying boxes at the top of the form ask about the trial court conviction. The only ruling carried forward from the trial court to this form involves the sentence. At the top of the form, there is a box reserved for *sentence* and next to this box, there is another box reserved for the maximum expiration of sentence date.

Item 1 on this form begins with these words:

> 1. The (offense) (parole violation) behavior has been rated as Category __ because the offense behavior involved (circle appropriate behavior):

Decision-makers will put a circle around what applies, either offense or parole violation, then fill in the Offense Category in the blank space. In the previous section, we quoted from Part D: Guideline Application Procedures, Section 104(b), which states:

> Determining the Offense Category. The Parole Board *shall begin its determination* of the appropriate offense category by considering the conduct and circumstances established by the offense of which the defendant was convicted (offense of conviction). [Ital added.]

From our point of view, Section 104(b) dictates that the offense of conviction must be inserted in line 1. No other place is reserved for the offense of conviction on this form and the above quoted paragraph stipulates that the Parole Board's deliberations shall *begin* by considering the offense of conviction. Apparently, the Parole Board has another opinion. We have studied one hundred and twenty Parole Board decisions utilizing this form. In conducting this review, we have looked up the offense of conviction, located its appropriate offense category in Ohio's Guidelines, and we have checked whether the number placed in Item 1 matches the offense of conviction. In conducting this analysis, we wanted to ascertain how many of these decisions begin with the offense of conviction and how many began with something other than the offense of conviction. *[Please see Chart B, Total Offensive Behavior vs. Offense of Conviction]*

For 75 of these 120 decisions (62.5%), the offense category reflects a number which *does not match* the offense of conviction from the trial court. In the remaining 45 decisions, Item 1 did reflect the offense of conviction from the trial court. In paragraph 12 of Mr. Spence's affidavit, he states *the APA does not frequently depart from the offense of conviction in classifying offense behavior*. In more than three out of five of its decisions, the Adult Parole Authority does not even acknowledge the trial court's offense of conviction. For every one of these 75 Parole Board Decisions, the offense of conviction was discarded before the panel's deliberations *even began*.

Even this observation does not completely expose the full depth of the insular thinking of a Parole Board panel. On page two of this decision form, Item 8 states:[128]

> 8. After review of all relevant factors and information presented:
>
> A. A decision outside the guidelines at this consideration is not warranted. Therefore, the Board's decision is within the applicable guideline range. . .
>
> C. A decision (Above/Higher) (Below/Lower) the guidelines is warranted because:

[128] Item 8 has three options. The middle option is not germane and its text is set out here. This reads: B. Rescission guidelines were used to address rescission behavior since the last time setting hearing, and the aggregate guideline range is exceeded.

When a decision begins with an offense category higher than the offense of conviction, *A will be checked*; stating a decision outside the guidelines is not warranted. This is even worse than discarding a trial court's decision before deliberations begin. By checking *A*, the trial court decision is rendered irrelevant. The offense category has been pegged to a crime different from the offense of conviction, but *the result is still inside the guidelines*. If this result is still inside the guidelines, *there is no other decision*. After the parole board conducted its review, the trial court decision was effectively erased.

When item *C* is checked, it is never followed with a circle around *Below/Lower* followed by a return to the offense of conviction. Instead, it is always the *Above/Higher* box that is circled, followed by *another upward departure*, making the parole board decision even more distant from the offense of conviction. Again, *C* will be checked in such a way as to imply that the trial court's offense of conviction is not even pertinent.
For the 45 Parole Board Decisions which began with the offense of conviction, only 16 decisions [13%] *began and finished* with the trial court's offense of conviction. For the other decisions, there was an upward departure, and this necessarily requires a departure from the offense of conviction.

If permitted to pursue discovery and issue subpoenas, Plaintiffs are certain that we will find departures from the offence of conviction in Mr. Spence's decisions running equivalent to the number in this sample, eight or nine out of ten. Mr. Spence's statement, *the APA does not frequently depart from the offense of conviction in classifying offense behavior* constitutes another example of a deliberate misrepresentation made with full knowledge of the statement's falsity and done for the purpose of misleading and misrepresenting to this Court the routine practice of departing from the trial court's offense of conviction when making parole review decisions.

In practice, Parole Board decision-making departs from the offense of conviction in a predictable and consistent manner. Just as testimony of Parole Board Members and Hearing Officers revealed unwritten rules governing decision-making, there are unwritten guidelines. You can usually count upon finding these unwritten guidelines driving decisions in the same cases where the offense of conviction is discarded on Line One.

Unwritten Guideline 1: The first offense category worthy of using is Category 8. Anything under Category 8 requires an upward departure. This phenomenon becomes apparent when we examine Named Plaintiffs convicted of Felonious Assault, Attempted Felonious Assault and Aggravated Felonious Assault. The highest offensive category

engaged for these crimes is Category 7. *[Please see Chart C, Assault Related Convictions]* After these cases have been considered by the Parole Board, none of these offenders are left with an assault conviction. Instead, the Parole Board will shop for an offense contained in the indictment that will lift these offenders to a higher offense category and change the conviction to the crime dismissed in their plea agreement. As a result, convictions for half these offenders have been changed from Assault to Rape, Aggravated Burglary, Kidnapping or Murder. If there is nothing in the indictment that will engage a higher offense category, the Parole Board panel will do an upward departure anyway to at least Category 9, an offense category appropriate for Attempted Murder. In some cases, the criminal conduct is not even labeled by the parole board panel. For our purposes, these unlabeled cases are called Attempted Murder.

Unwritten Guideline 2: Sex offenders have never *attempted* anything. Although Section 102(B) of the Guidelines provides a clear instruction for scoring an *attempt* one category below the underlying offense, in Parole Board deliberations, there is no such thing as *attempt* in a sex offense. In all cases, the offender committed the underlying offense. To see this unwritten guideline manifested in decision-making, *please see Chart D, Sex Related Offenses*. One out of five sex offenders are convicted of either Attempted Rape, Attempted Felonious Sexual Penetration or Attempted GSI. After a Parole Board panel has reviewed the case, all of these crimes are rounded upward to rape.

Unwritten Guideline 3: There is no such thing as Attempted Murder or Conspiracy to Commit Murder, even though Sections 101 and 102(A) provide a clear instruction to score *Conspiracy* and *Attempt* two categories lower than the underlying behavior. *[Please see Chart E, Homicide Offenses, graph on right.]* The two pie pieces representing Attempted Murder and Conspiracy to Commit Murder disappear in the right graph. These offenders are elevated to Category 11, reserved for murder.

Unwritten Guideline 4: There is no such thing as a lesser included offense for a homicide or sex offender. In the case of sex offenders, everybody committed rape.[129] *[Please see Chart D, Sex Related Offenses, graph on right.]* In the case of homicides,

[129] According to a Department of Rehabilitation and Correction study of sex offender convictions in 1989, the largest percentage (40%) were convicted of Gross Sexual Imposition. Next came Rape (28.1%), Sexual Battery (23.0%), followed by Corruption of a Minor (8.1%) and other miscellaneous offenses (0.8%). *See* Ten Year Recidivism Follow Up of 1989 Sex Offender Releases, Paul Konica, author, Nov. 2000, at p. 4. Plaintiff's Exhibit 22.

everybody committed murder. *[Please see Chart E, Homicide Offenses, graph on right.]* Voluntary Manslaughter in the right graph actually includes offenders convicted of Aggravated Vehicular Homicide in the left graph. Involuntary Manslaughter retains offenders because Offense Category 11 (running 15 to 20 years) is available for this crime without a departure from the guidelines. This is a thinly disguised sentence for Murder.

Unwritten Guideline 5: In Chapter 10, Subchapter A - Adjustments to Offense Category, Item I, at pp.'s 52-53, there is a provision for a downward adjustment of the offense category if the offender played a minor role in the offense. The unwritten rule is that nobody has ever played a minor role in any of these crimes.[130] Rather, the operative rule can be found in Part D: Guideline Application Procedures, Section 104(g). An offender is responsible for their own conduct and for everyone that they aided or abetted, regardless of whether the resulting conduct was intended or foreseeable.

Unwritten Guideline 6: Homicide and sex offenders are destined to do life sentences, regardless of how many programs they take, regardless of their progress in rehabilitation and regardless of the fact that they have no prior criminal history. These offenders have been marked as *Part 1 Violent Offenders* and are going to be held for 85% or more of their maximum sentence.

These unwritten guidelines necessarily require departures from the trial court's offense of conviction. Returning to our survey of 120 decisions memorialized by two page parole board decisions, we found parole board panels giving each offender upward departures of two or more vertical ranges. Over a larger sample of 193 offenders, upward departures averaged 2.5 vertical ranges. *[Please see Chart B, graph on right.]*

Mr. Spence's affidavit states in Paragraph 1 that he is in charge of Quality Assurance for the Ohio Parole Board. We have hundreds of complaints filed by our Named Plaintiffs describing the above violations of Parole Board guidelines and seeking

[130] After examining hundreds of parole board decisions, only one offender has been found to have played a minor role in a crime. Coy Downey A259971 was convicted of Aggravated Robbery and Drug Abuse. Based on his court conviction, he belonged in Category 9. The Parole Board panel found him guilty of Aggravated Murder and placed him in Category 13, equivalent to the category of a co-defendant. He was then found to have played a minor role and his level was reduced to Category 11 for Murder. Downey was still two vertical ranges above his court conviction after this downward departure. He did not receive the benefit of this provision.

reconsideration. As Chief of the Parole Board's Quality Assurance Group, Mr. Spence is privy to facts and statistics maintained by computers operated by the Department of Rehabilitation and Correction. It is inconceivable that Mr. Spence is not aware of these complaints of violations submitted by offenders. It is equally inconceivable that he can make a representation to this court that the Adult Parole Authority *does not frequently depart from the offense of conviction in classifying offense behavior*.

The statement which appears in paragraph 12 is more than false. This statement reflects fraud. It has been made with the specific intent to portray Parole Board decision-making as something that it clearly is not.

* * * * *

Thirteenth Issue of Fact - Because the Parole Board's insistence upon the fullest possible information has led to widely different results relating to convictions, further discovery is needed to ascertain which entity, Ohio trial courts or the Parole Board, are arriving at proper results.

Paragraph 11 of the Spence Affidavit states:

> "The APA, like all parole agencies, must make difficult, predictive decisions as to whether, when and how an offender may be safely released before the end of his judicially imposed sentence of incarceration. It is absolutely essential that its staff have access to the fullest possible range of reliable information to minimize the risk of error in those decisions. Anything which restricts access to that information increases the risk of error and hence, the risk of injury to innocent third parties."

We have just seen how the Parole Board's access to *the fullest possible range of reliable information* has lead to markedly different results when compared to Ohio's trial courts. Out of 21 offenders convicted of Assault charges, four by jury trials, not one remains convicted of assault. After parole reviews, they are all convicted of other crimes.

Assuming the statement of Richard Spence is true and the Parole Board does genuinely need access to the fullest possible range of reliable information, a corollary necessarily follows. Somebody is awfully intelligent and the other party is pretty obtuse. Because of the divergent results produced, we do find a genuine issue of fact here.

Additional discovery is necessary to ascertain which of these two parties, the Ohio Parole Board or Ohio's trial courts, deserves the dunce's cap and which deserves the *star*.

* * * * *

Fourteenth Issue of Fact - Have the current Guidelines truly been adopted?

Paragraphs 1 and 2 of the Richard Spence affidavit state:

> 1. I am Chief of Quality Assurance for the Ohio Parole Board ("OPB") and have worked in probation and parole since 1977. I have personal knowledge of the matters set forth in this affidavit as a result of that work.
>
> 2. In April of 1998, the Ohio Adult Parole Authority ("APA") adopted guidelines to aid in the discretion given by Ohio Rev. Code §2967.03. Those guidelines were further refined in 2000 as part of a quality assurance process. (The "Current Parole Guidelines").

There is no mention of a Parole Board Quality Assurance Group in either Policy 501-36[131] or Policy 501-38[132]. We do know that a Quality Assurance Group exists within the Parole Board because our Named Plaintiffs have written numerous letters to this entity and they have received replies. We further believe that the Parole Board Quality Assurance Group was created by retired Parole Board Chairman Margarette Ghee to monitor compliance with the newly issued Parole Board Guidelines.

There is a delegation of discretion to the Ohio Parole Board by Ohio's General Assembly. Ohio Rev. Code §2967.03 states in pertinent part:

> "The adult parole authority ... may exercise its functions and duties in relation to the parole of a prisoner who is eligible for parole upon the initiative of the head of the institution in which the prisoner is confined or

[131] Defendant's Exhibit B.

[132] Defendant's Exhibit C.

> upon its own initiative.... The authority may investigate and examine, or cause the investigation and examination of prisoners... concerning their conduct in the institutions, their mental and moral qualities and characteristics, their knowledge of a trade or profession, their former means of livelihood, their family relationships and any other matters affecting their fitness to be at liberty without being a threat to society..."

There is also a limit placed upon the exercise of this discretion in Policy 501-36. Part V states:

> "Decision making involves the exercise of discretion. Unlimited discretion is to be eliminated. Necessary discretion is to be structured. Persons who are stakeholders in the decision-making process are notified pursuant to the Ohio Revised Code. Fairness and equality shall be the standards by which inmates, releasees, staff and the public are treated."

When these Guidelines were voluntarily adopted, limits were placed on the Parole Board's discretionary power. At minimum, these Guidelines express the manner in which the Parole Board's discretion has been structured. We can also accept them at face value. These Parole Board Guidelines can be taken to represent what, in fact, the clear language of the text in fact represents. Creating a Quality Assurance Group to monitor the implementation of these guidelines would underscore this point. Mr. Spence is in charge of monitoring compliance with these guidelines. This is the logical implication of his title as Chief of Quality Assurance.

In the prior section, we have seen how Ohio Parole Board decisions are making a shambles out of Ohio trial court convictions. Our next set of charts demonstrate how Ohio Parole Board decisions are doing the same identical thing to guideline sentences.

The same offenders convicted of assault charges in Chart C, appear again in the next chart. This time, the focus is on sentencing and compliance with the Ohio Parole Board's Guidelines. *[Please see Chart F, Guideline Sentencing for Assault Offenders.]* The graph on the left shows that if the Parole Board's Guidelines had been properly applied, most of these offenders would have been placed in Offense Category 7, and the rest would be in categories 4 and 5. Instead, all of these offenders have been moved to Category 9 and higher. This is at least a two vertical range upward departure for everyone and much more for offenders found guilty of Attempted Assault.

Voluntary Manslaughter presents another opportunity to focus upon compliance with the guidelines. Unlike Involuntary Manslaughter, Ohio's treatment of Voluntary Manslaughter resembles the Federal Guidelines. Category 9 has been designated as the only category applicable to Voluntary Manslaughter.[133] *[Please see Chart G, Guideline Sentencing for Voluntary Manslaughter.]* Not one of the offenders convicted of Voluntary Manslaughter has remained in Category 9. They have all been moved to Category 10 and higher. When you enter offensive categories 10, 11 and 12, the time increments to be served are five additional years per range. 13 out of 17 of these offenders received upward departures of *more than one* vertical range. These offenders are being required to do double and triple the time required of their guideline, and Ohio's guideline is pitched three years higher than its Federal counterpoint.[134]

Another example is Murder. *[Please see Chart H, Guideline Sentencing for Murder Offenders.]* All 22 offenders should be placed in Category 11. After the Parole Board has undertaken its review, only five of these offenders remain in their proper category. The remaining 17 offenders have been moved to categories 12 and 13.

At Chart A, we looked at a comparison of Federal and Ohio Guidelines for Involuntary Manslaughter. In that chart, the Ohio Guidelines were properly applied to offenders. In the next chart, we are repeating the first two charts set out in Chart A and adding a third chart, to show where these offenders were actually placed in the guidelines. *[Please see Chart I, Guideline Sentencing for Involuntary Manslaughter.]* In perfect conformity with the prior unwritten guidelines, offenders belonging in Categories 6 and 8 have moved up to 9 and higher. Most of these offenders are in Categories 10, 11 and 13. Involuntary Manslaughter usually incorporates acts taken in self defense.

We have just reviewed 79 offenders.[135] Only five Named Plaintiffs remain in

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[133] One major difference between the Ohio and Federal Guidelines treatment of Voluntary Manslaughter concerns the offense category selected. Federal Guidelines employ Category 7 and Ohio employs Category 9. *See* 28 CFR §2.20, Chapter Two, Subchapter A, Section 202.

[134] This calculation was obtained by calculating the mid-point for Category 7 of the Federal Guidelines, which is 66 months or 5.5 years, and comparing this to the midpoint of Category 9 in Ohio's Guidelines, which is 102 months or 8.5 years. In both cases, the low end of the recidivism scale was employed.

[135] Felonious assault, voluntary manslaughter and murder are the only categories that can be readily checked for compliance. Sex offenders are spread out over many offense categories, as are property

their correct offensive category. The guidelines have been misapplied in 93.6% of these cases. When this happens, offenders complain to Quality Assurance and seek reconsideration. These requests are routinely denied.[136] Three words appear in many of these denial letters: Total Offensive Behavior. This refers to looking beyond the offense of conviction to the total behavior of the offender, including offenses dismissed pursuant to a plea.

Mr. Spence can be charged with knowledge of how the term Total Offensive Behavior is employed because of his position as Chief of Quality Assurance. These letters are issued by the department he runs. To understand what Total Offensive Behavior actually means, *please see Chart J, Parole Board Decision Making.* Based upon a review of hundreds of Parole Board decisions, the biggest single component of Total Offensive Behavior consists of a new interpretation of facts. As the need to justify more upward departures occurs, the facts relied upon change and become progressively more gruesome.[137] Next comes an exercise of pure discretion usually marked by the phrase, *"Offender's offensive behavior is higher than indicated by their criminal history risk score and does not properly reflect the threat posed by this person to society ..."* Information from an indictment comes next, followed by Victim Impact statements, a distant fourth.

Driven by the Total Offensive Behavior rationale, 82.4% of Parole Board decisions are either Upward Departures or edicts to remain incarcerated until the expiration of their maximum sentence. Many offenders in the block marked *No Departures* are accidents. The Parole Board stopped issuing continuances for longer than ten years.[138] Many sex offenders come to the Parole Board for their first hearing,

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offenders and involuntary manslaughter offenders.

[136] Requests for review are so routinely denied, the exercise is practically futile. In our complaint, we attached almost forty such letters as Exhibit 35, and all of them are denials.

[137] Ricky Palmer A202864 is an example. He was indicted for gross sexual imposition. His decision dated August 18, 1999 states: "On 1-5-87, the inmate along with two codefendants forced a female victim into his car and drove to an isolated area. He sexually abused the victim by fondling her vaginal area." For this hearing, his offense category was rated 9. On July 10, 2000, the Parole Board decision states: "On 1-5-87 the inmate and two codefendants kidnapped the female victim, masturbated on her (unintelligible), fondling her vagina and the inmate put his fingers in her vagina." After this hearing, the offensive category rose to Category 10.

[138] *See* Department of Rehabilitation and Correction Policy 501-67, Dec. 22, 2000. Plaintiff Exhibit 23.

and panels find they can be continued ten years and still remain inside their proper guideline. In due course, these sex offenders will become upward departures.[139] As Chart J states, not one of the offenders in the block reflecting *No Departure* has been given a Preliminary Release Date.

In a larger study of 193 Named Plaintiffs, we inquired as to how many cases have been considered *and resolved* within the Parole Board Guidelines.[140] To be considered within the confines of the guidelines, these variables must be present. The offender is placed in the proper category for their crime based upon the court conviction and not upon the total offensive behavior criteria. This offender has been reviewed and their case has been resolved. They have been given a Preliminary Release Date which calls for them to exit the system while still inside their guideline, properly applied. If they are in their proper guideline but they have no preliminary release date, their case is unresolved.

We found one Named Plaintiff whose case fits this criteria. *[Please see Chart K, Compliance with Guidelines.]* In the bar graph on Chart J, we have listed the reasons why our Named Plaintiffs are out of compliance. The list comes to more than the 193 studied, and this is not an error. Many Named Plaintiffs are out of compliance for more than one reason.

We concede that the Ohio Parole Board issued a news release and announced to the public that new Parole Guidelines were adopted. We concede that a manual has been published setting forth these guidelines, complete with a Preface written by the Parole Board Chairperson. We further concede that a Quality Assurance Group has been formed to monitor compliance with these guidelines. In accord with the Spence Affidavit, these Parole Guidelines have been imbued with all of the trappings of legitimacy, save for one.

Nobody on the Ohio Parole Board is following these guidelines.

The clear language of the text in these guidelines *is not* being applied. Instead,

[139] Plaintiffs Clellan Callahan A192693, Timothy Kinkaid R136623 and John Orchard A257158 are examples of first time offenders with extensive programming that have done everything they can be asked to do. Nevertheless, they are getting life sentences. In the Parole Board Decision for James Pless, the panel telegraphed their intent to continue him at their next hearing by underlining the words, *at this* consideration *is not* warranted. Plaintiff's Exhibit 24.

[140] Named Plaintiffs convicted of Aggravated Murder were excluded from this sample.

there is another driving force behind parole board decision-making. It is Total Offensive Behavior. In decision after decision, and in reconsideration request after reconsideration request, Total Offensive Behavior is trumping the application of a specific guideline to its designated set of facts.[141] This term, Total Offensive Behavior, is not defined in the Ohio Guidelines. Total Offensive Behavior is not even discussed in Part D: Guideline Application Procedures. This term dwells *outside* the Guidelines.

We submit that these Ohio Guidelines have been converted into a tool of deception. They are offered to this Court as evidence to prove that the Parole Board has voluntarily imposed restraints upon its discretion. But, the decisions tell another story. These guidelines are a camouflage. They exist to place a patina of legitimacy over the parole board's decision-making. The real operative mechanism guiding and dictating Parole Board decision-making is Total Offensive Behavior, which allows for unbridled exercise of discretion. The concept of Total Offensive Behavior could never stand alone. It is a blatant attempt by the Parole Board to remove the judiciary's conviction from these criminal cases and substitute its own crime. But,Total Offensive Behavior, coupled with these guidelines, has successfully endured without any serious threat for four years.

We submit that the Parole Board has not accepted restraints upon the exercise of its discretion as stipulated in Policy 501-36, and these Guidelines are being offered to this court as a ruse. Further, because Mr. Spence has been charged with the responsibility of monitoring these guidelines and insuring their proper application, it is further submitted that Mr. Spence is positioned at the pin-point center of this ruse.

* * * * *

Fifteenth Issue of Fact - Is the practice of reversing a jury acquittal proper, utilizing the Parole Board preponderance of the evidence standard?

In Paragraph 15 of his affidavit, Mr. Spence states:

> "The APA does, in extremely rare situations, consider conduct underlying charges for which an offender has been acquitted in

[141] *See* Plaintiff's Exhibit 25, consisting of 11 letters responding to a reconsideration request, each of them denying this request based upon Total Offensive Behavior. These letters were previously submitted as part of Exhibit 35 to the original complaint.

> determining how much time that offender should serve on an indeterminate sentence imposed for a related offense. However, that practice is extremely rare and is becoming less and less frequent over time. The APA only engages in that practice when the conduct is established by a preponderance of the reliable evidence and that practice is followed for the same reason that the preponderance standard is employed - to provide its decision-makers with the fullest possible range of reliable information, as discussed in paragraphs 11 and 12."

In a survey of three hundred offenders, we found fifty-eight Named Plaintiffs convicted by Jury Trials. *[Please see Chart L, Jury Verdicts Honored and Violated by the Parole Board.]* Of this number, twenty suffered the reversal of an acquittal. This is 34.5%. One out of three cases does not strike us as an *extremely rare situation*.

In practice, a jury acquittal will be reversed in a very predictable and consistent manner. When the government wins and proves the charges contained in the indictment, there is no change. Acquittals are reversed when the jury returns a verdict for a lesser charge or fails to convict. This does not happen some of the time. It happens *every* time. Earlier, we set out five Unwritten Guidelines. Every one of the twenty jury acquittals reversed by a Parole Board decision can be explained through these Unwritten Guidelines.

The first Unwritten Guideline states that only Offense Category 8 and higher is worthy of using. Named Plaintiffs Goodwin A285563,[142] Dixon A253752,[143] Coyne A178803[144] Porter A295773,[145] Rollins[146] and Nicholas[147] engage this guideline. If the

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[142] Jeffrey Goodwin A284463 was acquitted of carrying a concealed weapon. The Parole Board found him guilty of carrying a concealed weapon and then committing a robbery with this weapon.

[143] Mark Dixon A253752 was acquitted of child endangering with a cruelty spec. The Parole Board reversed this decision and found not only a cruelty spec but also a sex specification to his crime.

[144] John Coyne A178803 was acquitted of Attempted Murder and Murder, but found guilty of Felonious Assault. He actually falls within two Unwritten Guidelines. The Unwritten Guideline that applies the culpability of a co-defendant to an offender applies here as well.

[145] Eldepalo Porter A295773 was acquitted of Aggravated Robbery, but convicted of Attempted Aggravated Robbery. The Parole Board found him guilty of Aggravated Robbery.

[146] Mancel Rollins A204096 was convicted of Abduction and Aggravated Assault. He was acquitted

guidelines had been properly applied to their offense of conviction, they would be in Category 7 or lower. The second Unwritten Guideline is that sex offenders never attempt anything. This applies to Frazier A285185[148], Miller A286274[149], Bass A165377[150] and McMillan A214061[151]. The third Unwritten Guideline is that there is no such thing as Attempted Murder or Conspiracy to Commit Murder. This applies to Teets W019513.[152] The fourth Unwritten Guideline is that there is no such thing as a lesser included offense for a homicide or a sex offender. Wasserman W025063[153], Finley A308859[154], Ross W017242[155], Wilder A201280[156], Stewart W037211[157]

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of Murder. The Parole Board has found him guilty of Murder. The fifth Unwritten Guideline could also be applied to him, that nobody has ever played a minor role in a crime and every offender is liable for the actions of all co-defendants.

[147] Ronald Nicholas A179596 was convicted of Aggravated Robbery, but acquitted of Kidnapping. The Parole Board found him guilty of Kidnapping to engage its higher offense category.

[148] Timothy Frazier A285185 was convicted of one count of rape, and acquitted of kidnapping and multiple counts of rape. The Parole Board found that he committed multiple counts of rape as well as kidnapping.

[149] Donald Miller A286274 was tried for multiple counts of rape and found guilty of only one rape, plus several counts of sexual battery. The Parole Board has reversed the rape convictions on the multiple counts. Another Unwritten Guideline, that there is no such thing as a lesser included offense, also applies here. Sexual battery has been rounded upward to rape.

[150] Kenneth Bass A165377 was acquitted of rape and convicted of complicity to commit rape. The Parole Board has found him guilty of rape.

[151] Curtis McMillan A214061 was acquitted of rape, but found guilty of Attempted Rape. The Parole Board has found him guilty of rape.

[152] Beverly Teets W019513 was acquitted of Aggravated Murder but found guilty of Conspiracy to Commit Murder. The Parole Board is making her serve the guideline sentence for Aggravated Murder.

[153] Peggy Wasserman W025063 was acquitted of murder and found guilty of the lesser charge, Involuntary Manslaughter. The Parole Board is requiring her to do 15 years, which is the sentence for Murder. Another Unwritten Guideline applies to her. Nobody plays a minor role in a crime and she is being held accountable for the conduct of her co-defendant.

[154] Michael Finley A308859 was acquitted of Involuntary Manslaughter but convicted of Aggravated Vehicle Homicide. The Parole Board required him to do the time appropriate for Involuntary Manslaughter.

[155] Sandra Ross W017242 was acquitted of Aggravated Murder but convicted of Voluntary

McNeil W021848[158], Oswalt A204095[159] and Palmer A202864[160] fit this guideline. The Fifth Unwritten Guideline, that nobody plays a minor role in a crime and each offender is responsible for actions of co-defendants, applies to Alexander A198652.[161]

Mr. Spence states in paragraph 15, *The APA only engages in that practice [reversal of a jury's acquittal] when the conduct is established by a preponderance of the reliable evidence*. There is something more profound at issue here, than just the question of how often this practice of reversing a jury's acquittal occurs.

Article IV, §3 of the Ohio Constitution, sets forth the authority for an Ohio Court of Appeals. Paragraph (B)(3) of this section states in pertinent part:

> (B)(3) "A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B)(2) of this article. *No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.*" [Itall added for emphasis.]

Manslaughter. She is being required to do a sentence appropriate for Aggravated Murder.

[156] Gary Wilder A201280 was acquitted of abduction. The Parole Board has found him guilty of not just abduction, but of kidnapping. This crime, when added to his offense of conviction rape, allows the Parole Board to elevate him from Category 9 to 10.

[157] Gerry Stewart W037211 was acquitted of rape but convicted of Gross Sexual Imposition. The Parole Board has found her guilty of rape.

[158] Helen McNeil W021848 was acquitted of Aggravated Murder but convicted of Involuntary Manslaughter. The Parole Board is requiring her to do the time appropriate for aggravated murder.

[159] Charles Oswalt A204095 was convicted of Voluntary Manslaughter and acquitted of Aggravated Murder. The Parole Board is making him serve a sentence appropriate for Aggravated Murder.

[160] Ricky Palmer A202864 was acquitted of Felonious Sexual Penetration, but convicted of Gross Sexual Imposition. The Parole Board has found him guilty of Felonious Sexual Penetration. In the Guidelines, this crime is equivalent to rape. *See* Parole Board Guidelines, Sections 231, 232.

[161] Lavaniel Alexander A198652 was convicted of Aggravated Robbery. He was acquitted of Murder, a crime committed by an accomplice. The parole board is holding him accountable for this murder.

Ohio's Constitution requires much more than a preponderance of the evidence. You need a unanimous decision from all three appellate judges. Considering the credibility attaching to a jury's verdict in Ohio, this writer finds Mr. Spence's statement, the Parole Board *only engages in that practice when the conduct is established by a preponderance of the reliable evidence* to be singularly offensive. This also underscores the naiveté of these decision-makers regarding the rules of evidence. Reversing even one jury acquittal by resting upon a finding of *preponderance of the evidence* is spurious.

Attorney Barry Wilford challenged the Parole Board's preponderance of the evidence standard.[162] An extract of his letter for client Thomas Brown A150883 follows.

> "In this case, I have obtained all police investigation reports pursuant to a request for public records, as well as the presentence investigation report that was prepared prior to sentencing. I have also reviewed the sworn testimony of State's witnesses Keith Williams and Andrew D. Meluch, Ph.D. [Juvenile Court Clinical Psychologist] at Brown's juvenile court bind-over hearing, as well as the transcripts of the plea and sentencing hearings. I say without fear of contradiction that there is no evidence in any of these records that supports a finding that this was a purposeful killing. ..."
>
> "I submit from the above that no preponderance of the evidence can support the finding by the panel of the Board that saw Brown that this was a purposeful killing, and that if the panel had enjoyed access to the appended factual testimony and other materials that it would have determined the offense conduct to be other than Category 13."[163]

Mr. Wilford's request for reconsideration was perfunctorily denied.[164] His client

[162] *See* Plaintiff's Exhibit 26 consisting of Attorney Barry Wilford's letter dated June 14, 2000 to Senior Hearing Officer Thomas Schneider. Four letters from the Parole Board, including one letter which answers Mr. Wilford's letter, are also included in this exhibit. This correspondence is used with permission from Attorney Wilford.

[163] Category 13 is effectively life. It requires 300 months or 25 years.

[164] On September 11, 2000, Hearing Officer Richard Fitzpatrick responded as follows. "The submitted packet of information was reviewed and discussed with Quality Assurance on September 8,

remained in Category 13. The Parole Board never revealed the information relied upon in their file, which they considered persuasive and justified a finding of aggravated murder. And the Parole Board cannot be compelled to reveal this information.[165]

After reviewing hundreds of Parole Board decisions and accompanying judgments, indictments, and some trial transcripts, this writer is convinced that Parole Board decision-makers do not possess even a rudimentary grasp of the rules of evidence. And they have no desire to learn. *Preponderance of the evidence* has been converted into another ploy. Like Total Offensive Behavior, this term is used to subjugate and justify departures from the guidelines while preserving the parole board's unbridled exercise of discretion. Without an understanding of the rules of evidence, it is impossible to comprehend and apply the *preponderance of the evidence* standard.

In Mr. Spence's affidavit, he refers to *preponderance of the evidence* no less than 5 times.[166] Unlike Total Offensive Behavior, *Preponderance of the Evidence* is defined in the guidelines.[167] In many denial letters from Quality Assurance, the terms *Total Offensive Behavior* and *Preponderance of the Evidence* are used in synchronization. For example, it will say, "total Offensive Behavior *as determined by* a preponderance of the evidence." These terms, *total offense behavior* and *preponderance of the evidence*, are both judgment calls. They are the product of facts and reasons which fall uniquely within the province of the decision-maker to know. More importantly, this is information that an outsider *cannot know*. Without access to a parole file, it is impossible to know the facts and reasons which support a judgment. Reliance upon these explanations makes it impossible for an offender to engage issues and point out errors.

Curtis McMillan A214061 is one of twenty Named Plaintiffs with a reversed jury

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2000. Based upon the offender being convicted of a Murder charge that involved an aggravated robbery offense, it was their decision to deny the reconsideration for a new hearing at this time." Mr. Wilford's quoted text is used with his permission.

[165] *See* State ex rel. Lipschutz v. Shoemaker (1990), 49 Ohio St. 3d 88, at 90.

[166] Once in paragraphs 13, 14 and 16. Twice in paragraph 15.

[167] *See* Part D: Guideline Application Procedures, Section 104(c),(d) and (e). Its definition reads, "... evidence that is more credible and convincing that the evidence offered in opposition to it; and that, taken as a whole, shows that the fact sought to be established is more probable than not."

acquittal and, he is also *that one*.[168] Mr. McMillan's jury acquitted him of rape. He was convicted of Attempted Rape. Mr. McMillan has been to the Parole Board four times. At his third hearing, the new guidelines were properly applied and Mr. McMillan was placed in offense category 8.[169] On December 4, 2000, at a Full Board Hearing, this panel decision was reversed and Mr. McMillan's conviction was changed to rape.[170]

This writer has reviewed Mr. McMillan's parole board decision. There is no evidence of any agonizing and scrutinizing over evidence preparatory to reaching this verdict. In fact, this writer does not believe the Full Board's decision had anything whatsoever to do with a finding related to Mr. McMillan's conduct consistent with the *preponderance of the evidence*. This decision had everything to do with the nature of Mr. McMillan's crime. He is a sex offender.

Something is wrong with this picture. A regular panel hears Mr. McMillan's case and places him in his proper guideline. Instead of letting this decision stand, the Full Board intervenes and conducts a COBR hearing. At this Full Board hearing, the panel's decision is rejected and Mr. McMillan is moved upward two vertical ranges. He is now required to serve 15 years, his maximum sentence. Earlier, we quoted from the testimony of Mr. Thomas Schneider before the State Highway Patrol. Mr. McMillan's experience corroborates Mr. Schneider's statement, that sex offenders must serve life sentences even though they are otherwise eligible for parole. It also demonstrates the Parole Board's propensity to prejudge sex offenders. This happened at a hearing of the Full Board.

Robert Crider A174562 was indicted for Aggravated Burglary, Aggravated Robbery and Rape. His jury convicted him of Aggravated Burglary, Aggravated Robbery and Rape. You would expect to see Mr. Crider's name in the segment on Chart L designating *No Change*. Somewhere in the description of the facts for Mr. Crider's crime, his panel found kidnapping. This charge was never even considered by his jury. Mr. Crider was found guilty of kidnapping by the Parole Board and this charge was then

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[168] *See* Affidavit of Curtis McMillan, dated May 24, 2002, Plaintiff's Exhibit 27.

[169] Mr. McMillan's October 26, 2000 decision engages §231B for the rape of an adult woman and Category 9, and §102, referencing Attempt and one range downward adjustment.

[170] *See* copy of Minutes of the Central Office Board Review dated December 4, 2000, attached to Mr. McMillan's Affidavit, Plaintiff's Exhibit 27.

used to elevate him from offense category 9 to 11. During Mr. Crider's incarceration, he attended college and graduated cum laude. He also maintained a completely clean institutional record and acquired several certifications from vocational schools.

We submit that the reversal of Mr. McMillan's jury acquittal and the finding that Robert Crider committed kidnapping has more to do with the fact that they are both sex offenders and destined to do life sentences, and nothing whatsoever to do with conduct established by a preponderance of the evidence.

Parole Board decisions reversing jury verdicts are the rule, not the exception, when the state has failed to prove the charges contained in the indictment. One Ohio appellate court has already observed:

> "By use of this system, the state is getting a result indirectly that it could not get directly.
>
> "Use of the Authority's theory is very dangerous. It virtually eliminates the constitutional safeguards that are designed to protect the liberty of the accused. The state is treating the person as being convicted of what the state alleged without having to prove it beyond a reasonable doubt at trial. In this case, the Plaintiff's actual conviction of involuntary manslaughter is ignored. It is as if it never happened."[171]

If we include charges never presented to a jury, as well as the reversal of acquittals, roughly two out of three jury verdicts are reversed or trumped by new charges never considered by the jury. The statement made by Mr. Spence in Paragraph 15, that the practice of reversing a jury's acquittal is extremely rare, constitutes another deliberate misrepresentation, made with full knowledge of the statement's falsity and done for the purpose of misleading and misrepresenting Parole Board decision-making to this Court.

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Sixteenth Issue of Fact - Is the preponderance of the evidence standard employed by the Parole Board truly accomplishing its purpose of keeping them as fully informed as possible; or, is it acting as an enabling device to help shape and support a

[171] Lee v. Ohio Adult Parole Authority, et al., Court of Appeals for Montgomery County, C.A. Case # 18833, at p. 4.

preconceived end?

In paragraph 13 of this affidavit, Mr. Spence states:

> "Restricting officials to consideration of only information that could be proven beyond a reasonable doubt would prevent consideration of much otherwise reliable data of great relevance to the safety of a potential parole release. The APA therefore considers data that is established by a preponderance of the reliable evidence so that its decisions may be as fully informed as possible."

In the first section describing the parole review hearing, we examined the forms prepared for the Parole Board preparatory to this hearing. Instead of finding wide ranging, exploratory questions, we found targeted, focused queries. Instead of trying to be fully informed, there is every indication from forms and from written comments that parole board decision-makers possess teleological qualities. They are being directed toward a very specific goal, namely to find justification for giving an offender more time.

The same applies to the so-called preponderance of the evidence standard embraced by Mr. Spence in his affidavit. Earlier, we discussed how good reports meant nothing to parole board panels. Bad records, on the other hand, mean everything.[172] We submit that there is no such thing as a preponderance of the evidence standard being employed. Instead, parole board panels are prejudging offenders,[173] and then looking for any record they can find to support this preconceived decision. When there is evidence in the file which points the other direction, these decision-makers do not want to know about it.[174]

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[172] *See* Affidavit of Bev Seymour, Plaintiff's Exhibit 14.

[173] *See* Testimony of Parole Board Executive Assistant Thomas Schneider, virtually admitting to prejudging all sex offenders.

[174] *See* Affidavit of Dennis Andrew McCoy A163239, Plaintiff's Exhibit 28; Affidavit of Ernest L. McMinn A166105, Plaintiff's Exhibit 29; Affidavit of Thom Hoffman A137592, Plaintiff's Exhibit 12; Affidavit of William H. Mabry, Jr. A299944, Plaintiff's Exhibit 30; Affidavit of John Peters A209244, Plaintiff's Exhibit 31. Affidavit of Douglas Lawson A209547, Plaintiff's Exhibit 11. Affidavit of Sheila Rutkowski W033337, Plaintiff's Exhibit 32 (ignoring 80 certificates of programming).

Information does not need to be accurate. The Department of Rehabilitation and Correction is known for maintaining false and erroneous information on inmates, particularly on prior criminal history.[175] Even after this information has been disproved with FBI reports and Ohio Bureau of Criminal Investigation sheets, the parole board continues to find this information reliable because it supports their objective, which is to justify issuing more time. Mr. Spence is personally handling the parole review of Named Plaintiff Thomas L. Smith A299876. Mr. Smith's victim has submitted numerous letters. The parole board has also received video tapes and affidavits from Attorney Cherita Stout, proving that this victim is not telling the truth.[176] Mr. Smith remains incarcerated because the Parole Board continues to accord more weight to a categorically false and malicious letter from a victim, than to the evidence submitted by two attorneys.[177]

We believe a genuine issue of fact is presented regarding what Mr. Spence considers reliable information and whether or not the Parole Board is genuinely interested in a full range of information. We contend that the Parole Board is more interested in protecting their practice of relying upon unsworn third party statements to justify and preserve their own preconceived judgment so as to compel an offender to serve more time.

* * * * *

Seventeenth Issue of Fact - What evidence exists to support the fact that preponderance of the evidence expedites releases and, if such evidence exists, how does this compare to cases in which this standard has prolonged the release?

In paragraph 14, Mr. Spence states:

> "It is important to note that the preponderance of the evidence standard expedites parole release in a significant number of cases."

Mr. Spence has not volunteered even one example, in which preponderance of

[175] *See* Affidavit of Named Plaintiff Matthew Chappell A150801, Plaintiff's Exhibit 33. *See also* Affidavit of Lester V. Keran A149140, Plaintiff's Exhibit 34.

[176] *See* Affidavit of Thomas L. Smith A299876, Plaintiff's Exhibit 35.

[177] In addition to Attorney Cherita Stout, Mr. Smith has also hired Attorney Mary Ann Torian.

the evidence expedited a prisoner's release. Earlier, we made reference to Chart K titled Compliance with Guidelines. On this chart, 174 offenders have been given Upward Departures. Every one of these Upward Departures required an exercise of discretion which has prolonged a prisoner's release, not shortened it. And, every one of these decisions has been reached through a preponderance of the evidence standard. That is the only rule that the Parole Board uses for weighing evidence. This is also 174 cases in which the preponderance of the evidence standard resulted in prolonging a prisoner's release. We submit that another genuine issue of fact is presented by this statement. The number of cases prolonged by the preponderance of evidence standards greatly outnumbers the cases, if any exist, that have been expedited.

* * * * *

Eighteenth Issue of Fact - Under what circumstances will the Parole Board consider conduct constituting an uncharged criminal offense and, in particular, how prevalent is this practice among technical parole violators?

In paragraph 16, Mr. Spence states:

> "The APA will in very rare situations sometimes consider conduct constituting an uncharged criminal offense in determining how much of an indeterminate sentence imposed for related conduct an offender should serve. It does so for the same reasons discussed in paragraphs 11 and 12 above and does so where the conduct is established by the preponderance of the reliable information."

This must be a reference to the case of Plaintiff James Turner A219303. Mr. Turner has an uncharged criminal offense. He is being held for an indeterminate sentence for *related conduct*. This is precisely the sort of case that Mr. Spence references.

James Turner was released on parole. He was driving a vehicle owned by one of two passengers, both of whom were juveniles. Police stopped him when he failed to come to a complete stop for a stop sign. Mr. Turner instantly agreed to let the officers search the vehicle. A weapon and cocaine were found, both well hidden. The two juveniles admitted to owning both items. The police charged Mr. Turner with failing to come to a complete stop for a stop sign and for failing to wear his seat belt. In the context of Mr. Spence's statement, this is the *related conduct of an offender*. For these

traffic violations, Mr. Turner's parole was violated. After seeing the parole board, Mr. Turner has been sentenced to five years in prison. Despite being cleared by police officers who were present at the scene, in a position to observe the demeanor of all parties concerned and empowered to arrest Mr. Turner on the spot, the parole board determined, based upon its preponderance of the evidence standard, that Mr. Turner did in fact own this cocaine.

Mr. Turner's case is not an isolated event. Some of the most bizarre factual situations are presented by technical parole violators, and they comport perfectly with the facts outlined in Mr. Spence's 16th paragraph. Named Plaintiff Anthony Adley A368111 was accused of assault. The police did not believe his accuser and he was never charged with any crime. But the Parole Board found the victim's testimony completely credible and he is serving nine years for this uncharged crime. Terrance Blassengale, A185896, had his parole violated for failing to submit to a urinalysis test and for disobeying staff. That was in 1989. His guideline calls for 1 to 1.5 years for this technical violation. He is still incarcerated, 13 years later. To justify this decision, the parole board cited his bad institutional record. Mr. Blassengale's institutional record is clean. There are no disciplinary violations recorded on the front page of his parole board decision.

We submit that another genuine issue of fact is presented by paragraph 16 of the Spence Affidavit. Mr. Spence states that in only very rare cases, will the Parole Board consider conduct constituting an uncharged criminal offense. We submit that this occurs routinely, particularly for technical parole violators.

LAW AND ARGUMENT

Opposing counsel states that Plaintiffs claims are not cognizable under 42 U.S.C. §1983 because all of our claims assert infirmities in the denial of parole.[178] From this platform, opposing counsel states next that if this court were to grant the relief requested, it would be tantamount to invalidating all of these Plaintiffs' convictions.[179] For these reasons, opposing counsel concludes that these claims are barred by Heck v. Humphrey, 512 U.S. 477 (1994) [hereafter *Heck*] and by Edwards v. Balisok, 520 U.S.

[178] *See* Memorandum in Support of Motion for Summary Judgment at p. 14. Hereafter, this shall be referred to as Opposing Counsel Memorandum.

[179] Opposing Counsel Memorandum, at p. 14.

641 (1997) [hereafter *Balisok*].[180] These two U.S. Supreme Court decisions are the primary pillars supporting opposing counsel's argument.

Heck and Balisok Decisions

Roy Heck was convicted of voluntary manslaughter and given a 15 year sentence by an Indiana court. While his appeal was pending, he filed an action in Federal court under 42 U.S.C. §1983. His complaint alleged that his defendants engaged in an unlawful, unreasonable and arbitrary investigation leading to his arrest, and that they knowingly destroyed exculpatory evidence and used an unlawful voice identification procedure at his trial. Heck sought compensatory and punitive damages. He did not ask for injunctive relief and he did not seek release from custody.

Although Heck was not seeking release from custody, he was challenging the legality of his conviction. If he were to prevail upon this action, a Federal court would have no choice but to order his release. It would be untenable to allow a person to remain incarcerated after their conviction had been declared illegal.

In reading this decision, it is apparent that the facts were simply a vehicle for transporting the U.S. Supreme Court to an area of conflict between two federal statutes, 42 U.S.C. §1983 and the habeas corpus statute.[181] These two statutes were on a collision course. The decision of *Heck* was primarily intended to relieve this tension. *Heck* limited the scope of 42 U.S.C. §1983 by denying the existence of a cause of action.[182] The key is defining precisely this cause of action, and then looking to the facts of our case to see if our facts fall within the cause of action that *Heck* clearly bars.

In writing its opinion for *Heck*, the U.S. Supreme Court went back to the roots of a 42 U.S.C. §1983 action.

> "We have repeatedly noted that 42 U.S.C. 1983 creates a species of tort liability," Memphis Community School Dist. v. Stachura, 477 U.S. 299, 305 (1986). "Over the centuries the common law of torts has

[180] Opposing Counsel Memorandum, at p. 14.

[181] This point is discussed by Justice Thomas in a concurring opinion. *Heck*, 512 U.S. 477, at 490-491.

[182] *Heck*, 512 U.S. 477, at 489.

> developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under 1983 as well."[183]

Because of the facts set forth by Roy Heck, the closest parallel in tort law was malicious prosecution. One element that must be proven in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused.[184] This avoids parallel litigation and furthers a strong judicial policy against the creation of two conflicting resolutions arising out of the same transaction.[185] Consequently, the *Heck* decision concludes:

> "We think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to §1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution."[186]

This is the cause of action that the *Heck* decision eliminated.[187] The crux of this holding is that before a plaintiff can attack an outstanding criminal judgment, the plaintiff must first prove that their conviction or confinement is unlawful.

The *Heck* decision went on to say:

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[183] *Heck*, 512 U.S. 477, at 483.

[184] *Heck*, 512 U.S. 477, at 484.

[185] *Heck*, 512 U.S. 477, at 484

[186] *Heck*, 512 U.S. 477 at 486.

[187] The official holding of *Heck* reads, "We hold that in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. 477, 486-487.

> "But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit." [188]

The critical point is whether or not the plaintiff's action seeks to render an outstanding criminal judgment invalid. If this is not the avowed purpose of Plaintiff's cause of action, then the action should be allowed to proceed.

The facts of *Balisok* are similar to *Heck*. Jerry Balisok filed a 42 U.S.C. 1983 action to attack a prison disciplinary hearing. He was charged with 4 prison infractions and sentenced to ten days in isolation, 20 days in segregation and deprivation of 30 days of good time credit previously earned toward early release. Balisok attacked the procedures used in his disciplinary proceeding. Much like Roy Heck, he asserted that state officials concealed exculpatory witness statements, refused to ask specific questions of witnesses and prevented him from introducing exculpatory material. But, there is this critical difference. Balisok limited his request to damages for depriving him of good time credits *without due process*.[189] In other words, Balisok stated that the procedures were wrong, but not necessarily the result.[190] He did not contest his confinement for an extra thirty days because of denial of good time.

The question presented was whether or not this difference, that Balisok was contesting his procedures but not his confinement, was sufficient to distinguish these facts from *Heck*. The *Balisok* decision applies the test set out in *Heck*. They went to the root of the action and looked at the tort claim. Though not seeking to invalidate the decision to prolong his incarceration, Balisok's claim was predicated upon deceit and bias. If these torts are proven, the Federal court would have no choice but to reverse the state order and restore his 30 days of good time. It would be untenable to allow the deprivation of this good time to stand, once bias had been proven.[191]

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[188] *Heck*, 512 U.S. 477 at 487.

[189] *Balisok*, 520 U.S. 614

[190] *Balisok*, 520 U.S. 641

[191] The *Balisok* decision cited the case of Tumey v. Ohio, 273 U.S. 510, 535 (1927), for the proposition, "A criminal defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him."

Just as the *Heck* decision provided an example of an action that *would be* cognizable, the *Bolisok* decision did as well.

> "His amended complaint alleges that prison officials routinely fail to date-stamp witness statements that are made in cases involving jail house attorneys like himself, in order to weaken any due process challenge for failure to call witnesses. (record citation deleted) He requests an injunction requiring prison officials to date stamp witness statements at the time they are received. Ordinarily, a prayer for such prospective relief will not necessarily imply the invalidity of a previous loss of good time credits, and so may properly be brought under Sections 1983. *Balisok*, 520 U.S. at 648.

In both *Heck* and *Bolisok*, the U.S. Supreme Court is drawing boundaries. They are describing an instance that crosses the line and becomes unavailable under 42 U.S.C. 1983. In the next paragraph, they are describing a set of facts which can be brought pursuant to 42 U.S.C. 1983.

The holding of *Heck* has been extended to administrative action through *Balisok*. After *Balisok*, what is the cause of action no longer available under 42 U.S.C. 1983?

To ascertain this question, we must first look at the underlying tort claim. On the surface, both *Heck* and *Balisok* are somewhat ingenious legal actions. Heck's complaint did not seek relief from custody. But if successful, he would have to be released. *Balisok* sought to dodge the *Heck* holding by stating that he was only attacking procedures, not his incarceration. This ploy fooled the Ninth Circuit Court of Appeals. To cut through form to substance, the formula of *Heck* requires looking at the underlying tort action. If the elements of this tort action do not necessarily invalidate the judgment or the state's final decision, then the action is not barred by *Heck*. On the other hand, if the underlying tort action, if proven, necessarily renders the judgment or final decision invalid, then this set of facts falls within the cause of action barred by *Heck*.

With this established, it is time to look at our Federal causes of action.

In Plaintiffs Complaint, paragraphs 151 and 152, we state:

> 151. The Ohio statutes which provide for parole do not create a protected liberty interest for a convicted prisoner. Parole is strictly an act

> of grace and there is no entitlement to parole before the expiration of a valid sentence. Parole for Ohio prisoners lies wholly within the discretion of the Adult Parole Authority.
>
> 152. Parole review is not a matter of grace. Ohio has created a statutory right to a *meaningful parole review* for certain classes of Ohio prisoners. Pursuant to the U.S. Constitution's 14th Amendment, minimum procedures are required by its Due Process Clause at a parole review for Ohio inmates to insure that the state-created right of parole review is not arbitrarily abrogated. [Ital added.] [192]

Under our Federal claims, the first example given is David Dennison.[193] Mr. Dennison was convicted of Involuntary Manslaughter.[194] Before his parole review hearing, Mr. Dennison's family presented a parole package that included letters from two attorneys, Michael Kaplan and Roger Davidson. These attorneys handled the defense and the prosecution of Mr. Dennison's case. In both of these letters, both attorneys described the facts and confirmed the correctness of this verdict, Involuntary Manslaughter. At Mr. Dennison's parole review hearing, this information was either ignored or considered less persuasive than other evidence, and Mr. Dennison was found guilty of Murder. The Parole Board decision specifically references Section 202B of its guidelines, which is the reference for Murder. In paragraphs 113 through 118 of our Complaint, there is no mention of Mr. Dennison's desire to set aside his conviction for Involuntary Manslaughter. On the contrary, Mr. Dennison seeks to enforce this original conviction.

To analyze Mr. Dennison's facts within the context of the *Balisok* holding, we must ask about the underlying tort action. In paragraphs 113 through 118 of the Complaint, there is no mention of bias on the part of the Parole Board. But the Complaint does say this about the Parole Board decision:

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[192] For the proposition that parole review ought to be a meaningful parole review, see Lee v. Ohio Adult Parole Authority, et. al., Montgomery County 2nd Appellate District, Case # 18853, p. 3. "What we have found objectionable, however, is the lack of meaningful parole consideration."

[193] David Dennison R132196.

[194] *See* paragraph 115 of Complaint. *See also* exhibits 36 and 37 to Complaint, letters filed with the Parole Board on Mr. Dennison's behalf by his former defense attorney and prosecutor, Michael Kaplan and Roger Davidson.

> 118. At Mr. Dennison's parole hearing on June 18, 1999, he was found guilty of Complicity to Commit Murder and placed in Category 11, which calls for a term of 15 to 20 years. To support this verdict, the parole board set out facts in its formal decision that are irreconcilably different from the facts set forth by the prosecutor and Mr. Dennison's trial attorney. In pertinent part, the Parole Board's decision states, "Inmate on 9/3/84 pointed a loaded firearm at the victim, within 3 - 4 feet of the victim and shot the victim. Please note, inmate retrieved the firearm from another room; returned to the room and was told by two individuals that the gun was loaded. The victim was shot on the lower side of the neck after arguing / making accusing statements directed at victim, he fired at close range in the neck area. 202B."

In Mr. Dennison's case, the underlying tort action involves use of inaccurate information. A due process violation can arise from inaccurate information, particularly when inaccurate information is relied upon in making a sentencing decision. In this circuit, defendants have a clear entitlement to be sentenced upon accurate information. *See* United States v. Phillip Fry, 831 F.2d 664, at 667 (6th Cir. 1987), citing United States v. Tucker, 404 U.S. 443, 447, Townsend v. Burke, 334 U.S. 736.

> "Thus, in order to show a due process violation, the defendant must raise grave doubts as to the veracity of the information and show that the court relied upon that false information in determining the sentence." U.S. v. Phillip Fry, 831 F.2d 664, at 667 *citing* U.S. v. Harris, 558 F.2d 366 (7th Cir. 1977).

There is so much distance between the comment reduced to writing on this parole board decision and the letters from two attorneys handling the trial, this test can be satisfied with Mr. Dennison's case.

With our underlying tort claim identified, namely the use of inaccurate information for making a sentencing decision, we are now ready to ask the core question required by *Heck* and *Balisok*. Can the underlying tort action be accommodated without rendering invalid the administrative decision of denying parole? We submit that it can. After examining in depth the preparatory forms and the information captured by these forms in anticipation of a parole review hearing; the amount of time that a decision-maker is allotted to consider the file; the make-up of the

current guidelines and the agenda set forth in Policy 501-36 as to what is to be presented and discussed at this hearing; we submit that Mr. Dennison has never been considered for parole. Forget meaningful parole eligibility. He has never been considered for parole in any sense of the word.[195]

Nothing in the Ohio Parole Board Decision form discusses Mr. Dennison's suitability for release.[196] We know what the parole board thinks of Mr. Dennison's trial court decision. But disagreeing with a trial court judgment is not a suitable reason for denying parole. In fact, it is irrelevant. Before something can be denied, it must be considered. If this Parole Board should be ordered to ascertain Mr. Dennison's suitability to be paroled, it would be a matter of first impression to them. They have nothing in their files that is even on point. No decision has yet been made, to grant or deny him parole. The have come to the decision that he committed murder. That is also irrelevant. They should be asking, will Mr. Dennison go out and kill someone *again*? That is relevant.

It is true that we cannot have an accommodation of this tort action without the possibility of rendering invalid a parole board decision finding Mr. Dennison guilty of Murder. Is this a problem? We submit that it is not.

In Vitek v. Jones, 445 U.S. 480 (1980) [hereafter *Vitek*], the U.S. Supreme Court held that the transfer of an inmate from a prison to a mental hospital *did* implicate a liberty interest. Placement in the mental hospital was not "within the range of conditions of confinement to which a prison sentence subjects an individual, because it brought about consequences ... qualitatively different from the punishment characteristically suffered by a person convicted of crime." *Vitek*, 445 U.S. at 493. *Vitek* construed a pair of earlier decisions, Meachum v. Fano, 427 U.S. 215 (1976) [hereafter *Meachum*] and Montanye v. Haymes 427 U.S. 236 (1976). In these decisions, the U.S. Supreme Court held that an intrastate prison transfer *does not* implicate a liberty interest. Therefore, this is not subject to audit under the Due Process Clause. *Meachum* instructed, "the determining factor is the nature of the interest involved." *Meachum*, 427 U.S. at 224.

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[195] *See* Affidavit of John Peters A209244, Plaintiff's Exhibit 31. Mr. Peters confirms that his parole was never even discussed.

[196] To appreciate how far afield our Parole Board has traveled, we are attaching as Plaintiff's Exhibit 36, an actual parole board decision from another state. To protect the privacy of the individual discussed, identifying information has been deleted.

In Mr. Dennison's case, setting aside his conviction for Involuntary Manslaughter and replacing it with a conviction for Murder by a parole board panel is not a consequence characteristically suffered by a person convicted of a crime. Again, pursuant to *Meachum*, we must look *at the nature of the interest involved*. Having a trial court decision set aside and replaced with another conviction for an even more serious crime clearly implicates a liberty interest, and navigation of this passage must be audited by the Due Process Clause of the U.S. Constitution. That did not happen. The holding of this parole board panel, finding Mr. Dennison guilty of Murder, was clearly unconstitutional.

The facts of Mr. Dennison's case, as well as for all other Named Plaintiffs, can be distinguished from *Balisok* in this important respect. In *Balisok*, prison authorities sentenced the offender to ten days in isolation, 20 days in segregation and to deprivation of 30 days of good time credit previously earned. This punishment falls within the sound discretion of prison authorities and no liberty interest is created by this action. In Mr. Dennison's case, the parole board panel found his trial court sentence in error, and they changed it to murder. The instant that Mr. Dennison was in peril of being separated for parole board purposes from his offense of conviction, a liberty interest arose. Declaring a trial court conviction erroneous and replacing it with another, more serious crime does not fall within the sound range of discretion conferred upon Ohio's Parole Board by the General Assembly. Nobody asked the parole board to review Mr. Dennison's conviction and ascertain whether or not the Summit County Court of Common Pleas has gotten this right. Without compliance with the Due Process Clause of the U.S. Constitution, this action is unconstitutional. As such, it is not worthy of being placed upon the same pedestal and accorded the same credence as the *Balisok* administrative ruling. This administrative action is spurious. Striking down this kind of illegitimate action constitutes precisely what 42 U.S.C. 1983 was intended to do.

In our view, Mr. Dennison was not denied parole. At this hearing, he was found guilty of murder. It is our position that Mr. Dennison has never been given a *meaningful parole eligibility hearing* as contemplated by Rule 5120:1-1-07. Furthermore, to be sure this state created right is not arbitrarily abrogated, the parole board must conduct this hearing with the same due process protections extended to offenders under Ohio's New Law pursuant to R.C. §2967.28(E)(5)(d) and Ohio Administrative Rule 5120:1-1-43(I). This cause of action is cognizable under 42 U.S.C. 1983 because rights guaranteed to all of these Plaintiffs under the Due Process Clause of the U.S. Constitution have been violated. None of these Plaintiffs are challenging their

convictions. All of these Plaintiffs are seeking a meaningful parole eligibility hearing. If proven, the relief requested contemplates only the convening of a proper parole eligibility hearing with accurate information, due process protections engaged and Rule 5120:1-1-07 followed.

Opposing counsel cites the case of Shafer v. Moore[197] to support the proposition that *Heck* and *Balisok* have been applied to parole decisions. We have previously stated, and we reiterate, that if Ohio's Parole Board granted these Plaintiffs meaningful parole eligibility hearings, which utilized the Parole Candidate Evaluation form and tracked the criteria set out in Rule 5120:1-1-07, this court would be virtually powerless to disturb these decisions. But, this is not happening. Comparisons of Ohio's parole board with other parole boards, since the current Guidelines were adopted in 1998, are pointless. Ohio's Parole Board is no longer acting within the realm of discretion granted pursuant to R.C. §2967.03. The Ohio Parole Board found Mr. Dennison guilty of Murder. Adjudicating crimes is not the parole board's acknowledged area of expertise. When these defendants crossed this line and ventured into territory where they have no acknowledged expertise, they forfeit the credibility that would normally attach to their decisions.

Opposing counsel cites a number of Ohio decisions,[198] all of them unreported and all of them brought by inmates, contesting their continued incarceration under the current Parole Board Guidelines. These decisions are offered as binding precedent to support the principle that this law suit is *Heck* barred. None of these courts had before them, the record of evidence that has been assembled and placed before this court. None of these other Ohio courts had the benefit of Parole Board testimony before the State Highway Patrol, which has only recently been released. It is submitted that if this same voluminous record had been offered into evidence in these other actions, these courts would not have rushed to judgment nearly so quickly. Because of the different record of evidence before this court, we submit that these decisions possess no precedent binding authority.

Substantive Due Process Protections

Opposing counsel argues that to engage substantive due process protections, the

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[197] 46 F. 3d 43 (8th Cir. 1995). See Opposing Counsel Memorandum at p. 15.

[198] *See* Opposing Counsel Memorandum, at p. 15.

action must shock the conscience.[199] We like the decision and the following quotation, selected by opposing counsel for supporting this principle.

> "the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."[200]

We would be hard put to find better words to describe the conduct of Ohio's Parole Board. Given the length of this memorandum, we are incorporating by reference the Facts of our Answer and our Cross Claims for Abuse of Discretion and Arbitrary and Capricious Decision-making, as if they were all reproduced here. We believe this proves that the conduct of Ohio's Parole Board varies from traditional executive behavior and from contemporary practice - at least we fervently hope so.

Preponderance of the Evidence Standard

Again, because of the length of this memorandum, we are responding to comments of opposing counsel relating to Preponderance of the Evidence Standard by incorporating by reference the factual portion of our Answer, and our Cross Claims for Abuse of Discretion and Arbitrary and Capricious Decision Making.[201] To answer the authority cited by opposing counsel for supporting the proposition that an offender is not entitled to any particular standard of proof, we are going to quote from *Balisok*.

> "The due process requirements of a prison disciplinary hearing are in many respects less demanding than those for criminal prosecution, but they are not so lax as to let stand the decision of a biased hearing officer who dishonestly suppresses evidence of innocence. Edwards v Balisok, 520 U.S. 641, *citing* Wolff v. McDonnell, 418 U.S. 539, at 570-571 (1979)

Ex Post Facto Clause of U.S. Constitution

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[199] Opposing Counsel Memorandum, at p. 18.

[200] Opposing Counsel Memorandum, at p. 18, *citing* County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998).

[201] Opposing Counsel Memorandum, at p. 19.

Opposing counsel begins his discussion of the Ex Post Facto Clause[202] with the statement, "Ohio courts have held that the Ex Post Facto clause only restricts legislative action." Whether a retrospective state criminal statute ameliorates or worsens conditions imposed by its predecessor is a federal question.[203] Accordingly, we must look to federal cases for authoritative interpretations, including U.S. Supreme Court decisions. If Ohio's Supreme Court truly believes that the Ex Post Facto clause only restricts legislative action - a view which we do not share because we do not consider this statement a holding of Ohio's highest court - then it is at odds with the U.S. Supreme Court on this question, and the Ohio court's view must defer to the opinion of the U.S. Supreme Court.

In Garner v. Jones, 529 U.S. 244 (2000), the controversy before the U.S. Supreme Court centered upon the interval between parole proceedings. Specifically, the issue in this case concerned the interval between a reconsideration for parole, after being denied parole in an initial hearing. There were no ties of any kind to a Georgia statute. The U.S. Supreme Court considered this case on its merits, which clearly proves that the Ex Post Facto Clause extends to more than just legislative enactments.

Opposing counsel cites the Ohio Supreme Court decision State v. Wickline (1996), 74 Ohio St.3d 369 [hereafter *Wickline*], to support his proposition that the Ex Post Facto Clause only constricts legislative action.[204] *Wickline* involved a question under Appellate Rule 26(B)(2)(b), which pertains to reopening an appellate judgment. The quote in opposing counsel's brief, that "the Ex Post Facto Clause of the United States Constitution applies only to legislative enactments,"[205] appears as dictum in this decision. It is not central to the Court's primary holding. *Wickline* is primarily concerned with application of court precedents. *Wickline* can also be quoted for the following proposition:

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[202] Article I, §10 of the U.S. Constitution, provides that "no State shall ... pass any ... ex post facto Law."

[203] Weaver v. Graham, 450 U.S. 24, at 33 (1981).

[204] Opposing Counsel Memorandum, at p. 23.

[205] Opposing Counsel Memorandum at p. 23. This portion of the *Wickline* decision is quoted verbatim above and differs slightly, but not in any material way, from opposing counsel's quotation. *See Wickline*, 74 Ohio St.3d 369, 371.

> "due process places similar [Ex Post Facto] constraints on a court's power to apply precedent to cases arising before the precedent was announced." Wickline, 74 Ohio St.3d 369, 371.

If the Ex Post Facto Clause of the U.S. Constitution has application to courts, then it obviously is not confined only to legislative enactments.

In Muhammad v. Kinkela, 2000 Ohio App. LEXIS 6012 (Franklin County 2000)[206] [hereafter *Muhammad*], Ohio's 10th Appellate District Court considered an Ex Post Facto challenge which concerned the Parole Board's guidelines. This decision began by quoting R.C. §2967.03, which grants Ohio's Parole Board wide discretion to make parole decisions. Next, the court quoted from the Guidelines themselves, which were to be used "to promote a more consistent exercise of discretion and enable fairer and more equitable decision-making without removing individual case consideration."[207] The author of this *Muhammad* decision was unaware of the evidence that has been developed for this Court. We strongly doubt that these words would have been quoted in the body of this decision if they had access to the evidence tendered by these Named Plaintiffs. Apparently, the *Muhammad* decision adopted the dictum from *Wickline* to rule that the Ex Post Facto Clause applies only to legislative enactments. Based upon our reading of *Wickline*, this is weak authority, bordering on tenuous.

We believe that a recent opinion from the Connecticut Supreme Court regarding the Ex Post Facto Clause under the U.S. Constitution is the much better reasoned decision on this point of law. In Dwayne Johnson v. Commissioner of Correction, 258 Conn. 804 (Conn. 2002) [hereafter *Johnson*], the question involved a new Connecticut law which required 85% of the sentence to be served, as compared to a minimum of 50% of the sentence before becoming eligible for parole. Like Ohio, Connecticut's statute is strictly discretionary.[208] Like Ohio, the State argued that even if Dwayne Johnson is eligible for parole after serving 50% of this sentence, he is still not entitled to any protected liberty interest. The Connecticut Supreme Court rejected this argument.[209]

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[206] The slip opinion for this decision was attached as Defendant's Exhibit Q.

[207] *See* Defendant's Exhibit Q, at p.3 of the opinion, numbered page 40.

[208] *Johnson*, 258 Conn. 804, at 811.

[209] *Johnson*, 258 Conn. 804, at 813.

"Unlike Vincenzo, however, the petitioner in the present case is claiming a violation of his rights under the ex post facto clause as opposed to the due process clause. The United States Supreme Court has recognized that a "law need not impair a 'vested right' to violate the ex post facto prohibition. Evaluating whether a right has vested is important for claims under the Contracts or Due Process Clauses, which solely protect pre-existing entitlements. ... The presence or absence of an affirmative, enforceable right is not relevant, however, to the ex post facto prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense." Johnson, 258 Conn. 804, at 817, citing Weaver v. Graham, 450 U.S. 24, 29-31 (1981), Lynce v. Mathis, 519 U.S. 433, 445 (1997). "the retroactive alteration of parole or early release provisions, like the retroactive application of provisions that govern initial sentencing, implicates the Ex Post Facto Clause because such credits are one determinant of the petitioner's prison term ... and ... [the petitioner's] effective sentence is altered once the determinant is changed [internal quotation marks omitted." [Quoted verbatim from opinion. Spacing is taken from text.]

This opinion goes on to state, "the presence of discretion does not displace the protections of the Ex Post Facto Clause," Johnson, 258 Conn. 804, at 818, *citing* Garner v. Jones, 529 U.S. 244, 253 (2000).

For the sake of brevity, we are incorporating by reference all of our charts and their accompanying text, demonstrating the tremendous disparities that now exist between sentences issued by trial courts and sentences issued today from the parole board. We submit that these parole board decisions are extremely vulnerable to attack via the Ex Post Facto Clause in the U.S. Constitution.

Access to Courts

We begin our rebuttal to the argument of opposing counsel that Named Plaintiffs are merely envious of the rights enjoyed by offenders under Ohio's New Law, by directing this Court's attention to our evidence. In our Complaint, we filed the following:[210]

> * Two letters from Heather S. Reed, Assistant Deputy Legal Counsel for Governor Bob Taft, explaining that matters of parole are solely under the jurisdiction of the Parole Board, dated November 28, 2000 and March 30, 2001.
>
> * Judgment Entry from the Court of Common Pleas of Huron County for Case #CRI-93-402, declaring that judicial release is not available to inmates sentenced under Ohio's Old Law.
>
> * Journal Entry from the Ohio Third Appellate Court of Appeals, Case #I-99-10, declaring that a Writ of Mandamus is not available to these Ohio Old Law inmates.
>
> * Judgment Entry for the Court of Common Pleas for Huron County, denying a motion to have their sentence set aside pursuant to R.C. 2853.21(G) and asking to be resentenced under Ohio's New Law.
>
> * Judgment Entry for the Court of Common Pleas for Stark County, denying the Motion of Beverly Teets[211] to have her sentence under the Old Law set aside after "the Court has reviewed all relevant matters and records permitted by law" and "determines that no substantive grounds exist for relief as required."
>
> * Letter from the Office of the Ohio Public Defender stating the Judicial Release is not available to an inmate under Ohio's Old Law.

This is palpable, irrefutable evidence to support our claim that under the Old

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[210] All of the following documents are being attached to this Memorandum as Plaintiff Exhibit 37. Most of these documents have been previously attached as exhibits accompanying our complaint, numbered Exhibits 27, 28, 29, 30, and 31.

[211] Beverly Teets W019513.

Law, these inmates are being denied access to our courts. This is also evidence of an injury. On a more pedestrian level, we have ample evidence of efforts by prison employees to impede access to the courts inside this law suit. Many Named Plaintiffs wanted to do affidavits, but they could not find staff willing to notarize them. Lester Keran[212] is one of these Named Plaintiffs. His affidavit was finally witnessed by three other offenders, and this has been entered as part of our evidence. Our Named Plaintiffs are having trouble sending out $10 a month legal retainer fees.[213] Their cash slips are being refused. Sheila Rutkowski[214] has just been given an additional five year continuance. For good cause, the Assistant Warden accused her of participating in gang activity. Ms. Rutkowski is one of our Named Plaintiffs, and that is also the name of the gang that she joined.

The argument made by opposing counsel that these Plaintiffs can seek judicial review of what they regard as excessive sentences, misses the point completely. The right to appeal that is available to them contemplates their trial court sentence. These Named Plaintiffs are not contesting their trial court sentences. They are contesting their treatment by the parole board and the manner in which the parole board is reversing orders to run terms concurrent and making them consecutive, and ignoring altogether their minimum sentence. The Judgment entries referenced above are evidence of the futility that these Named Plaintiffs have experienced, when they have sought relief from their trial courts.

There is compelling evidence to grant Old Law inmates access to the courts. These Named Plaintiffs are being brutalized by the parole board with new convictions and extended prison terms dictated by crimes that have never been proven or acknowledged in court. This is occurring in an environment where due process protections are nonexistent and legal counsel is unavailable. They are powerless to do anything about it.

In Wolff v. McDonnell, 418 U.S. 539 (1974) [hereafter *Wolff*], the U.S. Supreme Court extended the universe of relevant claims to civil rights actions under 42 U.S.C. 1983 for the purpose of vindicating U.S. Constitutional rights. *Wolff*, 418 U.S. at 579.

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[212] Lester Keran A149140, Plaintiff's Exhibit 34.

[213] *See* Plaintiff's Exhibit 38. Grievance of Stewart Brooks, plus correspondence between Mr. Brooks, Norman Sirak and the Ohio Attorney General's Office.

[214] Sheila Rutkowski W033337

See also Lewis v. Casey, 518 U.S. 343, at 355 (1996).

Finally, it is true that all of these Defendants are Executive Branch officials. And if they were purely exercising executive branch duties, much of this complaint would disappear. These Defendants have chosen to don judicial robes, figuratively if not literally, and they are exercising judgment over these Named Plaintiffs by declaring Ohio trial court judgments in error and replacing these judgments with new ones of their own making. Since they have chosen to get into the business of exercising judicial authority, *they are* the proper people to hold accountable. We have not sued the wrong parties.

Claims for Sex Discrimination

The last argument by opposing counsel will be addressed first. Opposing counsel states that only entities can be sued under a Title VI claim, and we have only sued individuals. If these defendants are merely individuals, why did Ohio move this court to Stay Discovery, predicated upon the State of Ohio's Eleventh Amendment claim to qualified immunity? Defendants cannot be the State of Ohio on January 22, 2002, for purposes of invoking its sovereign immunity to stay discovery, then transform back into individuals for the purpose of defending a Title VI claim. It does not work that way.

We do agree with opposing counsel that the provisions of a consent decree cannot be enforced via a §42 U.S.C. action. In fact, that is precisely why this consent decree was included in the complaint. It affords Plaintiffs an alternative platform for asserting some of these federal claims. This is also why §601 of the Civil Rights Act was asserted in our Complaint.[215] Plaintiffs were specifically reserving additional avenues for asserting federal claims, beyond 42 U.S.C. §1983.

Opposing counsel has not cited any law relating to our substantive claim involving sex discrimination. Their entire argument is aimed at peripheral issues, such as our use of the Taylor v. Perini consent decree, our use of §601 of the Civil Rights Act, and that Defendants are all individuals and not entities. It is unnecessary for us to cite law and assemble substantial evidence, because our basic claims have not been attacked.

Plaintiffs Tenth, Eleventh and Twelfth Causes of Action

[215] *See* paragraph 206 of Complaint.

These Defendants submitted applications for federal grants predicated upon Ohio being a purely determinate sentencing state. In truth, Ohio had a dual sentencing scheme. The consequence of this decision was to include all of the offenders incarcerated under the Old Law into the same class as New Law offenders, despite the fact that these Old Law offenders had substantially longer sentences.

These Old Law offenders had one more thing, New Law offenders lacked. They had a statutorily granted right of eligibility for parole.[216] When Ohio signed an agreement to hold these Old Law offenders for at minimum, 85% of their minimum sentence, they also rendered meaningless, this statutory right to eligibility for parole. When any government entity tramples upon the statutorily created entitlements of any class of citizen, standing is immediately created to challenge this action.

The fact that the United States has not been joined as a party has not been an oversight. This action was originally tailored for state court, and this explains why the United States was not added. Now that we are in Federal court, plaintiffs may just reevaluate this position and motion this Court to add the United States as a party.

Qualified and Absolute Immunity

The arguments advanced by opposing counsel relating to qualified and absolute immunity have been the subject of a Reply Brief, filed by Plaintiffs on May 13, 2002. Responsive answers to these issues have been set forth in this filing.

Ohio Law Claims

Opposing counsel asserts that prisoners have no right to definite, mechanically applied parole criteria. They express the view that these Parole Board Guidelines do not have to be "vetted in the same manner as administrative regulations"[217] because they do not have the force of law. Judge Nodine Miller of the Franklin County Court of Common Pleas disagrees. In a decision titled Poluka v. Ohio Adult Parole Authority,

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[216] *See* Ohio R.C. §2967.13, which provided at time of sentencing for offenders under the Old Law: (a) prisoner serving a sentence of imprisonment for a felony for which an indefinite term of imprisonment is imposed becomes *eligible for parole* at the expiration of his minimum term, diminished as provided in sections 2967.19, 2967.193 and 5145.11 of the Revised Code.

[217] Opposing Counsel's Memorandum, at p. 34.

Case #00CVH08-7676, Franklin County Common Pleas (unreported) [hereafter *Poluka*],[218] Judge Miller begins by quoting extensively R.C. § 5149.02, 119.01(C) and 119.02, to establish the fact that the Adult Parole Authority is a regular administrative unit of the Department of Rehabilitation and Correction, that it is entitled to adopt Rules, and that it is also expected to bring its Rules into compliance with Ohio's Administrative Procedure Act, or risk having its Rules rendered invalid for failure to comply.[219]

> "Clearly, the APA has the authority to adopt rules pursuant to R.C. §5120. There are a number of reasons for this rule-making authority. One reason is to assist the APA in carrying out the duties and responsibilities delegated to it by the Ohio General Assembly. Another is to provide some measure of surety to the individuals who come within the administrative purview of the APA that they will be treated fairly, equally, and appropriately within the APA's statutory authority. Another valid reason for its rule making authority is the elimination of arbitrary policies; oral histories; and pernicious guidelines which tend to be endemic to a bureaucracy. Such arbitrary policies, oral histories and pernicious guidelines precipitate a labyrinth of requirements which elude the average inmate; can adversely affect their basic rights; and slip under the door and away from the scrutiny of the Joint Committee on Agency Rule Review which would otherwise curb these abuses." *Poluka*, at p. 6.

Opposing counsel quotes just as extensively from a Franklin County appellate court, to the effect that these guidelines are merely internal rules, and since they do not have to be followed, then it is not necessary to have them published.[220] This opinion was issued on April 30, 1998, when the Guidelines that we are discussing were only one month old. If this Franklin County Appellate Court possessed the evidence that we have presented to this Court, demonstrating how these internal guidelines are making a mockery out of Ohio trial court criminal convictions, we doubt very much that this decision would have been written exactly the same way.

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[218] *See* Plaintiff's Exhibit 39. Poluka v. Ohio Adult Parole Authority, Franklin County Common Pleas case no. 00CVH-7676

[219] See *Poluka*, at p. 5.

[220] *See* Opposing Counsel Memorandum, at p. 34, quoting from Mayrides v. State Parole Authority, 1998 Ohio App. LEXIS 1985, Franklin App. #97APE08-1035 (unreported), attached as Defendant's Exhibit U.

Good Time Credits

The authority cited by opposing counsel, that our claim for good time credits and earned credits fails as a matter of law, consists of two sentences from one Ohio Supreme Court decision. The entire discussion of this topic in State ex rel. Bealler v. Ohio Adult Parole Authority (2001), 91 Ohio St.3d 36 [hereafter *Bealler*] consists of the following:

> "First, neither R.C. 2967.19 nor former R.C. 5145.02 reduces the maximum term of Bealler's indeterminate sentence. These provisions also do not entitle Bealler to release from prison before he serves his maximum sentence provided in his sentence." *Bealler*, 91 Ohio St.3d 36 [citations omitted.]

In this decision, the Ohio Supreme Court is not confronting the issue directly, as to the continuing validity of these credits. Instead, it is referencing the fact that Ohio inmates do not have a liberty interest until the last day of their sentence, and this factor is trumping their entitlement to these earned credits. We submit that one authority, which is not confronting the issue directly but rather disposing of it indirectly, is insufficient to entitle Defendants to a Summary Judgment on this issue.

Plea Bargains are Contracts

This question has just been certified to the Ohio Supreme Court.[221] In opposition to the cases quoted by opposing counsel, we can cite Lee v. Ohio Adult Parole Authority, et al., 2nd Appellate District in Montgomery County, A.C. #18853,[222] Oswald v. Ohio Adult Parole Authority, 10th Appellate District, Case #1AP-363,[223] and Givens v. Ohio Adult Parole Authority, et al., 2nd Appellate District Clark County, Case # 2000 CA35.[224] We take issue with all of the points raised on this matter by

[221] See Plaintiff's Exhibit 40. The parties to this action are Wiley Lane v. Ohio Adult Parole Authority Case # 01-1266 and Gerald Huston v. Reginald Wilkinson Case #01-1443.

[222] See Plaintiff's Exhibit 41.

[223] *See* Plaintiff's Exhibit 42.

[224] *See* Plaintiff's Exhibit 43.

opposing counsel and rely upon the appellate cases herein cited, particularly the Lee decision.[225]

Fifth and Sixth Causes of Action

Opposing counsel places great weight upon the decision Provens v. Stark County Board of Mental Retardation & Developmental Disabilities (1992), 64 Ohio St.3d 252 [hereafter *Provens*]. This action was brought by a public employee. The Court's holding is framed by the fact that this is a public employee, bringing a private cause of action against her employer for the violation of her Ohio constitutional rights. We have no problem with the principle that an Ohio public employee has no private cause of action against the State of Ohio to redress violations by her employer of policies embodied in Ohio's constitution. We frankly do not care.

While it is true that our Named Plaintiffs are drawing paychecks from the State of Ohio, amounting on average to $18.00 to $22.00 per month, they *are not* public employees. This is involuntary servitude. The weight placed by opposing counsel upon *Provens* is completely mis-placed. The central issue to this decision, plaintiff's status as an Ohio public employee, is absent in the case presented here.

The federal decision cited by opposing counsel, Jackson v. City of Columbus, 194 F.3d 737 (6th Cir. 1999), suffers from the same infirmity. The plaintiff, James Jackson, is also the Chief of Police for Columbus, Ohio. We reiterate, our Named Plaintiffs are not Ohio public employees. They are unwilling wards of the State of Ohio.

In opposing counsel's second paragraph of this section, he states that Named Plaintiffs can seek relief through administrative remedies. Defendant's Exhibit C, Policy 501-38, is cited as proof. This is true. But, before you can engage this Policy, you must have *new information*. Inmates genuinely believe that they have lots of *new information* to offer. The problem is, the term new information means *new* to the Ohio Parole Board. Very few inmates have new information in this sense, and very few inmates can engage this administrative remedy. Furthermore, very few inmates have been happy with the review undertaken of their claim, once they have proven that they have something *new* to bring to the parole board. As a consequence, this avenue is considered worthless by inmates. It looks good on paper. In practice, it is unresponsive and not trusted.

[225] *See* Lee v. Adult Parole Authority, Plaintiff's Exhibit 41.

Damage Claims

We acknowledge that damage claims should be filed before the Ohio Court of Claims. The central thrust of our law suit is not to obtain damages from these defendants as individuals. The liberty interest is easily the primary goal of this litigation.

Affidavit of Counsel

The undersigned certifies, pursuant to 28 U.S. §1746 and N.D. Ohio L.R. 7.1(g) that this memorandum complies with the length restrictions set forth in N.D. Ohio Rule 7.1(g) as modified by this Court's Order on Plaintiff's unopposed Motion for Leave to Waive the page limitation for this filing and for the filing of Cross Claims.

Respectfully submitted by

Norman L. Sirak #0038058
4035 Cinwood Street N.W.
P.O. Box 7468
Canton, Ohio 44705
(330) 478-1947

Peter Wagner #0034083
5th 3rd Center - 14th Floor
608 Madison Ave.
Toledo, Ohio 43604
(419) 242 1400

Certificate of Service

A copy of the foregoing has been mailed to the Office of the Attorney General, Corrections Litigation Section, to the attention of Todd Marti, at 140 East Town Street, 14th Floor, Columbus, Ohio 43215, this 28th day of June, 2002.

_____
By Norman L. Sirak

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

DENNIS MICHAEL, et al.	Case # 3:01CV7436
Plaintiffs	Judge James G. Carr
vs.	**Motions for Summary Judgment**
MARGARETTE GHEE, et al.	
Defendants	Pursuant to Rule 56(C)

Memorandum in Support of Summary Judgment Motions

FIRST CROSS CLAIM

ABUSE OF DISCRETION

Introduction

The discussion of *Parole Review* appearing in our Answer to Defendant's Motions for Summary Judgment, including the hearing, the guidelines and the parole decisions and documentation, is hereby incorporated by reference and inserted into this First Cross Claim as if this material has been fully reproduced here.

The basis for this First Cross Claim can be found in Plaintiffs Eighth Cause of Action titled Abuse of Discretion. This claim is predicated upon state law.

In this First Cross Claim, we are asserting that the Adult Parole Authority has committed abuse of discretion. This is a reference to the entire Adult Parole Authority, also known as the Ohio Parole Board. In particular, this is a reference to the upper echelon leaders of this Ohio agency, Chairperson Margarette Ghee, Defendants Reginald Wilkinson and Harry Hageman. We are not referring to particular panel decisions. Instead, we are referring to decisions in general, the manner in which they are being made and the criteria utilized to drive these decisions.

The subject matter for this Cross Claim concerns the transformation of the Adult Parole Authority that occurred in April of 1998, when the current Guidelines were adopted and implemented. At this point in time, the mission of the Adult Parole Authority was radically altered. In lieu of performing their traditional role, the Adult Parole Authority granted itself the license to review *de novo* the judgments of Ohio trial courts and to change those judgments, if they disagreed with them. This is the crux of our abuse of discretion claim. When this boundary was crossed, abuse of discretion necessarily trickled down to panels deciding the fate of inmates, as a practical consequence of making decisions within the newly adopted framework. Abuse of discretion is inevitable and unavoidable while these guidelines remain in force. This misdirection has also created a vacuum, because the traditional role of the Parole Board is no longer being performed.

FACTS

The following facts are uncontradicted and irrefutable.

Ohio's General Assembly has granted the Adult Parole Authority, also referred to as the Ohio Parole Board, the discretion to determine when an Ohio inmate is to be paroled. In exercising this discretion, Ohio Rev. Code §2967.03 states in pertinent part:

"The adult parole authority may exercise its functions and duties in relation to the pardon, commutation, or reprieve of a convict upon the direction of the governor or upon its own initiative, and in relation to the parole of a prisoner eligible for parole, upon the initiative of the head of the institution where the prisoner is confined, or upon its own initiative. When a prisoner becomes eligible for parole, the head of the institution in which such prisoner is confined shall notify the authority in the manner prescribed by the authority. The authority may investigate and examine, or cause the investigation and examination of, prisoners confined in state correctional institutions *concerning their conduct therein, their mental and moral qualities and characteristics, their knowledge of a trade or profession, their former means of livelihood, their family relationships and any other matters* affecting their fitness to be at liberty without being a threat to society..." [Ital added for emphasis.]

The Department of Rehabilitation and Correction has placed a limit upon the exercise of the Parole Board's discretion. Part V of Policy 501-36 states:

"Decision making involves the exercise of discretion. *Unlimited discretion is to be eliminated. Necessary discretion is to be structured.* Persons who are stakeholders in the decision-making process are notified pursuant to the Ohio Revised Code. *Fairness and equality shall be the standards by which inmates, releasees, staff and the public are treated."* [Ital added for emphasis.]

The Ohio Parole Board has adopted Guidelines to assist in making consistent, fair and equitable decisions.[226] At minimum, these Guidelines can be taken at face value to represent what, in fact, the clear language of the text in fact represents.

These Ohio Parole Board Guidelines have never been filed with the Joint Committee on Agency Rule Review in accordance with Ohio R.C. §119.03.[227] The

[226] *See* Preface of Guidelines, first sentence by Chairperson Margarette Ghee. *See also* Paragraph 2, Spence Affidavit, confirming that Ohio adopted these guidelines in April, 1998.

[227] R.C. §119.03 is titled, Procedure for adoption, amendment or rescission of rules. This statute begins, "In the adoption, amendment or rescission of *any rule*, an agency shall comply with the following procedure" [Ital added for emphasis].

Joint Committee on Agency Rule Review consists of ten members of the Ohio General Assembly. Under Paragraph (I) of R.C. §119.03, one purpose served for submitting rules to this Joint Committee is as follows:

> "The joint committee on agency rule review may recommend the adoption of a concurrent resolution invalidating a proposed rule, amendment, rescission, or part thereof if it finds any of the following:
>
> (a) That the rule-making agency has exceeded the scope of its statutory authority in proposing the rule, amendment or rescission;
>
> (b) That the proposed rule, amendment or rescission conflicts with another rule, amendment or rescission adopted by the same or a different rule-making agency;
>
> (c) That the proposed rule, amendment, or rescission conflicts with the legislative intent in enacting the statute under which the rule making agency proposed the rule, amendment or rescission;
>
> (d) That the rule-making agency has failed to prepare a complete and accurate rule summary and fiscal analysis of the proposed rule, amendment or rescission as required by section 121.24 or 127.18 of the Revised Code, or both. R.C. §119.03(I)(1)

An important check and balance function performed by the Joint Committee on Agency Rule Review is to evaluate whether or not an Ohio administrative agency has exceeded the scope of its statutory authority and whether the rules comport with the legislative intent of the statute pursuant to which, the rule is to be adopted. These Ohio Parole Board Guidelines have never been subjected to this scrutiny. For this reason, these Guidelines have never been approved by the Joint Committee on Agency Rule Review.

LAW AND ARGUMENT

Applicable Law

The Ohio Supreme Court has not explored the subject of *abuse of discretion* in depth for some time. To discover what this term means to Ohio's highest court, we must

defer to a 1925 decision, State v. Ferranto [(1925) 112 Ohio St. 667, 148 N.E. 362 hereafter referred to as *Ferranto*].

> "Bouvier's Law Dictionary gives this definition:
>
> "*Abuse of discretion*. A discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence.
>
> "The term is comprehensively defined in 18 Corpus Juris, p. 1135, as follows:
>
> "This authority may be said, in a general way, to be the power of the judge to rule and decide as his best judgment and sound discretion dictate; ... in all cases courts must exercise a discretion in the sense of being discreet, circumspect and prudent, and exercising cautious judgment. (citations deleted) However incapable of exact definition, it is clearly recognized that discretion is not absolutely without elements, conditions or limitations. The term implies the absence of a hard and fast rule, yet it should not be another word for 'arbitrary will', 'inconsiderate action' or 'unstable caprice.'" 112 Ohio St. at 676, 677.

In *Ferranto*, the Court cited with approval a California and Wisconsin decision.

> "In Sharon v. Sharon, 75 Cal. 1, 16 P. 345, the court said:
>
> "Abuse of discretion does not necessarily imply a willful abuse, or intentional wrong. In a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason - all the circumstances before it being considered."
>
> "In Murray v. Buell, 74 Wis. 14, 41 N.W. 1010, this definition was given:
>
> "The term as used in the decisions of courts and in the books, implying, in common parlance, a bad motive or wrong purpose, is not the most appropriate. It is really discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." 112 Ohio St. at 677.

In Steiner v. Custer, [(1940) 137 Ohio St. 448, hereafter *Custer*] Ohio's Supreme Court stated:

> "The meaning of the term 'abuse of discretion' in relation to the present controversy connotes something more than error of law or of

judgment. Black's Law Dictionary (2 Ed.), p. 11. Such term has been defined as a 'view or action that no conscientious judge, acting intelligently, could honestly have taken." 137 Ohio St. at 451.

In State v. Adams, [(1980) 62 Ohio St. 2d 151 hereafter *Adams*], the Ohio Supreme Court stated:

> "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable", citing *Custer*. 62 Ohio St. 2d at 157.

In two recent decisions, State Ex Rel Master v. Cleveland (1996) 75 Ohio St. 3d 23, hereafter *Master*] and State Ex Rel Askew v. Goldhart, [(1996) 75 Ohio St. 3d 608 hereafter *Askew*], the Ohio Supreme Court dealt with the term *abuse of discretion* in one sentence and with precisely the same words.

> "An abuse of discretion connotes a decision that is unreasonable, arbitrary or unconscionable." *Master*, 75 Ohio St. 3d at 27, *Askew* 75 Ohio St. 3d at 610.

According to Webster's Dictionary, one definition of *unreasonable* is excessive or exorbitant.[228] The term *arbitrary* means not governed by principle.[229] And the term *unconscionable* means exceeding the limits of reason or expectation, or being unscrupulous in that you are not restrained by ideas of right or wrong.[230]

Summarizing, the Ohio Supreme Court does not require any subjective finding of willful abuse or intentional wrong for proving abuse of discretion. Similarly, there is no requirement to find a bad purpose or ill motive. Ohio's Supreme Court has stipulated that abuse of discretion does require something more than error of law or error of judgment. An abuse of discretion connotes a decision that is unreasonable, arbitrary or unconscionable. This is consistent with the definition in *Ferranto*. Discretion has been abused when it is exercised to an end or purpose not justified by, and clearly against, reason and evidence.

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[228] Webster's 20th Century Dictionary, unabridged, 1978 edition, at p. 2004.

[229] Webster's 20th Century Dictionary, unabridged, 1978 edition, at p. 95.

[230] Webster's 20th Century Dictionary, unabridged, 1978 edition, at pp. 1991, 2005.

Finally, the following considerations govern whether or not summary judgment is proper. It can be demonstrated that there is no genuine issue of material fact remaining to be litigated. For this reason, one party is entitled to judgment as a matter of law. Third, it appears from the evidence that reasonable minds can come to but one conclusion and, viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.[231]

Evidence of Abuse of Discretion

Statutory Guidelines provide us with the beginning point for any analysis of abuse of discretion. Whether discretion has been abused must be determined from the record and from these statutory requirements.[232] The governing provision is Ohio Rev. Code §2967.03. After conducting an examination of the inmate's record while incarcerated and particularly the points referenced by ital in the statute, if the Ohio Parole Board determines that an offender is not entitled to parole, there is very little that can be done to disturb this decision. The Courts have granted Ohio's Parole Board broad discretion to decide when an offender can be permitted to return to society, if at all.[233]

The record developed in this case can be distinguished from the hypothetical case of an offender whose parole eligibility has been evaluated in accord with this statute. All of the matters pertaining to a prisoner's conduct while in the institution, with the exception of disciplinary violations, have been deleted from the Parole Board's current preparatory form and from its decision. Questions relating to their education level have been deleted from the decision format. Questions regarding their participation in self-improvement programs have been made discretionary. This is the only question on the decision form that can be skipped. Queries relating to their mental qualities and characteristics have been deleted from the current preparatory form and from the decision record. Work evaluations have been deleted from the current preparatory form and from the issued decision. There is no room on the preparatory forms or in the decision to discuss whether or not the inmate has acquired a marketable skill while in

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[231] *See* Ohio Civil Rule 56 (C). *See also* Temple v. Wean United, Inc. (1977) 50 Ohio St. 2d 317, 327. We will not repeat this paragraph in remaining claims, although it clearly applies.

[232] Killebrew v. Dept. of Corrections, 604 N.W.2d 696, 698 (Mich. Ct. of Appeals 1999).

[233] *See* Jago v. Van Curen, 454 U.S. 14 (1981); Inmates of Orient Correctional Institution v. Ohio Adult Parole Authority [929 F.2d 233 (6th Cir. 1991)].

prison. There is also no space reserved in the decision-making process for documenting the inmate's family background and whether or not the inmate has family support. R.C. §2967.03 and the regulations promulgated pursuant to this statute require the Adult Parole Authority to examine and investigate these areas.[234] Every one of these areas has either been deleted or made discretionary in its decisions.

Conversely, the preparatory forms and the decision itself place great weight upon the crime. This becomes translated into an Offensive Category. They also place great weight upon the prior criminal history. This factor becomes translated into a Criminal History Risk Score. These two factors, the Offensive Category and the Criminal History Risk Score, converge on a grid. The intersection of these two scores on this grid dictates when an inmate is eligible for release. Because of this mechanism for making this decision, all of the subjective factors contained in R.C. §2967.03 are excluded.[235]

Does the Ohio Parole Board have the right to alter its existing mission without an accommodating amendment to its governing statute? Does the Ohio Parole Board have the right to pursue its new mission while totally shunning its former mission as set forth in R.C. §2967.03 and in published administrative regulations which have been subjected to the scrutiny of the Joint Committee on Agency Rule Review and approved? This is the proposition presented by this record. Instead of looking at a prisoner's conduct while incarcerated, the Parole Board has focused upon the crime and prior criminal history, exclusively. In the process, they are also conducting a *de novo* review of the trial court judgment. And if they do not agree with the trial court judgment, they reserve the right to change it and deal with the prisoner as if they were guilty of this new conviction.[236]

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[234] *See* Ohio Department of Rehabilitation and Correction Administrative Code 5120:1-1-07 [Plaintiff's Exhibit 13]

[235] In addition to excluding the factors contained in R.C. §2967.03, this scoring method for determining parole eligibility effectively discards most of the considerations contained in Ohio Administrative Code 5120:1-1-07 [Plaintiff's Exhibit 13], which sets out all of the factors that are to be considered in a parole review hearing. These factors include any reports of physical, mental or psychiatric examination of the inmate [5120:1-1-07(B)(5)], the inmate's ability and readiness to assume obligations and undertake responsibilities [5120:1-1-07(C)(1)], the inmate's family status [5120:1-1-07(C)(2)], the inmate's employment history and occupational skills [5120:1-1-07(C)(4)], the inmate's vocational, educational and other training [5120:1-1-07(C)(5)], the inmate's conduct during their term of imprisonment [5120:1-1-07(C)(8)] and the availability of community resources to assist the inmate [5120:1-1-07(C)(10)].

[236] *See* Part D: Guideline Application Procedures, Section 104 (b), 2nd paragraph.

The Ohio General Assembly would understand some review of an offender's crime and prior criminal history. And, they would expect some weight to be given these factors. But, the Ohio General Assembly has also made a substantial investment in programs and continuing education at prisons,[237] and it is looking to the Ohio Parole Board to select inmates that have taken advantage of these programs and proven themselves worthy of returning to society. By restricting its view of an inmate to strictly disciplinary violations while incarcerated,[238] the Ohio Parole Board is neglecting the job that it has been given to do. And Ohio's investment in rehabilitation is going unmonitored and unharvested.

The Guidelines themselves provide compelling proof of this phenomenon. Eighty-seven and a half pages out of eighty-nine pages of the Guidelines are devoted to offense categories, prior criminal history and filling out the decision and criminal history risk score forms.[239] There is virtually nothing devoted to the areas of inquiry set out in R.C. §2967.03 and its supporting regulations. This radical departure from the statute constitutes our first evidence of Abuse of Discretion. Ohio's General Assembly has never delegated to the Parole Board the authority to review criminal convictions of Ohio trial courts.

In the form titled *Ohio Parole Board Decision*, there is no space reserved for recording an offender's criminal conviction.[240] Previously, we have shown how 75 out of 120 Parole Board decisions began with an offense category pegged to a level that *was not* the offense of conviction. *[Please see Chart B, Total Offensive Behavior vs.*

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[237] Proof of this investment can be found in The State Government Book, 4th Edition, published by Ohio's Office of Budget and Management. The Chapter devoted to the Department of Rehabilitation and Correction has been included as Plaintiff's Exhibit 44. In education alone, Ohio appropriated $23,460,000 from its General Revenue Fund and another $18,237,100 from State Special Revenue for advancing the education of inmates. Federal Special Revenue contributed another $5,378,600. In total, $47,075,700 was spent on education services in Fiscal Year 2001.

[238] *See* Affidavit of Named Plaintiff R. Dean Omar A169464, Plaintiff's Exhibit 4, paragraph 22, noting how the only part of his Unit File that had been updated were his Rules infraction tickets, and these had obviously been placed at the forefront of the folder.

[239] *See* Defendant's Exhibit D.

[240] On a predecessor form, called Offender Hearing Record, there was a space for the offense of conviction in an upper box. This was removed when the Parole Board adopted its present form, sometime in 1998.

Offense of Conviction] In Part D: Guideline Application Procedures, Section 104 (b), it states:

> (b) Determining the Offense Category: The Parole Board *shall begin its determination* of the appropriate offense category by considering the conduct and circumstances established by the offense of which the defendant was convicted (offense of conviction). [Ital added for emphasis.]

We are entitled to assume that these Guidelines can be taken at face value to represent what, in fact, the clear language of the text in fact represents. Every one of these Parole Board Decisions ought to begin with the offense of conviction.[241] The fact that two-thirds of the decisions surveyed among our Plaintiffs began with something other than the offense of conviction is evidence of arbitrary decision making.[242] The Parole Board is not abiding by its own written principles. This is not a technicality. In the process, the judgment of an Ohio trial court is being erased, as if it never existed.

Designing an Ohio Parole Board Decision form without a reference the trial court's conviction and beginning its deliberations by pegging the offense category to something other than the offense of conviction, constitutes potent evidence of abuse of discretion.

Earlier, we examined how the Parole Board reversed twenty trial court judgments predicated upon jury findings. Findings of fact from a jury are considered so sacrosanct, the Ohio Constitution requires three appellate judges to concur before a jury's decision can be reversed based upon weight of the evidence. An examination of Parole Board decisions reveals that jury verdicts are treated just like plea agreements. If the jury has sided with the State, then the Parole Board will leave the final result undisturbed. But, if the jury has returned a *not guilty* verdict or found the offender guilty of a lesser included offense, the Parole Board will very routinely reverse this decision. Mr. Spence seems to

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[241] At least two Ohio courts agree with this. *See* Randolph v. Ohio Adult Parole Authority (2nd Dist.), No. 99CA17, 2000 Ohio App. LEXIS 121, at pp. 8, 9; Givens v. Ohio Adult Parole Authority (2nd Dist. 2000), No. 2000CA35, 2000 Ohio App. LEXIS 4316. *See also* Poluka v. Ohio Adult Parole Authority, Case # 00CVH08-7676, at p. 31.

[242] The Adult Parole Authority was even admonished by the Court of Appeals for Montgomery County to begin its deliberations with the offense of conviction. In Lee v. Ohio Adult Parole Authority, et al., C.A. Case #18833 (unpublished), the Court stated:

be at ease reversing jury acquittals because, as he points out, the Parole Board would only take this action in reliance upon its preponderance of the evidence standard. The reversal of a jury's acquittal by resorting to a preponderance of the evidence standard is obscene. This is incredible abuse of discretion. This satisfies the severe test in *Custer*, an *action that no conscientious judge, acting intelligently, could honestly have taken*.

We previously examined twenty offenders convicted of Assault. Every one of these offenders had their convictions changed from Assault to Rape, from Assault to Aggravated Burglary, from Assault to Kidnapping and from Assault to Murder. *[Please see Chart C, Assault Related Convictions]* In some cases, their offensive behavior remained unchanged or unlabeled, but they were elevated to an offense category appropriate for Attempted Murder. Four of these offenders had jury trials. In effect, the Parole Board is saying in twenty out of twenty cases, Ohio's trial courts made errors.[243] This exceeds the limit of reason and expectation and qualifies as unconscionable.

The Parole Board's guidelines have a specific scoring instruction for an attempted sex offense.[244] There are also two pages of guidelines - which are longer than the treatment given to Outstanding Program Achievement - for lesser included sexual offenses.[245] We have a number of Named Plaintiffs convicted of lesser included sex charges such as Sexual Battery and Gross Sexual Imposition, as well as Attempted sex offenses. *[Please see Chart D, Sex Related Offenses.]* The Parole Board has chosen to ignore the specific provisions in its guidelines related to these lesser included sex offenses, as well as its instruction for an Attempted sex offense. Instead, it has rounded all of these offenses upward to rape. This is additional evidence of arbitrary decision making. The Parole Board is not abiding by its own written principles. This also qualifies as unconscionable, in that it is exceeding the limit of reason and expectation.

For Assault and Sex Offenders, there are sweeping overhauls of the trial court judgments. The conviction has been changed and offensive behavior has been redefined. This is happening to every single assault offender and every single sex offender

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[243] Franklin County Common Pleas Judge Nodine Miller referenced the Parole Board as "an omnipotent and superior arbiter of justice." *See* Michael C. Poluka v. Ohio Adult Parole Authority, Case # 00CVH08-7676, Franklin County Court of Common Pleas at p. 19.

[244] *See* Section 102(B).

[245] *See* Sections 233 Sexual Battery, 234 Gross Sexual Imposition, 235 Corruption of a Minor and 236 Failure to Register as a Sex Offender, at pp. 13-15.

convicted of an Attempted sex offense or of a lesser included sex offense. There are no exceptions. This is proof of abuse of discretion, in that this exceeds the limit of reason and expectation and qualifies as unconscionable.

Switching from convictions to sentencing decisions, the record reflects a continuing propensity to refuse to abide by its own written principles. Previously, we have presented Guideline charts for Assault, Voluntary Manslaughter and Involuntary Manslaughter. *[Please see Chart F, Guideline Sentencing for Assault Offenders; Chart G, Guideline Sentencing for Voluntary Manslaughter; Chart I, Guideline Sentencing for Involuntary Manslaughter.]* Not one offender convicted of these crimes remains in their proper guideline. Even offenders convicted of Murder are moved higher to guidelines reserved for Aggravated Murder. *[Please see Chart H, Guideline Sentencing for Murder Offenders.]* All of these offenders are doing substantial amounts of additional time, in some cases triple the amount of time deemed appropriate by their guidelines, properly applied. This is evidence of unreasonable conduct, as this is clearly excessive and exorbitant. It is also evidence of arbitrary decision-making, in that they are not abiding by their own principles as reflected in their guidelines.

To grasp the full depth of the distance that the Parole Board has traveled wayward, we need to isolate and examine just its sentencing decisions and compare these to the sentencing decisions of Ohio trial courts and to its own sentencing guidelines properly applied, for the same offenders. To do this, four new charts are presented. *[Please see Chart M, Sentencing for Sex Offenses; Chart N, Sentencing for Voluntary Manslaughter Offenses, Chart O, Sentencing for Assault Offenses and Chart P, Sentencing for Murder Cases.]* These charts are identical in terms of structure and message. The chart on the left illustrates how trial court sentences compare with the Parole Board's Guidelines, properly applied. In one respect, these guideline ranges are inflated. They have been adjusted across the board to include the Criminal History Risk Score of the highest offender. This design feature favors Defendants. By making these guideline ranges broad, the chances of including both trial court decisions and final parole board decisions within these guidelines are improved. The chart on the right compares the same trial court decisions with parole board decisions after application of its total offensive behavior criteria.

For sex offenders, 60% of the trial court sentences fall below their minimum guideline range. The good news is that 40% of these trial court sentences fall within this guideline range. Credit for including this many trial court sentences into the guideline range can be attributed to our incorporation of offense category 8, which applies to

attempted rapes. After the Parole Board has applied its total offensive behavior criteria, any harmony existing between trial court decisions and the guideline ranges is gone. Now, there are two separate tangents occupying almost mutually exclusive domains upon the time chart.

For Voluntary Manslaughter offenders, comparisons between Parole Board sentences and trial court sentences are even more pronounced. All but three of these offenders have been taken out of the marked guideline range, and this is an inflated guideline range. In relation to their actual Criminal History Risk Scores, they are all beyond their proper guidelines categories. The most severe trial court sentence requires less time than the most lenient Parole Board decision.

Assault Offenders are being treated much like Voluntary Manslaughter offenders. There is an enormous disparity between the trial court sentences, the guidelines properly applied and the Parole Board sentences actually issued. For two out of three these cases, the Parole Board is not finished. These Plaintiffs have no Preliminary Release Date.

In the case of Murder convictions, the trial court sentence reflects a flat line. These are generally 15 years to Life sentences, with eligibility to reduce this sentence with accrued good time and earned credits.[246] That explains why trial court sentences hover close to ten years. These offenders become eligible for parole in ten and a half years. The slight deviations reflect gun specifications and one sentence with consecutive life sentences. As we can see from the Parole Board's decisions, almost everyone is being held as if they were sentenced for two consecutive life sentences. None of these offenders has been issued a preliminary release date.

The distances reflected in terms of time between the Parole Board's decisions, decisions of trial courts and its own guidelines, demonstrate unreasonableness in the form of excessive sentencing. The fact that the Parole Board is not following its own rules constitutes further evidence of arbitrary decision-making. Wandering this far away from both Ohio trial courts and from its own guidelines exceeds the limits of reason and expectation and qualifies as unconscionable. The Ohio Supreme Court does not require all three of these attributes to be engaged for conduct amounting to abuse of discretion.

[246] Named Plaintiffs convicted of Aggravated Murder are not included in this chart. The guideline for these offenders begins at 25 years. There is no such thing as an upward departure for these cases because the trial court has placed them in the highest available bracket.

But our evidence indicates that all three of these criteria can be engaged multiple times.

Previously, we introduced *Chart K, Compliance with Guidelines*. Of 193 offenders, we found one case handled in compliance with the guidelines and resolved. Part V of Policy 501-36 states, *Fairness and equality shall be the standards by which inmates, releasees, staff and the public are treated.* Adopting guidelines, then applying them in such a way that 192 out of 193 cases are out of compliance or unresolved, is not *fairness and equality* to inmates and to releasees.[247] This is closer to *unstable caprice*. The one resolved and compliant case is a freak. Once more, we are entitled to take Guidelines at face value to represent what, in fact, the clear language of the text represents. This is evidence of exceeding limits of reason or expectation and, hence, being unconscionable. It is also evidence of being arbitrary. Defendants are not being governed by principle.

Conclusion

Defendants have abused their discretion by acting unreasonable, arbitrary and unconscionable. Defendants have also abandoned the task given to them by Ohio's General Assembly. Finally, in making these decisions, Defendants are erasing trial court decisions and, in a *de facto* manner, convicting and sentencing Named Plaintiffs to new crimes that have never been acknowledged by the inmate or proven in an Ohio trial court.

SECOND CROSS CLAIM

ARBITRARY AND CAPRICIOUS DECISION MAKING

Introduction

The discussion of *Parole Review* in our Answer to Defendant's Motions for Summary Judgment, including the hearing, the guidelines and the parole decisions and documentation, is hereby incorporated by reference and inserted into this Second Cross Claim as if this material has been fully reproduced here. The First Cross Claim is its entirety, is also incorporated by reference into this Second Cross Claim and inserted here.

[247] *See* Affidavit of Charles Oswalt A204095, Plaintiff's Exhibit 5.

The basis for this Second Cross Claim can be found in Plaintiffs Seventh Cause of Action titled Arbitrary and Capricious Decision Making. This claim is predicated upon state law.

There is some commonality existing between our First and Second Cross Claims, but there are also significant differences. In our First Cross Claim, our source for abuse of discretion consisted of the Ohio Parole Board Guidelines themselves. In this second Cross Claim, arbitrary and capricious decision making is manifested primarily in the decision-making process itself. For this reason, our source of evidence consists of decision-making at the parole review hearing level.

Facts

The following facts are uncontradicted and irrefutable.

The Ohio Parole Board utilizes the preponderance of the evidence standard in all of its parole review hearings.[248] It emphatically rejects the more demanding standard of proof beyond a reasonable doubt required for a conviction in a court of law.[249]

Parole review proceedings are closed to the public.[250] With the exception of Full Board Reviews, most parole review hearings take place at prisons.[251] These hearings are not transcribed by a court reporter.[252] Attorneys are not allowed to be present, even if an attorney has submitted a parole package on an offender's behalf.[253] Offenders are

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[248] *See* Spence Affidavit, paragraph 13.

[249] *See* Spence Affidavit, at Paragraph 13. *See also* R.C. §2901.05 (A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution.

[250] *See* R.C. §121.22 (D)(3) Meetings of public bodies open to the public; (D) This section does not apply to any of the following, (3) The adult parole authority when its hearings are conducted at a correctional institution for the sole purpose of interviewing inmates to determine parole or pardon. *See also* Policy 501-36, Part VI (C)(2), Defendant's Exhibit B.

[251] *See* Defendant's Exhibit B, Policy 501-36, Part VI, Procedure, B (2).

[252] *See* Affidavit of R. Dean Omar A169464, Plaintiff's Exhibit 4.

[253] *See* Defendant's Exhibit B, Policy 501-26, Part VI Procedure, C (2).

also not allowed to see confidential information relied upon to make decisions.[254] None of the due process protections set out in Administrative Rule 5120:1-1-43(I) for post release offenders under Ohio's New Law apply to inmates under Ohio's Old Law.

Under current Guidelines, parole review panels reserve the right to review the judgment issued by an Ohio trial court and to change this judgment if they disagree with it.[255]

When the Ohio Department of Rehabilitation and Correction announced its new Parole Board Guidelines on January 13, 1998, Director Reginald Wilkinson stated, "Our goal is to utilize state of the art techniques so that decisions on whether or not to release offenders are made with public safety uppermost in our minds."[256] Concern for the public's safety frequently appears in Mr. Wilkinson's speeches and announcements.

The Ohio Department of Rehabilitation and Correction offers programs to address anti-social behavior. Specifically, a program is offered for sex offenders, for drug abuse and for anger management. Inmates are encouraged to take these programs. Among the incentives listed, prisoners are told that completion of programs will enhance their standing with the Parole Board and improve their chances of earning a Preliminary Release Date. The same applies to advancing one's education. Inmates are told that if they acquire their high school equivalency certificate or attend college, this will improve their prospects for earning a parole. We have seven Named Plaintiffs that have graduated from Ohio colleges with Summa Cum Laude honors.[257]

The Ohio Department of Rehabilitation and Correction offers programs to teach vocational skills. These programs consist of formal vocational education at technical colleges as well as apprenticeship programs. Inmates are encouraged to take these programs. Prisoners are told that completion of these programs and acquisition of a job

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[254] *See* Defendants Exhibit B, Policy 501-36, Part VI Procedure, C (7).

[255] Ohio Parole Board Guidelines, Part D: Guideline Application Procedures, Section 104 (b). *See also* Affidavit of David Shusky, Plaintiff's Exhibit 45.

[256] *See* News Release dated January 13, 1998, Plaintiff Exhibit 20.

[257] Named Plaintiffs George Brehm A257595, Clifford Goodballet A274109, Linda Karlen W024021, Bruce Lower A203800, Mark Masten A202210 (2 college degrees, graduating both times Cumma Sum Laude), William Peterson A197487 and Danny Srofe Jr. A315915.

skill will improve their chances of earning a parole when they see the Parole Board.

LAW AND ARGUMENT

Applicable Law

Arbitrary and *capricious* are terms describing much the same thing. *Arbitrary* has been defined in Black's Law Dictionary[258] to mean in an unreasonable manner, without adequate determining principle and without fair, solid and substantial cause. It has also been construed to mean not governed by fixed rules, and without consideration for facts and circumstances presented.[259] The term *capricious* has been defined to mean a willful and deliberate disregard of competent testimony and relevant evidence.[260] Both of these terms, *arbitrary and capricious*, presume behavior that is unsupported by facts.[261] This is consistent with the Ohio Supreme Court understanding of this term.[262]

Decisions reflecting a lack of principle and unsupported by facts are only part of this cause of action. Alone, they are not enough. First and foremost, vital interests must be at stake at the time these decisions are being made. Arbitrary and capricious decision-making turns actionable when it occurs at a point in time when substantive due process protections are engaged and vital interests are at stake. Without this threshold condition, there can be no injury in any constitutional or legal sense, despite the proof presented.

It is settled law that in the U.S. Constitution, there is no constitutional or inherent right for a convicted person to be released through parole before the expiration of a valid sentence.[263] If a liberty interest does exist, this liberty interest must be found in

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[258] *See* Black's Law Dictionary, 6th Edition at p. 104.

[259] Black's Law Dictionary, 6th Edition, at p. 104.

[260] Black's Law Dictionary, 6th Edition, at p. 211.

[261] *See* Concurring opinion of Justice White, in Gregg v. Georgia (1976), 428 U.S. 153, at 225, referring to arbitrary and capricious as standardless. This opinion has been cited with favor by Ohio's Supreme Court in State v. Jenkins, (1984) 473 N.E.2d 264, at 272.

[262] *See* State v. Jenkins, (1984) 15 Ohio St. 3d 164, 473 N.E.2d 264, 274. Ohio's Supreme Court refers to the exercise of arbitrary and capricious prosecutorial discretion as standardless and unsupported by facts.

[263] *See* Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979)

state law.[264] Ohio's statute states that the Ohio Adult Parole Authority "*may* ... grant a parole to any prisoner, if in its judgment there is reasonable ground to believe that, if ... the prisoner is paroled, such action would further the interests of justice and be consistent with the welfare and security of society."[265] Since *Greenholtz* was decided in 1979, Ohio's statute has been construed as being strictly discretionary.[266] Use of the word *may* is pivotal to this construction. No liberty interest can be found in Ohio's law.[267]

The fact that an Ohio prisoner possesses no right to parole neither precludes nor concludes our inquiry. Prisoners still retain what the Supreme Court has characterized as "a residuum of liberty."[268] All of these Ohio inmates possess the statutory right to be eligible for parole.[269] While there is no absolute right to parole, there is a right to a proper *consideration for parole*.[270] Since 1996, when Ohio's legislature significantly reduced the maximum terms of felonies,[271] this right to a proper consideration for parole

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hereafter *Greenholtz*. *See also* Jago v. Van Curen, 454 U.S. 14 (1981).

[264] *See* Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, at 99 (1979), where the Supreme Court held in the context of a Nebraska statute, that the word *shall* translated into an entitlement to liberty and, once established, could not be taken away without due process.

[265] Inmates of Orient Correctional Institution v. Ohio State Adult Parole Authority, 929 F.2d 233, 236 (6th Cir. 1991), *citing* R.C. '2967.03

[266] Inmates of Orient Correctional Institute v. Ohio State Adult Parole Authority, 929 F.2d 233, 236 (6th Cir. 1991).

[267] Inmates of Orient Correctional Institution v. Ohio State Adult Parole Authority, 929 F.2d 233, 236 (6th Cir. 1991). *See also* State ex rel. Seikbert v. Wilkinson (1994), 69 Ohio St. 3d 489, 490, 633 N.E.2d 1128. This is an Ohio Supreme Court decision stating that R.C. '2967.03 creates no expectancy of parole or any constitutional liberty interest sufficient to establish a right of procedural due process.

[268] *See* Inmates of Orient Correctional Institute v. Ohio State Adult Parole Authority, 929 F.2d 233, 235 (6th Cir. 1991), *citing* Olim v. Wakinekona, 461 U.S. 238, 245 (1983). *See also* Wolff v. McDonnell, 418 U.S. 539, 555-556 (1974).

[269] *See* R.C. § 2967.13 quoted in part, below.

[270] Wallace v. Turner, 525 F.Supp 1072, 1076 (S.D. Fla. 1981)

[271] *See* R.C. § 2929.14(A). Maximum sentences for first degree felonies were reduced from 25 years to 10 years, from 15 years to eight years for 2nd degree felonies and from 10 years to 5 years for 3rd

should be particularly poignant for inmates with long tails under the Old Law.

A parole board is required, as any other body, to comply with constitutional requirements; it cannot deny parole upon illegal grounds or upon improper considerations.[272] The question of eligibility for parole must be determined upon evidence which passes constitutional muster.[273] For this reason, decisions affecting prisoners *must not* be based upon inaccurate information or upon an erroneous evaluation.[274] As one court stated:

> "That, of course, is true in any one of the prisoner situations which the Supreme Court has considered, whether it is the prisoner who is transferred to a less desirable place of confinement or whether it is a prisoner who losses good time credit in a disciplinary proceeding. Indeed it (accurate information) is a desirable element of every decisional process in which people's lives or fortunes are affected."[275]

At time of sentencing for these Plaintiffs, Ohio R.C. §2967.13 provided:

> (a) prisoner serving a sentence of imprisonment for a felony for which an indefinite term of imprisonment is imposed becomes *eligible for parole* at the expiration of his minimum term, diminished as provided in sections 2967.19, 2967.193 and 5145.11 of the Revised Code. [Ital added for emphasis.]

While this statute does not provide inmates with a right to be paroled at the end of their

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degree felonies. This is a source of enormous tension inside Ohio prisons. Inmates under the New Law with shorter terms share cells with Old Law inmates doing double and tripe the amount of time, because of parole board continuances, for the same crime.

[272] Moore v. Florida Parole and Probation Commission, 289 So. 2d 719, 720 (Fla. 1974). *See also* Wallace v. Turner, 525 F.Supp 1072, 1076 (S.D. Fla. 1981), a post *Greenholtz* decision. "Parole authorities cannot determine eligibility for parole on illegal or improper grounds."

[273] Moore v. Florida Parole and Probation Commission, 289 So. 2d 719, 720 (Fla. 1974).

[274] Christopher v. U.S. Board of Parole et al., 589 F.2d 924, 930 (7th Cir. 1978).

[275] Christopher v. U.S. Board of Parole et al., 589 F.2d 924, 930 (7th Cir. 1978). The words *accurate information* in parenthesis are added by writer.

minimum term, or at any time before the maximum term ends, one Ohio appellate court has stated, "we think the words *eligible for parole* ought to mean something."[276] This same Ohio appellate court continued:

> "... the legislature's choice of words implies that inmates will actually become eligible for parole at some point. Therefore, when Lee entered into the plea agreement, he would have had a reasonable expectation of *meaningful* parole consideration."[277] [Ital added for emphasis.]

Unlike some legal rules, *due process* is not a technical term with a fixed content unrelated to time, place and circumstances.[278] Under Federal law, *due process* is a flexible concept and calls for such procedural protections as the particular situation demands.[279] Whether or not *due process* considerations apply, depends in part upon the situation and the extent to which a person's statutory created rights are being arbitrarily abrogated.[280] Under Ohio law, *due process* rights guaranteed by Section 16, Article I of the Ohio Constitution apply to some extent, in the context of administrative law.[281] In the context of this problem, it depends upon the particular circumstances surrounding a prisoner at the point in time when he or she is being considered for parole eligibility.

Before adopting the current Guidelines, and given the fact that a parole board can hold an offender to the last day of their maximum sentence, one could argue the existence of a vital interest at stake during a parole review hearing. There is authority to support both sides of this proposition. But when an inmate is being charged and adjudicated with new criminal behavior pursuant to published guidelines by a panel

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[276] Lee v. Ohio Adult Parole Authority, et. al., Montgomery App. #18833 unreported, 2001 Ohio App. LEXIS 3852 [slip opinion at p. 4]. Words appearing in ital appear in quotations in court opinion.

[277] Lee v. Ohio Adult Parole Authority, et. al., Montgomery App. #18833 unreported, 2001 Ohio App. LEXIS 3852 [slip opinion at p. 4].

[278] Christopher v. U.S. Board of Parole, 589 F.2d 924, 929 (7th Cir. 1978).

[279] Christopher v. U.S. Board of Parole, 589 F.2d 924, 929 (7th Cir. 1978).

[280] Christopher v. U.S. Board of Parole, 589 F.2d 924, 929 (7th Cir. 1978).

[281] *See* Oswalt v. Ohio Adult Parole Authority, Tenth Appellate District # 01AP-363 [slip opinion at p. 3] *citing* LTV Steel Co. v. Indus. Comm. of Ohio (2000) 140 Ohio App. 3d 680, 688.

empowered to place this inmate into an offense category commensurate with this new crime, there is no debate concerning whether or not a vital interest is at stake. When any person is confronted with criminal accusations by a parole board decision-maker with authority to alter and continue an existing sentence to take into account this new criminal conduct, due process protections are instantly engaged. Introducing new criminal conduct into a parole review hearing, that has never been proven beyond a reasonable doubt or voluntarily acknowledged by the inmate in a courtroom, constitutes both inaccurate information and an erroneous evaluation for parole consideration purposes.

Under Ohio's current Parole Board Guidelines, every trial court decision is being reviewed *de novo* at a parole board hearing.[282] If the reviewing parole board panel disagrees with the trial court, these Guidelines empower the panel to alter the conviction and place an offender into an offense category appropriate for this altered conviction.[283] In our legal system, you cannot plead guilty to one offense and then be adjudicated guilty of another crime.[284] It is a basic tenet of our judicial system that a judgment of guilt must conform to the offense of conviction.[285] This applies, even if two offenses are closely related or of the same general character.[286] Accusing an offender of committing any crime at a parole review hearing, other than the offense of conviction, is evidence of prejudice.[287] If a parole board panel finds an inmate guilty of another crime, this is evidence of prejudicial conduct sufficient to prove that a prisoner's due process rights have been violated and their right to proper consideration for parole has been abrogated.[288] Unproven criminal behavior has corrupted the parole eligibility question.

Substantive *due process* considerations are firmly engaged at all of these parole review hearings, because Ohio parole authorities reserve the right to deviate from the

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[282] *See* Ohio Parole Board Guidelines, Part D: Guideline Application Procedures, §104 (b).

[283] *See* Testimony of Executive Assistant Thomas C. Schneider on April 6, 1998 at p. 10.

[284] Wallace v. Turner, 525 F.Supp 1072, 1076 (S.D. Fla. 1981).

[285] *See* Wallace v. Turner, 525 F.Supp. 1072, at 1076 (S.D. Fla. 1981).

[286] *See* Wallace v. Turner, 525 F.Supp. 1072, at 1076 (S.D. Fla. 1981).

[287] *See* Wallace v. Turner, 525 F.Supp. 1072, at 1076 (S.D. Fla. 1981).

[288] *See* Wallace v. Turner, 525 F.Supp. 1072, at 1076 (S.D. Fla. 1981).

offense of conviction and undertake their own independent review as to whether or not the offender is guilty of a crime other than the trial court conviction.[289] In the Spence Affidavit, the Parole Board admits to using a lesser standard of proof and bases its findings upon a preponderance of the evidence.[290] Owing to this diminished level of proof, an Ohio prisoner's right to *due process* is also being violated. The parole board has reserved the right to find them guilty of new criminal conduct with proof that is constitutionally flawed under Ohio's law.[291]

Based upon the above, substantive due process protections are being engaged at parole board hearings in Ohio, and this has been true ever since these current guidelines were adopted. These *due process* rights are also being violated because Ohio inmates are being found guilty of committing crimes pursuant to a diminished and constitutionally flawed standard of proof. In fact, adjudicating criminal behavior with any standard of evidence other than beyond a reasonable doubt also constitutes one form of arbitrary and capricious decision-making. With this as our basis, we are now prepared to examine the evidence of arbitrary and capricious decision-making occurring at parole board hearings.

Evidence of Arbitrary and Capricious Decision-Making

In a study of 255 offenders, all convicted of 1st degree, 2nd degree and aggravated 3rd degree crimes, we inquired into the final results. Four possibilities were presented. Offenders were serving time for only proven crimes. Second, offenders were serving time for a crime that had never been proven or acknowledged in a court. Third, despite an Order from the trial court judge that the sentences were to be served concurrent, an offender was being required by the parole board to serve time consecutively for these same crimes.[292] Finally, an offender is serving a life sentence

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[289] *See* Wallace v. Turner, 525 F.Supp. 1072, at 1076 (S.D. Fla. 1981).

[290] *See* Spence Affidavit, Paragraphs 13, 15 and 16

[291] *See* Lee v. Ohio Adult Parole Authority, et al., Montgomery County Court of Common Pleas, Case #00-2219, Magistrate's Decision at p. 11. In a magistrate's opinion, the differences in proof between an indictment and convictions are discussed. *See* Misc. Unreported Decisions, Magistrates's Opinion, an unnumbered exhibit. The magistrate's decision has been favorably commented upon in two Ohio appellate decisions. *See* Lee v. Ohio Adult Parole Authority, et. al., Montgomery Asp. #18833 unreported, 2001 Ohio Asp. LEXIS 3852 [slip opinion at p. 3]; Oswalt v. Ohio Adult Parole Authority, Tenth Appellate District # 01AP-363 [slip opinion at p. 4].

[292] The preferred method for a parole board panel to reverse a judge's decision to serve sentences

that has never been issued by a trial court.[293] *[Please see Chart Q, End Results.]*

As the left graph on Chart Q indicates, 63.9% of these inmates are serving time for a crime that has never been proven or acknowledged by the offender via a plea in an Ohio trial court. All of these sentences rest upon the diminished standard of proof, preponderance of the evidence. From charts examined earlier, we know exactly which offenders are caught in this predicament. These are offenders convicted of lesser included offenses, of attempted charges and of crimes that do not engage an Offense Category as high as 8. We also have a few notable exceptions. Teresa Booher's[294] trial court conviction for Aggravated Murder was reversed on appeal. Instead of going through a second trial, she pled guilty to Involuntary Manslaughter. The Parole Board found her guilty of Aggravated Murder and reinstated the vacated trial court sentence. Robert Boyd's[295] conviction for Aggravated Murder was also reversed by an appellate court. He was convicted of Conspiracy to Commit Aggravated Murder and sentenced to 7 to 25 years. The Parole Board reinstated his original conviction for Aggravated Murder. In both cases, decisions were made *without* going outside of the Parole Board's Guidelines.

Another 5.5% of these inmates are being required to serve consecutive sentences for multiple crimes, even though the trial court issued an order that the sentences were to be served concurrent. In 25.5% of these cases, the criminal conviction has not been changed, but the sentence has been converted into a life term. From charts examined earlier, we know the inmates caught in this predicament. These are the cases that the government successfully prosecuted. Many of these cases involve sex offenders. Although the government secured a conviction for rape, mitigating circumstances resulted in relatively light sentences of between five to twenty-five years. After earning

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concurrent, into consecutive, is to apply their Multiple Separate Offenses rule. [See Ohio Parole Board Guidelines, Chapter 10, Subchapter A, Section 2 at pp.'s 53-55.] This rule allows them to attach points to every multiple instance of an offense, and with enough points, an offender can be moved upward one or more offense categories.

[293] A life sentence is defined as 15 years or longer. In these cases, the prosecutor could have pursued a life sentence but opted, instead, to accept a conviction for a 1st degree conviction. Parole board panels have utilized the long maximum terms attached to an indefinite 1st degree sentence to convert these into life sentences.

[294] Named Plaintiff Teresa Booher W019140.

[295] Named Plaintiff Robert Boyd A182324.

good time, these offenders expected to do between three and a half and four years. This is also what the trial court anticipated. Instead, these prisoners are serving life sentences, defined as a minimum of fifteen years.

The net result is that only 5.1% of these inmates are serving time for proven or acknowledged crimes, without any dramatic alteration *so far* to their sentences.

In some ways, the right graph on End Results is more remarkable. Among inmates with Life Sentences, more than half are serving time for a crime that has never been proven in court. We know from charts examined earlier, many of these people have been convicted of murder. They are being required to serve the time for Aggravated Murder.

Earlier, we quoted Parole Board Executive Assistant Thomas Schneider's testimony, commenting upon how sex offenders deserve life sentences. Both of the graphs on Chart Q corroborate his point. Prejudging people is a manifestation of making arbitrary and capricious decisions. It is also a certain formula for making wholesale arbitrary and capricious decision-making. And this is exactly what is occurring.

In the next chart, we documented how many Named Plaintiffs are serving time for a crime that the State has never even accused them of doing. *[Please see Chart R, Doing Time for a Crime Never Charged.]* Out of 300 Named Plaintiffs surveyed, more than one out of four inmates are serving time for a crime that the prosecutor has never pursued. Individual words lifted from police reports and converted into crimes appear here. This chart contains compelling evidence of arbitrary and capricious decision-making.

The largest two categories involve homicides (17%) and sex offenders (15%). Bruce Lower is typical of this group.[296] Prosecutors have acknowledged the practice of over indicting to facilitate plea bargaining.[297] This happened with Mr. Lower. He was indicted for Murder, but he pled guilty to Involuntary Manslaughter. The Parole Board is requiring Mr. Lower, a first time offender who graduated Summa Cum Laude from

[296] Named Plaintiff Bruce Lower A203800.

[297] *See* Plaintiff's Exhibit 46, Article by Stephanie Tubbs-Jones, a prosecutor in Cuyahoga County before she became a municipal judge (1981-1983), then a common pleas judge from 1983 to 1991 and then the Cuyahoga County Prosecutor from 1991 to 1998.

Ohio University while in prison, to serve 23.7 years with no release date. This amount of time places him firmly in the bracket for Aggravated Murder, a charge that the prosecutor never even considered.[298] Sex offenders receive similar treatment, with only one difference. They are convicted of rape instead of Aggravated Murder.

We have four Named Plaintiffs with phantom felonies.[299] Eric Davis[300] is one of them. He is a first time offender with a 0 Criminal History Risk Score who has been incarcerated continuously since 1981. At his parole review, Hearing Officer Kathy Hilbert looked at a 12 year old conduct report. Relying upon this record, Ms. Hilbert gave him a prior felony conviction, which carried a prior commitment of more than one year, then a another *1* for not having three years of freedom without a violation, and one final *1* for a parole, probation, confinement or escape status. When Ms. Hilbert was finished, Mr. Davis's criminal history risk score rose from 0 to 4.[301] This higher criminal history risk score put him into a higher offense category and increased his sentencing 2.5 years. Ms. Hilbert then applied this higher risk score to calculate his next review date, 27.5 years from his date of admission. Mr. Davis was in the Ohio State Penitentiary Honor Camp at the time. This honor status was lost because of this large Parole Board continuance.

In State ex rel. Bray v. Russell [hereafter *Bray*],[302] the Ohio Supreme Court struck down Bad Time[303] as unconstitutional. This decision ruled that additional prison time, without engaging the full panoply of protections offered under the Ohio Constitution and enforced through the courts, violated the Separation of Powers

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[298] *See also*, Affidavit of Charles Oswalt A204095, Plaintiff's Exhibit 5. Mr. Oswalt is now serving time for a crime that he has never investigated for, charged with or indicted for doing.

[299] The Parole Board considers a DUI ticket equivalent, for Criminal History Risk Score purposes, to a felony. *See* Ohio Parole Board Guidelines, Criminal History Risk Score Manual, Item A, A.3 at p. 61.

[300] Named Plaintiff Eric Davis A163633. *See also* Affidavit of Eric Davis, Plaintiff's Exhibit 47.

[301] A copy of this Criminal History Risk Score is Plaintiff Exhibit 47. Note the original *0*'s are still in place.

[302] State ex rel Bray v. Russell (2000), 89 Ohio St. 3d 132, 729 N.E.2d 359.

[303] *Bad Time* is a term denoting additional prison time for committing disciplinary and rule violations while incarcerated. This was part of Senate Bill 2 and codified R.C. 2967.11.

Doctrine. This decision applied to inmates convicted under Ohio's current law. Named Plaintiffs convicted under the Old Law are routinely issued Bad Time by the parole board. We have eight Named Plaintiffs serving time for this reason. And we are not counting added time tacked on to the aggregate guideline because of disciplinary tickets. That is because most of these people are still lacking preliminary release dates. The actual time to serve is still unknown.

When the Parole Board adopted its current guidelines, two forms were created with it. We have already discussed the Ohio Parole Board Decision sheet. The second form is called the Criminal History Risk Score [hereafter *Risk Score*]. The Risk Score is actually a recidivism gauge. It is used to give some reading as to the offender's likelihood of reoffending. Prisoners are rated along a scale from 0 to 8. An offender with a 0 or 1 Risk Score will have no prior felonies. On the other hand, an offender with a 7 or 8 Risk Score will have at least three, and usually four or more prior felony convictions.

You would expect offenders with a low risk score to have a better chance at earning parole as compared to offenders with high risk scores. That is what you would expect. *[Please see Chart S, Percentage of Paroles Granted by Criminal History Risk Scores]* In a survey of 299 Named Plaintiffs, offenders with the lowest criminal history risk scores stood the poorest chances of getting a release date.[304] Conversely, offenders with the highest criminal history risk scores stood the best chance of getting a parole. And the differences are not even close. Offenders with high criminal history risk scores have almost a 10% better chance than the next highest category and roughly three times as good a chance as offenders with no prior criminal records.

Offering paroles to habitual repeat offenders at three times the rate for offenders with no prior criminal history constitutes palpable and notorious evidence of arbitrary and capricious decision-making.

You would expect offenders that had taken college courses, obtained their degree and acquired marketable skills to have a better chance at earning a parole, as compared to offenders with no acquired skills and no education. That is what you would expect.

[304] *See* Affidavit of Beverly Seymour W025777, date June 15, 2002, Plaintiff's Exhibit 48. Ms. Seymour has collected over her ten plus years of incarceration, a list of over 180 examples of very dangerous, repeat and career criminals who have been granted parole, while thousands of first time offenders with excellent chances of successfully completing parole get routinely denied.

[Please see Chart T, Arbitrary and Capricious Decision Making] In a study of the same 299 Named Plaintiffs, we wanted to ascertain how certain attributes and accomplishments were judged and rewarded by the parole board with Preliminary Release Dates. We expected to find that inmates with programs and particularly programs designed to address anti-social behavior and acquire marketable skills, fared better as compared to inmates without self improvement courses and job skills. We were wrong. Inmates with no acquired skills stand at the top of the list, with a 76% chance of earning parole. They are followed by inmates with no education (62%). At the bottom of this chart, you will find the inmates that have taken the three year sex offender programs and graduated with college degrees.[305] Their chances of earning a parole are 1.5% and 13% respectively.

Incidentally, not one of the seven Named Plaintiffs that graduated college with Summa Cum Laude honors earned a parole. Not one of these Named Plaintiffs has even earned an Outstanding Program Achievement credit. For a majority of these Named Plaintiffs, these educational accomplishments were met with scorn and contempt. *[Please see Chart U, Programs and Advancing Education.]* The graph on the right is particularly telling. In this pictorial, inmates have taken both self improvement programs and they have advanced their education or learned a trade. These Named Plaintiffs have done everything that they can be asked to do. Only a quarter of these inmates earned an Outstanding Program Credit and less than one out of five have been given a parole.

Investing thousands of dollars in an inmate to give them a college education and extensive sex offender programming, and then to follow this with extensive incarceration which renders this programming and education virtually worthless, constitutes strong evidence of arbitrary and capricious decision-making. Granting a parole to inmates with no acquired skills while in prison and no education is further evidence of arbitrary and capricious decision-making.

Conclusion

Parole Board panels are turning the judgments and the sentencing decisions of Ohio trial courts topsy turvey, and rendering them virtually meaningless. They are rewarding inmates with high criminal history risk scores with Preliminary Release Dates, while denying out-dates to first time offenders with very low Risk Scores. Parole

[305] *See* Affidavit of Beverly Seymour, Plaintiff's Exhibit 48. The people who work the hardest to win their freedom are always denied parole.

Board panels are rewarding inmates with no skills and no education with release dates. Offenders with college degrees and marketable skills are getting additional decades of incarceration. This is all occurring after Ohio has made substantial investments in these inmates by paying for their educations and for expensive rehabilitation therapy. Evidence of arbitrary and capricious decision making by Parole Board panels is both ubiquitous and appalling.

THIRD CROSS CLAIM

VIOLATION OF SEPARATION OF POWERS

Introduction

The discussion of *Parole Review* in our Answer to Defendant's Motions for Summary Judgment, including the hearing, the Guidelines and the parole decisions and documentation, is hereby incorporated by reference and inserted into this Third Cross Claim as if this material has been fully reproduced here. Portions of the First Cross Claim, including the Facts and discussion titled Evidence of Abuse, are also incorporated by reference into this Third Cross Claim and inserted here. The Second Cross Claim, titled Arbitrary and Capricious Decision-Making, is incorporated in its entirety into this Third Cross Claim as if it were fully reprinted here.

Our basis for this Third Cross Claim can be found in Plaintiffs Fifth Cause of Action, Claim 3, titled Wrongful Exercise of Executive Authority, and in the Sixth Cause of Action, titled Separation of Powers. This Cross Claim is based upon state law claims.

There is reference made in our discussion to Ohio's New Law and Ohio's Old Law. In all cases, the New Law refers to Am. Sub. S.B. No. 2 (also referenced as *Senate Bill 2* and *S.B. 2*) and its companion *Am. Sub. S.B. No. 269*. The New Law took effect on July 1, 1996. The Old Law refers to Ohio's prior sentencing statute, which expired on July 1, 1996. All Named Plaintiffs have been convicted under Ohio's Old Law.

Facts

The following facts are uncontradicted and irrefutable.

The Parole Board Guideline manual devotes its first nine chapters to the subject of criminal offenses. These are references to crimes as defined in the Ohio Revised Code. They are also references to the criminal offenses committed by inmates in Ohio prisons.

In Section 104(a) of Part D: Guideline Application Procedures, these Guidelines state:

> (a) Offense Seriousness Category. The offense seriousness category shall reflect the nature and circumstances of the current offense behavior as determined by the Parole Board. ...

Under paragraph (b) of Section 104, the Parole Board Guidelines state that the Parole Board reserves the right to engage a higher offense category than the offense of conviction if there is "Information describing conduct or circumstances that establish a higher offense category than the offense category applicable to the offense of conviction ..." We have previously shown how this authority is exercised in over ninety percent of the cases.[306]

The Adult Parole Authority is an administrative unit of the Ohio Department of Rehabilitation and Correction.[307] The Ohio Department of Rehabilitation and Correction is an administrative department of the executive branch of the State of Ohio.[308] Both the Adult Parole Authority and the Ohio Department of Rehabilitation and Correction are aligned with Ohio's Executive Branch of government.

Under Ohio's Revised Code, Named Plaintiffs are entitled to eligibility for parole. At their time of sentencing, R.C. §2967.13 provided:

> (a) prisoner serving a sentence of imprisonment for a felony for

[306] *See* Exhibit 18, Compilation of 193 offenders reviewed under the current parole board guidelines, reflecting the fact that 175 of 193 are out of compliance and reflect upward departures, and only 18 are in compliance and reflect no departure.

[307] *See* R.C. §5149.02

[308] *See* R.C. §121.02(P)

> which an indefinite term of imprisonment is imposed becomes *eligible for parole* at the expiration of his minimum term, diminished as provided in sections 2967.19, 2967.193 and 5145.11 of the Revised Code.

The Adult Parole Authority convenes these parole eligibility hearings pursuant to Ohio R.C. §2967.03. These hearings are not open to the public.[309] No court reporter is present to transcribe these proceedings.[310] The Ohio Parole Board utilizes the preponderance of the evidence standard in all of its parole review hearings.[311] It emphatically rejects the more demanding standard of proof beyond a reasonable doubt required for a conviction in a court of law.[312]

At the conclusion of a parole board hearing, the decision is reduced to writing in the form of an Ohio Parole Board Decision.[313] If the panel finds, pursuant to §104(a) and (b), Part D of the Parole Board Guidelines Manual, that an offender should be placed in an offense category other than the one dictated by the offense of conviction, the reasons supporting this decision must be set out in a hearing record by a brief statement of the specific findings that justify the offense seriousness rating.[314]

LAW AND ARGUMENT

Applicable Law

Section 1, Article IV of the Ohio Constitution states:

> "The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the Supreme Court as may from time to time be

[309] *See* R.C. §121.22 (D)(3)

[310] *See* Affidavit of Named Plaintiff R. Dean Omar A169464, Plaintiff's Exhibit 4.

[311] *See* Spence Affidavit, paragraph 13.

[312] *See* Spence Affidavit, at Paragraph 13. *See also* R.C. §2901.05 (A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution.

[313] *See* Ohio Parole Board Decision, Plaintiff's Exhibit 21.

[314] *See* 104(a) of Part D: Guideline Application Procedures, at p. 71.

established by law."

This sentence from Ohio's Constitution has been interpreted by Ohio's Supreme Court to mean that the determination of guilt in a criminal matter and the sentencing of a defendant convicted of a crime are solely the province of the judiciary.[315]

In 1995, Ohio's General Assembly enacted a comprehensive revision of Ohio's Criminal Code as well as its sentencing system.[316] One of the overriding goals of this new legislation was "truth in sentencing," meaning that the sentence imposed by the judge is the sentence that is to be served, unless altered by the judge.[317] This was primarily accomplished by two methods: eliminating indefinite sentences and eliminating parole.[318] Under this New Law, the Parole Board no longer has the authority to determine how long an offender stays in prison.[319]

> "In enacting SB 2, the General Assembly took the APA out "of the loop" when it came to the release of inmates and put the judiciary "into the loop." A quantitative decision was made here. That decision was that the judiciary, in combination with prosecutors and defense counsel, is in a better position to decide the appropriate sentence for a defendant and how much of that sentence the defendant needs to serve." [320]

SB 2 only applies to offenders under Ohio's New Law. Unfortunately, Named Plaintiffs have been prosecuted under the Old Law. Regardless, the decision to terminate the Parole Board's authority to decide when an inmate may be released, at minimum, stands as a strong testimonial from Ohio's General Assembly that the courts are in the best position to make these decisions, not the Parole Board.

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[315] *See* State ex rel Bray v. Russell (2000), 89 Ohio St. 3d 132, at 136.

[316] S.B. No. 2 and its companion bill, Am. Sub. S.B. No. 269, also called the Truth in Sentencing Act, effective July 1, 1996.

[317] *See* Woods v. Telb, et al., (2000) 89 Ohio St. 3d 504, at 508.

[318] *See* Woods v. Telb, et al., (2000) 89 Ohio St. 3d 504, at 508; 733 N.E.2d 1103. Poluka v. Ohio Adult Parole Authority, Case # 00CVH08-7676 (unreported), at p. 22.

[319] Woods v. Telb, et al., (2000) 89 Ohio St. 3d 504, at 508.

[320] Poluka v. Ohio Adult Parole Authority, Case # 00CVH08-7676 (unreported), at p. 23.

Four years after the New Law was enacted, Ohio's Supreme Court ruled upon two constitutional challenges to its terms. In *Bray*, the question concerned a provision in Ohio's New Law that allowed the Executive Branch of Ohio's Government, acting through the Ohio Adult Parole Authority, to extend the prison sentence of an inmate by adding up to three months of additional time for violations committed while in prison.[321] The Plaintiff, Gary Bray, allegedly assaulted a prison guard in violation of R.C. §2903.13. His sentence was continued in accordance with R.C. §2967.11(B). The pertinent Ohio statute read as follows:

> R.C. §2967.11(B) "As part of a prisoner's sentence, the parole board may punish a violation committed by the prisoner by extending the prisoner's stated prison term for a period of fifteen, thirty, sixty, or ninety days in accordance with this section. ... If a prisoner's stated term is extended under this section, the time by which it is so extended shall be referred to as 'bad time.' A violation is defined as 'an act that is a criminal offense under the law of this state or the United States, whether or not a person is prosecuted for the offense." R.C. §2967.11(A)[322]

The *Bray* decision struck down R.C. §2967.11 as unconstitutional. Ohio's Supreme Court held that it violated the separation of powers doctrine, because it could:

> "enable the executive branch to prosecute an inmate for a crime, to determine whether a crime has been committed, and to impose a sentence for that crime. This is no less than the executive branch's acting as judge, prosecutor and jury. R.C. §2967.11 intrudes well beyond the defined role of the executive branch as set forth in our Constitution." [323]

The other pertinent Supreme Court decision is Woods v. Telb [hereafter *Woods*],[324] In *Woods*, Milton Woods was given a ten month sentence in prison plus up to three years of post release control. The terms of Post Release Control state that if a

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[321] State ex rel. Bray v. Russell (2000), 89 Ohio St. 3d 132, at 135.

[322] State ex rel. Bray v. Russell (2000), 89 Ohio St. 3d 132, at 135.

[323] State ex rel. Bray v. Russell (2000), 89 Ohio St. 3d 132, at 135.

[324] Woods v. Telb et al. (2000) 89 Ohio St. 3d 504, 733 N.E.2d 1103.

person violates the conditions of supervision while under post release control, the parole board could return Mr. Woods to prison for up to nine months for each violation and for a total of 50% of his originally issued prison term.[325] If the violation is a new felony, the offender can receive a new prison term of *the greater* of one year *or the time remaining on post release control."*[326] [Ital added for emphasis.]

In *Woods*, the court stated:

> "Under the current system of post-release control, the judge sentences the offender from the options available under the new sentencing scheme and informs the offender that he or she may be subject to a definite period of post release control, which may last up to three years in the case of post release control, and that a violation of those conditions would result in additional time up to fifty percent of the original sentence. Those terms are part of the actual sentence, unlike bad time....In other words, the court imposes the full sentence and the Adult Parole Authority determines whether violations merited its imposition. The defendant is fully informed at sentencing that violations of post release control will result in, essentially, time and a half."[327]

To distinguish between its holding for *Bray* and its decision in *Woods*, the Ohio Supreme Court stated:

> "We are mindful that we have recently held that Ohio's bad-time statute, R.C. 2967.11, violates the separation of powers doctrine. However, the post release control statute is clearly distinguishable. We held the bad time statute was unconstitutional because the bad time statute set up a scheme whereby the parole board acted as "judge, prosecutor and jury" for an action that could be prosecuted as a felony in a court of law. State ex rel Bray v. Russell (2000), 89 Ohio St. 3d 132, 135, 729 N.E. 2d 359, 362. While we acknowledge that prison discipline is a proper exercise of executive power, we conclude that trying, convicting and

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[325] *See* Woods v. Telb et al. (2000) 89 Ohio St. 3d 504, 733 N.E.2d 1103, at 1108.

[326] Woods v. Telb et al. (2000) 89 Ohio St. 3d 504, 733 N.E.2d 1103, at 1109-10..

[327] *Woods*, 89 Ohio St. 3d 504, at 511.

> sentencing inmates for crimes committed while in prison is not an appropriate exercise of executive power. Id, 89 Ohio St. 3d at 136, 729 N.E. 2d at 362. The commission of the "crime" actually resulted in an additional sentence being imposed by an administrator. If an offense was serious enough to constitute an additional crime, and the prison authorities did not feel that administration sanctions were sufficient (i.e. isolation, loss of privileges), the prison authorities should bring additional charges in a court of law, as they did before SB 2."[328]

There is no discussion in *Bray* or *Woods* about the Parole Board's current Guidelines. And this is not surprising. These guidelines were implemented in April of 1998. It took until January of 2001 before these Guidelines began to come to the attention of Ohio trial courts[329] and until August of 2001 before they surfaced in Ohio appellate decisions.[330] The briefs for both *Bray* and *Woods* had to be filed in 1999, because these decisions were issued in June and April, respectively, of 2000.

Earlier, we stated that if the Parole Board was tracking the criteria set forth in R.C. §2967.03 and its approved implementing regulations,[331] Ohio courts have almost no authority to disturb a parole board decision. We noted, however, that since these new Guidelines were adopted, this is not happening. We went into painstaking and laborious detail to prove this point, going through the preparatory forms, the information captured on these forms and, just as important, the information that was not captured. We also walked through the Ohio Parole Board Decision form in the same methodical manner. This needed to be done, because the following pivotal point requires this proof.

When the Parole Board decided to scrap its traditional role of reviewing the record of an inmate while incarcerated, and chose instead to review the record of the inmate's trial and conviction, it also forfeit its exemption from scrutiny by Ohio and Federal courts. As the *Woods* decision notes, prison discipline is an appropriate

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[328] *Woods*, 89 Ohio St. 3d 504 at 512.

[329] The Magistrate's Decision in Lee v. Ohio Adult Parole Authority, Case #00-2219, Montgomery County Common Pleas, was filed on January 29, 2001.

[330] The appellate decision of Lee v. Ohio Adult Parole Authority, et al., C.A. Case # 18833, 2001 Ohio App. LEXIS 3852, was decided on August 31, 2001.

[331] By reference to approved implementing regulations, we refer to Administrative Code 5120:1-1-07 [Plaintiff's Exhibit 13]

executive function. Similarly, courts will defer to a parole board decision that reviews an inmate's record of incarceration. It is a completely different story when the subject switches to indictments, sentencing, the presence of mitigating and aggravating circumstances, the weighing of evidence and the proper interpretation of the Ohio Revised Code. Ohio trial courts know something about these areas, maybe even more than the Parole Board knows.

Before leaving the topic of applicable law, one more decision needs to be reviewed. David Lipschutz was indicted on two counts of aggravated murder. He pled guilty to the lesser included offense of murder on just one count, and the second count was dismissed. At his parole hearing on April 27, 1988, he was denied parole. For good cause, the parole board panel stated that he had committed two murders. To support this finding, they relied upon his indictment, which stated that both victims had been shot in the head and the murder weapon belonged to him. A mandamus action was filed and ultimately decided by the Ohio Supreme Court. In *State ex rel. Lipshutz v. Shoemaker*,[332] [hereafter *Lipshutz*] the Ohio Supreme Court held that "the Parole Board may consider crimes that an inmate has committed but has not been convicted of."[333]

This twelve year old *Lipshutz* decision has been employed as a primary pillar by the Ohio Attorney General's office to support the practice of resorting to an indictment and using an indictment to justify an upward departure by the parole board under its current Guidelines. But *Lipshutz* can be readily distinguished from the record before this Court. This decision only says, "the Parole Board *may consider* crimes that an inmate has committed but has not been convicted of." Under the grid matrix method utilized by the current Parole Board, if the offensive category becomes dictated by the indictment, then this indictment supersedes the offense of conviction. This is the consequence of pegging the offensive category with an indictment. Now, the indictment becomes the *only thing* being considered and the offense of conviction is set aside, as if it never happened. Nothing of this nature can be read into or implied from this *Lipshutz* decision.

Evidence of Executive Encroachment Upon Judicial Authority

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[332] (1990), 49 Ohio St. 3d 88.

[333] State ex rel. Lipshutz v. Shoemaker (1990), 49 Ohio St. 3d 88, at 90. In a strong dissent, Judge Sweeney states, "such a decision has the potential of opening a veritable Pandora's box by permitting over-indictment abused by prosecutorial authorities." Id.

On this question, we have a clear roadmap for determining a violation of the Separation of Powers Doctrine, thanks to two recent Ohio Supreme Court decisions involving prisoners and the question of whether or not the parole board has exceeded its authority. Because the *Woods* decision specifically distinguishes between the two holdings, it is this decision that gives us our best guidance.

From *Bray*, we have three key factors. If these key factors are present, our barometer is tilting toward violating the Separation of Powers Doctrine.

> (1) The criminal conduct in question involves a new violation of Title 29 of the Ohio Revised Code.[334]
>
> (2) The statute or rule creates a scheme whereby the executive branch is able to prosecute an inmate for a crime, determine whether a crime has been committed and to impose a sentence for that crime. In effect, the executive branch acts as judge, prosecutor and jury.[335]
>
> (3) As a result, there is a finding of new criminal conduct, followed by an additional sentence imposed *from an administrator* as punishment for this new crime. [336]

From *Woods*, we can also find three key indicators. If these indicators are present, then our needle is pointing toward no violation of the Separation of Powers Doctrine.

> (1) The Judge is in control and imposes the full sentence.[337]

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[334] *See Woods*, 89 Ohio St. 3d 504 at 512, "an action that could be prosecuted as a felony in a court of law."

[335] *See* State ex rel. Bray v. Russell (2000), 89 Ohio St. 3d 132, at 135. *See also Woods*, 89 Ohio St. 3d 504 at 512, the bad time statute set up a scheme whereby the parole board acted as judge, prosecutor and jury.

[336] *See Woods*, 89 Ohio St. 3d 504 at 512. The commission of the "crime" actually resulted in an additional sentence being imposed by an administrator.

[337] *See Woods*, 89 Ohio St. 3d 504, at 511. In other words, the court imposes the full sentence.

(2) Post release conditions are attached and the offender is informed by the Judge at time of sentencing as to the consequences for violating these post release conditions. [338]

(3) It is then left to the discretion of the parole board to determine whether the violations of these conditions merit the imposition of these prison sanctions.[339]

We have previously reviewed the experiences of hundreds of our Named Plaintiffs before the parole board. On the appointed date, they are summoned into a room for an interview that lasts about fifteen minutes. At the conclusion of this interview, they find out where they are being placed in the guidelines. If their crime only qualifies for a category 7 offensive category or lower, or if they have been convicted of an attempted crime, or of a lesser included offense, it is virtually certain that their convictions will be changed and rounded upward. If they have co-defendants convicted of more serious crimes, it is virtually certain that they will leave the room with a new conviction that matches the conviction of a co-defendant. We know this. This has been thoroughly documented. Now, we are going to run these experiences through the gamut of factors listed above from these two Ohio Supreme Court decisions, *Bray* and *Woods*.

Plaintiffs are being accused of violating new provisions of Ohio's criminal code. The first *Bray* factor is satisfied.

Owing to our oft cited §104 (a) and (b) of Part D:Guideline Application Procedures on page 71, the Parole Board has been set up to act as judge, prosecutor and jury. The second *Bray* factor is satisfied.

Upon finding that an inmate's offensive behavior is different from the offense of conviction, a parole board panel is empowered to move this offender to a higher offensive category, which in turn imposes a longer period of incarceration. This decision

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[338] *See Woods*, 89 Ohio St. 3d 504, at 511. The judge sentences the offender from the options available under the new sentencing scheme and informs the offender that he or she may be subject to a definite period of post release control, which may last up to three years in the case of post release control, and that a violation of those conditions would result in additional time up to fifty percent of the original sentence.

[339] *See Woods*, 89 Ohio St. 3d 504, at 511. "the Adult Parole Authority determines whether violations merited its imposition."

to engage the higher offensive category is made solely by the administrator. The third *Bray* factor is satisfied. Furthermore, under Ohio's Old Law, there is no appeal from this decision.

At this point, our needle indicates the violation of a separation of powers doctrine.

Looking to the first key indicator in *Woods*, the trial court judge does set the minimum and maximum sentence and, in effect, impose the entire sentence. Superficially, this is satisfied. But looking at this key indicator in the spirit of the New Law would dictate an opposite result. Under the Old Law, long tails on indefinite sentences were being virtually ignored.[340] Courts were not informing offenders of these maximum sentences in the manner and with the same degree of urgency that occurs in trial courts today, with post release controls. Offenders were being informed and misinformed at the same time, because they were told not to worry about these long maximum sentences.

Looking to the second key *Woods* factor, at time of sentencing, there was no discussion of post release controls coming from the judge to any of these defendants. This is significant, because every Old Law defendant that leaves prison before the expiration of their maximum sentence, leaves with post release controls under another name, parole.[341]

Looking to the third key indicator from *Woods*, there is a tremendous difference between reviewing an offender's post release violations to determine whether prison sanctions are warranted, and a mandatory parole review hearing. The latter is supposed to focus upon accomplishments and maturity, to determine whether or not an offender can return to society. This third *Woods* criteria is not satisfied.

All three *Bray* indicators are firmly engaged, which tilts the decision strongly

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[340] One trial court commented, "The Court can almost take judicial notice that, throughout the late 1980's and the early 1990's, criminal defendants were routinely told by prosecutors and defense attorneys alike that they would serve the front end of an indefinite sentence - less good time if earned - and that the tails of indefinite sentences were being ignored." Ankrom v. Harry Hageman, et al., Case # 01CVH02-163, Common Pleas Court of Franklin County, Decision denying Motion for Judgment on the Pleadings, at p. 2.

[341] *See* Plaintiff's Exhibit 49, a form titled Conditions of Supervision, issued by the Adult Parole Authority and given to every Ohio inmate released on parole.

toward a violation of the separation of powers doctrine. There is only one *Woods* factor pushing the pendulum the other direction, and it is an extremely weak push. While it is true that Ohio trial courts set the long maximum terms, if judges had cautioned offenders earnestly and at length, dwelling upon these maximum sentences and informing them that they may very well end up doing this amount of time day for day, the prosecutor would be doing nothing but trials. Few defendants would take pleas. These maximum sentences were set by the court; but nobody, not even the judges, took these sentences seriously.

Conclusion

Parole board panels are exercising the authority of the judge, the prosecutor and the jury. They are making decisions regarding the guilt or innocence of an offender, and then these decisions are replacing the offense of conviction set by a trial court. As a consequence, offenders are being moved into offense categories commensurate with these higher crimes, and forced to serve significantly longer prison sentences. This is exactly what the Ohio Supreme Court struck down in *Bray* as a violation of the separation of powers doctrine.

FOURTH CROSS CLAIM

BAD FAITH

Introduction

The discussion of *Parole Review* in our Answer to Defendant's Motions for Summary Judgment, including the hearing, the Guidelines and the parole decisions and documentation, is hereby incorporated by reference and inserted into this Fourth Cross Claim as if this material has been fully reproduced here. The First, Second, and Third Cross Claims are also incorporated by reference in their entirety into this Fourth Cross Claim and inserted here.

Our basis for this Fourth Cross Claim can be found in Plaintiffs First, Second, Third, Ninth and Tenth Causes of Action. References to Bad Faith can be found in paragraphs 77, 80 and 84. This Cross Claim is based upon state law claims.

Facts

In 1994, the U.S. Congress passed the Violent Crime Control and Law Enforcement Act of 1994, Title II, Subtitle A.[342] The public policy advanced by this legislation involved sentencing for violent offenders. Pursuant to a grant program created in this legislation, states were offered money to build prisons for holding violent offenders. To qualify for these grants, states had to demonstrate a commitment to hold violent offenders for longer periods of time. Furthermore, the biggest portion of this grant funding was reserved for states that had adopted determinate sentencing schemes. This meant issuing one sentence for a maximum term, with the trial court controlling this sentence from beginning to end. Determinate sentencing represented a major departure from most sentencing laws at that time. Ohio, like many other states, issued two sentences, a minimum and a maximum sentence, and let the parole board decide how much of the sentence would be served. Under the new sentencing scheme urged by the Federal government, parole boards were relieved of this task. Trial courts dictated the sentence and decided how much of the sentence was to be served.

In due course, Ohio's General Assembly accepted the bait offered by the Federal government and adopted parts of the *Violent Crime Control and Law Enforcement Act of 1994* into its own comprehensive overhaul of Ohio's criminal and sentencing statutes. This legislation was enacted in 1995 as Ohio's Truth in Sentencing Act. Throughout this Answer and in the Cross Claims, we have referred to this legislation as Ohio's New Law. The Parole Board was relieved of its responsibility for deciding how much of the sentence would actually be served. This decision was transferred to trial courts. In addition, indeterminate sentencing was replaced with determinate sentences. This New Law became operational on July 1, 1996. As expected, Ohio applied for Truth in Sentencing Grants and these were routinely awarded.

In 1995, as these events were unfolding, the Ohio Department of Rehabilitation and Correction appreciated an important reality of the New Law. After July 1, 1996, this Ohio department would no longer be able to control the timing of an inmate's exit from their prison system. Inmates sentenced under the New Law would serve the time required by the judge, and the parole board would be powerless to do anything about it.

At this same time, the Department of Rehabilitation and Correction was in the midst of a major building program to add additional prison capacity. From 1991 to 2000, fourteen new prisons were built, increasing the number of Ohio prisons from

[342] Public Law 103-322, codified 42 U.S.C. 13701 et seq.

twenty to thirty-four. At the same time, the rate of crime in Ohio, particularly during the late 1990's, declined.[343] This exacerbated the problem previously mentioned with Ohio's New Law. The pool of new offenders entering prison was shrinking. Prison officials were powerless to delay the exit of New Law prisoners. Just as new prisons planned years earlier were becoming operational, the number of offenders to house was dropping.

To avoid closing prisons, the Department of Rehabilitation and Correction made a strategic decision sometime in 1995 or 1996 to substantially extend the sentences for Old Law inmates. This was done, because Old Law inmates were the only prisoners they could still control. Specifically, a decision was made by these Defendants to set aside the minimum sentence issued by trial courts and treat the maximum sentence as if it were the *only* sentence. To cloak this decision with a patina of legitimacy, new Parole Board Guidelines were contrived and formalized. Dr. Peter Hoffman, formerly with the U.S. Parole Commission, was hired as a consultant. Ohio's Guidelines adopted the same grid and the same basic organization as the Federal guidelines. They were represented to be just like the Federal Guidelines with only minor modifications.[344] As we have previously observed, Ohio's Guidelines are not at all like the Federal Guidelines.

Examining Ohio's Guidelines in this light, the decision to use these guidelines as a vehicle for camouflaging their decision to hold Old Law offenders for most of their maximum sentences becomes obvious. Time charts march right up to 25 years and even apply to first time offenders.[345]

Armed with these Guidelines, the Parole Board is routinely and systematically blotting out the minimum sentence issued by the trial court, and treating the maximum sentence created by operation of law as the only sentence. You can see this reflected on the Ohio Parole Board Decision form. There is a box on the top of the form for the maximum sentence. No mention is made of the minimum sentence.

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[343] *See*, Monitoring Sentencing Reform, Ohio Criminal Sentencing Commission, by Fritz Rauschenberg at p. 12, Plaintiff's Exhibit 50. *See also*, Memo by Teri Decker, Chief, Bureau of Labor Relations to Charles Wheeler, documenting the abolishment of jobs because of a prison closure. From July, 1998 to December 10, 2001, Ohio's prison population decreased by 4,261 inmates, a 9% reduction. Page 2 of Decker Memo, attached as Plaintiff's Exhibit 51.

[344] *See* Spence Affidavit, at paragraph 6. This representation has been made to this Court.

[345] *See* page 1 of Parole Board Guidelines.

The process for altering sentences of Old Law inmates proceeds as follows.

Every Ohio inmate under the Old Law has a right to eligibility for parole.[346] The first alteration of an Old Law inmate's sentence occurs when an inmate is eligible to see the parole board for their first hearing. Instead of being considered eligible for parole, the Parole Board panel places this Old Law inmate into a grid for the current Guidelines. This has the practical effect of setting aside the trial court ordered minimum sentence and substituting in its place, a new sentence dictated by its current guidelines.

When an inmate is placed into the current Parole Board Guidelines, this invariably translates into a continuance, which in turn leads to the second material alteration of an Old Law inmate's sentence. All of their accrued good time and earned credits, frequently amounting to years, are instantly erased. This runs completely contrary to the rules which prevailed at the time of their conviction.

After this first hearing, these Guidelines have served the purpose that they were created to do. The Old Law inmate has been taken totally out of their original court sentence, and all of the trappings of an indeterminate sentence, such as good time and earned credits, have been stripped away. From this point forward, Old Law inmates are left to do their extremely long sentences day for day.

These Guidelines provided an immediate and substantial benefit to the Department of Rehabilitation and Correction. One by one, parole review by parole review, old law inmates were being transformed into a completely fluid pool. Defendants exercised total control over this segment of the prison population *after* the Guidelines were applied. Because of Ohio's law, the Parole Board controlled the date of release for these inmates and their discretion was absolute. With their long sentences, Old Law inmates could be held for decades. If the crime rate continued to fall and the number of new entrants dropped off, the Parole Board could refrain from issuing paroles. This would keep the cells occupied and the prisons operating. If the courts were sending in too many blacks, causing the racial balance inside these prisons to tilt too far from the fifty-fifty distribution considered optimal, the Parole Board could refrain from issuing paroles to whites. In this manner, the pool of Old Law inmates could

[346] *See* Ohio R.C. §2967.13, which provided at time of sentencing for offenders under the Old Law: (a) prisoner serving a sentence of imprisonment for a felony for which an indefinite term of imprisonment is imposed becomes *eligible for parole* at the expiration of his minimum term, diminished as provided in sections 2967.19, 2967.193 and 5145.11 of the Revised Code.

cushion the vagaries encountered with New Law offenders that were beyond Defendants control.

In his affidavit, Richard Spence acknowledges the fact that the Ohio Department of Rehabilitation and Correction utilizes parole as a tool for managing the behavior of incarcerated offenders.[347] Bev Seymour agrees. In her affidavit, she states:

> "It has been my personal experience and observation that the Ohio Department of Corrections uses parole decision powers to manage prison population ... by simply placing the worst behavior problems, the most violent fighters, the most incorrigible candidates on parole, and maintaining a "pool" of "old law" stable prisoners who are not behavior problems in the prison by denying them parole. In the women's prisons, these "old law" prisoners are placed among the "short term" prisoners and used as stabilizers for mental health problems, behavior problems and social problems. They also fill key work posts and are major assistants to staff, and help make their jobs easier."[348]

Consistent with Ms. Seymour's observations in the women's prisons, Old Law inmates at men's prisons also hold the key jobs. This includes yard care machinery, baker, roofing, all building maintenance, electric shop, law library and staff assistants.[349]

The Ohio Department of Rehabilitation and Correction operates a number of businesses at Ohio prisons under its division called Ohio Penal Industries.[350] At Lebanon Correctional Institution, license plates are manufactured. At London Correctional Institution, they make push brooms and mops. In total, there are 47 different industries operating out of 19 of Ohio's 34 prisons.[351] Old law inmates hold

[347] *See* Spence Affidavit, paragraph 5.

[348] *See* Affidavit of Bev Seymour, Plaintiff Exhibit 14 at p. 2.

[349] Affidavit of Owen Kilbane, Plaintiff's Exhibit 52.

[350] R.C. §5147.07 titled Purchase of supplies for the state or its institutions requires Ohio agencies and departments to purchase all of its supplies from Ohio Penal Industries. Before supplies can be purchased elsewhere, Ohio Penal Industries must certify that the item cannot be supplied by any of its businesses.

[351] *See* Plaintiff's Exhibit 53. List of industries operated out of Ohio's prisons.

critical jobs in these industries.

The affidavit of David Israel[352] cuts right to the core of his allure:

> "The unfortunate and increasingly apparent truth is that I am what D.R.C. wants. An inmate, who is of the lowest security level, thus is the cheapest to guard. I have no medical requirements, thus even more so reducing the cost of keeping me incarcerated. Finally, I actually make this department more money than it costs to maintain me. I say this because of the jobs I have worked while incarcerated. I worked in the fiscal office of the governor's office filling a position which would have required a state employee, and since leaving, was filled by a state employee. I currently work at a state garage in downtown Columbus, which bills my labor out at 30 dollars an hour."[353]

Increasingly, Old Law inmates are being relied upon to operate the prisons, run the different industries operated out of prisons, and assist in managing New Law inmates.

LAW AND ARGUMENT

Applicable Law

In Tumey v. Ohio, 273 U.S. 510 (1927) [hereafter *Tumey*], the U.S. Supreme Court considered a challenge to certain Ohio statutes during the era of prohibition. Ed Tumey was charged with unlawfully possessing intoxicating liquor. The warrant was issued by the Mayor of North College Hill, a small village in southern Ohio.

The Mayor's duties were primarily executive. A special statute, called the Crabbe Act, gave the Mayor of every village in Ohio the authority to try violations of the Prohibition Law. The evidence indicated that the Mayor who tried these liquor cases had a personal financial interest in the outcome. He received a small percentage of the proceeds collected, in addition to his salary. The evidence also indicated that this liquor court generated needed revenue. His village was in bad financial shape and relied upon

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[352] David Israel A288711

[353] Affidavit of David Israel, Plaintiff's Exhibit 54.

this money. As Tumey's attorney put it, this made the mayor's "so-called court but a mask and a sham, in which there were the forms of judicial proceedings, but in fact, no real judicial hearing." [354]

Tumey has come to stand for the proposition, "No matter what the evidence was against him, he had the right to have an impartial judge." Tumey, 273 U.S. at 535.

This principle has been applied to criminal trials. In Rose v. Clark, 478 U.S. 570 (1986) [hereafter *Rose*], the Court stated.

> "... some constitutional errors require reversal without regard to the evidence in the particular case. citing Chapman v. California, 386 U.S. 18, at 23 n. 8 (1967), Payne v. Arkansas, 356 U.S. 560 (1958) (introduction of coerced confession), Gideon v. Wainwright, 372 U.S. 335 (1963) (complete denial of right to counsel), Tumey v. Ohio, 273 U.S. 510 (1927) (adjudication by a biased judge). The limitation recognizes that some errors necessarily render a trial fundamentally unfair. The State of course must provide a trial before an impartial judge, Tumey v. Ohio, ... Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, see Powell v. Alabama, 287 U.S. 45 (1932), and no criminal punishment may be regarded as fundamentally fair." *Rose*, 478 U.S. at 577.

Today, the Due Process Clause has moved beyond the rule first set forth in *Tumey* and now applies to cases where no actual bias needs to be proven in the case pending. The test of impartiality can be rebutted if a pattern of bias can be proven from other cases. In Bracy v. Gramley, 520 U.S. 899 (1997)[hereafter *Bracy*], petitioner was tried, convicted and sentenced before then-Judge Thomas Maloney, an Illinois judge later convicted on federal charges of taking bribes from criminal defendants. Petitioner did not offer any bribe to Maloney. On appeal, he claimed that Maloney's acceptance of bribes from criminal defendants not only rendered him biased against the state in those cases, but also induced a compensatory bias against defendants like himself, who had not bribed him, to deflect suspicion that he was soft on criminal defendants. Stated differently, Judge Maloney was prosecution oriented in his case, to camouflage his behavior in other cases.

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[354] *Tumey*, 273 U.S. 510. This line does not appear within the decision. It is quoted from one of the briefs prior to the decision.

In *Bracy*, the U.S. Supreme Court held, "difficulties of proof aside, there is no question that, if it could be proved, such compensatory, camouflaging bias on Maloney's part in petitioner's own case would violate the Due Process Clause of the Fourteenth Amendment." *Bracy*, 520 U.S. at 905.

Federal courts in this District have defined the term *Bad Faith* in identical terms. While construing Ohio R.C. 2744.03(A)(6)(b), a provision granting limited immunity to employees of political subdivisions, one court stated "bad faith includes a dishonest purpose, conscious wrongdoing or breach of a known duty through some ulterior motive." Wright v. City of Canton, Ohio 138 F.Supp.2d 955, at 967 (N.D. Ohio 2001) *See also* Van Hull v. Marriott Courtyard, 87 F.Supp.2d 771 at 777 (N.D. Ohio 2000).

Fraud or misrepresentation is not a prerequisite to a determination that a Chapter 7 debtor has filed their petition in "bad faith."[355]

In Words and Phrases, the term *bad faith* is defined as follows.

> "Bad faith is not simply bad judgment or negligence, but imports dishonest purpose or moral obliquity, and means breach of known duty through some motive of interest or ill will; it differs from negative idea of negligence in that it contemplates state of mind affirmatively operating with furtive design or some motive of interest or ill will." [356]

Evidence of Bad Faith

We placed three hundred Named Plaintiffs into a data base. The information gathered for these Named Plaintiffs begins with personal details. Our program captures their sex, race, age and date of admission. It includes details of their incarceration, such as their security status, their disciplinary record, time served and their participation in programs. Next, we entered information relating to their crime and prior criminal history. This includes their trial court conviction and sentence. Finally, parole board experiences are documented. Before entering this information, extreme care was taken to be sure that it was accurate. Clients sent in records of indictments and sentences. We reviewed Parole Board decisions and parole board correspondence. The Offender

[355] Vol. 5, Words and Phrases, Pocket Supplement, citing In re Krohn, 87 B.R. 962.

[356] Vol. 5, Words and Phrases, Permanent Edition at p. 17.

Search Engine maintained by the Department of Rehabilitation and Correction on the Internet was consulted on every client and used as a check to insure accuracy. Every client filled out a data base questionnaire. Before answers from this form were entered into the data base, they were first corroborated. This was tedious, time consuming work. But there was no other way to place a human face upon these Old Law inmates.

When this was done, we hired Dr. Martin Schwartz and asked him to conduct his own, independent survey based upon Named Plaintiffs that *were not* included in this data base. Dr. Schwartz is a professional statistician. He was given full access to our files. After completing his own survey, he concluded that our three hundred member group is similar to the rest of his sample cases. We went to this extra measure, because we wanted to be sure that our findings were not atypical. Although only three hundred Named Plaintiffs generated the data reflected in the graphs which follow, they are fully representative of the entire client base, which now numbers approximately nine hundred. With about 19,500 Old Law inmates still incarcerated, this client base accounts for almost five percent of the offenders in the entire class.

At the beginning of this Cross Claim, we stated that a decision had been made to make Old Law inmates serve substantially all of their maximum sentences. *[Please see Chart V, Average of Time Served to Date and Average of Total Time Required for Named Plaintiffs]* Sentences for our Named Plaintiffs fall into five categories. There are first, second and third degree sentences. These sentences have a maximum time limit. We also have Named Plaintiffs with consecutive sentences that exceed twenty five years. We have placed these Old Law offenders into a separate category, called Stacked Sentences. Finally, we have Life sentences which have no maximum expiration date.

The maximum amount of time for an offender convicted of a Third Degree felony is ten years. If you look at this chart, you will see that our Named Plaintiffs are being required to serve, on average, 10.7 years. This is not an error. Several clients convicted of third degree felonies have prior offenses. The parole board has aggregated these sentences with unserved portions of prior sentences to achieve terms in excess of ten years. That explains how the average time is in excess of the legal maximum term.

For second degree offenders, the average amount of time to be served is 13.8 out of a maximum of 15 years. That is equivalent to 92% of the full term. For 1st degree felonies, they are requiring 17.2 years on average, or 69% of the maximum term. And there is no light at the end of the tunnel for four out of five of these offenders, because the Parole Board has still not assigned them a release date. There is nothing to stop the

Parole Board from continuing to issue more time to these offenders until they have served the entire 25 years. We believe they have every intention of doing so.

Finally, for offenders with stacked sentences, they are being required to serve 18.8 years on average. Because these sentences vary, we cannot compute a percentage of the maximum. Similarly, offenders with life sentences are being required on average to do 25.4 years. This cannot be equated to any kind of percentage figure.

This is compelling evidence of a decision to hold these offenders for substantially all of their maximum sentences.

Defendants have been prone to characterize these Old Law inmates as "the worst of the worst." *[Please see Chart W, Security / Custody Levels for Named Plaintiffs]* The Department of Rehabilitation and Correction has a gauge for determining who is the worst of the worst. It is called their security status.[357] Dangerous inmates are placed in Maximum security. The least dangerous inmates can be found in minimum security. More than fifty percent of our Named Plaintiffs are in minimum security. In the smaller graph, we can see the percentage of the total population qualifying for minimum security. It is 33%. The real number of Old Law inmates qualifying for minimum security is higher then the 54.7% total reflected on this graph. When an Old Law inmate receives a long continuance from the parole board, this automatically causes them to lose their minimum security status. Despite long continuances, Old Law inmates are maintaining minimum security status. 88% of our Named Plaintiffs qualify for minimum or medium security status. In comparison, the general population includes only 73% of offenders in these categories. Using a barometer employed by Defendants, this chart proves Old Law inmates are better behaved than New Law inmates. Old Law inmates are not the *worst of the worst*.

This chart also proves something more fundamental. These Old Law inmates were not always this well-behaved. When they first entered prison, there is every reason to believe that they were disbursed among the different security classifications, much like New Law inmates are disbursed today. This chart corroborates the point made by Bev Seymour. Over the years, difficult Old Law inmates have been released. Better

[357] We are using security status classifications that have recently been abandoned. Formerly, these were called Super Maximum, Maximum, Close, Medium and Minimum. The Department of Rehabilitation and Correction has just switched from descriptive labels to numbers. The basic system remains unchanged. We are employing descriptive labels, because they are more meaningful than abstract numbers.

behaved inmates have been held back. Parole board decisions are directly responsible for forging the pie wedges reflected on this graph.

We captured the nature of the crime committed by our Named Plaintiffs and their current average ages. *[Please see Chart X, Description of Named Plaintiffs by Average Age and by Nature of Crime]* The average age of these Named Plaintiffs is 44. That compares to a median age of 29 for New Law inmates.[358] It is a self evident truth that a person in their middle forties is not at all like a person in their late twenties. The next bar graph is a strong testimonial to how these Defendants are using the parole board to shape and mold this Old Law inmate population into a product of its own creation. 76% of these Named Plaintiffs have committed sex related or homicide related crimes. To put this figure into its proper perspective, please look at the lower graph, which illustrates the percent of entering offenders convicted of these crimes. It is less than 10%.

We also classified Named Plaintiffs by felony grades.*[Please see Chart Y, Named Plaintiffs Portrayed by Felony Grade and 1st Time Offenders]* Half of these Named Plaintiffs committed first degree felonies. One out of five committed 2nd degree felonies. Third degree felonies are less than 6%. The chart on the right tells us how many of these Named Plaintiffs are first time offenders. It is three out of five. This figure is shocking. That is 20% higher than the figure taken from a Year 2000 intake study conducted by the Department of Rehabilitation and Correction.

This chart further corroborates the affidavit of Bev Seymour. First time offenders are typically well-behaved inmates.

Maintaining a near fifty - fifty racial balance in all Ohio prisons is an extremely important goal to the Department of Rehabilitation and Correction. *[Please see Chart Z, Race Composition for Named Plaintiffs.]* Caucasians now account for nearly 70% of these Old Law inmates. When they entered prison, the ratio was probably close to the figure reflected in the smaller graph, 47% Caucasian to 51% Afro-American. This graph attests to the fact that Old Law Caucasian inmates are being used to maintain this racial balance.

The parole board might be treating women even tougher then men. *[Please see*

[358] This figure has been taken from a Year 2000 Intake Study performed by the Department of Rehabilitation and Correction, Plaintiff's Exhibit 55.

Chart AA, Named Plaintiffs Granted and Not Granted Preliminary Release Dates] Although we have many more men than women among our Named Plaintiffs, the ratio of men to women is comparable to the ratio of our prison populations. 8% of our Named Plaintiffs are women. Two out of three of these women have not been given release dates, and they have served on average 13.63 years. By comparison, four out of five males have not been given Preliminary Release dates and they have served 12.35 years on average. To put this into perspective, the maximum sentence for a First degree felony under the New Law is ten years. *All* of these Old Law offenders have served this much time, and then some.

Previously, we discussed programs. *[Please see Chart U, Programs and Advancing Education.]* More than one out of three Named Plaintiffs advanced their education and participated actively in their rehabilitation. These offenders did everything that they can do. One out of four received an outstanding program credit. One out of five have Preliminary Release dates. Three out of four have nothing to show for this effort.

Old Law inmates are better behaved than New Law inmates. They have taken programs and advanced their education. 60% of these inmates have no prior criminal records. More than half of these Old Law inmates have been qualified for minimum security status. All of them have served their minimum trial court sentence.

The working definition for *bad faith* among Federal courts in the Northern District of Ohio includes *a dishonest purpose, conscious wrongdoing or breach of a known duty through some ulterior motive*. This definition applies to the facts of this case.

These Parole Board Guidelines have nothing whatsoever to do with assisting the Parole Board "in making consistent, fair, and equitable decisions in determining the amount of time an offender must serve before being released to the community."[359] From an earlier chart documenting how only one case out of 193 had been handled and resolved within the parameters of these guidelines, we know they also have nothing whatsoever to do with structuring parole board discretion. *Chart K, Compliance with Guidelines*.

These Parole Board Guidelines were adopted for one purpose. They were

[359] *See* Preface, Parole Board Guidelines, Defendant Exhibit D.

introduced to legitimize a decision to do away with the minimum sentences from trial courts, and strip away as well, all remnants from the prior sentencing law entitling Old Law inmates to credits toward early release. That decision required something akin to these Guidelines. Without these Guidelines, this decision could not withstand the scrutiny of a court of law.

With the adoption of these Guidelines, the whole process of parole review has been converted into a sham. Today, we have only the pretence of a parole review. To paraphrase the comment of Ed Tumey's attorney in *Tumey*, there are the forms of a parole review hearing, but in fact, no real parole review hearing.

Since 1998, these Guidelines have been enlisted as a tool for subverting the parole eligibility entitlements of Old Law inmates and altering their trial court sentences. In the process, they are violating traditional concepts of criminal justice and denigrating Ohio's legal institutions, including its courts. Trial court judgments for criminal defendants have been set aside and replaced with new judgments. Court ordered sentences are being superseded by hastily written, half illegible handwritten decisions by parole board panels. Plea agreements, balancing the hard realities of evidence against the brutal ordeal of a trial, are discarded with contempt. Jury acquittals are receiving the same identical treatment.

This has occurred, because these Defendants have placed the pecuniary interest of their Ohio department ahead of the welfare of the people they are holding, ahead of their obligation under the Ohio Revised Code to give Old Law inmates a meaningful parole eligibility hearing, and ahead of their duty as public employees to conserve taxpayer funds and operate as prudently as possible. Instead, they are selfishly holding back thousands of prisoners, conspicuously qualified and deserving of parole, so they could continue to occupy cells, act as stabilizing influences in their prisons and assist in the operation of their prison complex. Without many of these Old Law inmates, some of Ohio's prisons and some Ohio Penal Industries would have to find outside talent to take their places. At the end of the day, these decisions have all been driven by money.

Conclusion

Defendant's dishonest purpose consists of setting aside the minimum trial court sentences issued under the Old Law and treating the maximum sentence for Old Law inmates as their only sentence. Adopting the Parole Board Guidelines to camouflage this decision constitutes conscious wrongdoing. The breach of a known duty consists of

holding out the possibility of parole, by scheduling parole review hearings, when it is patently obvious that the parole board has no intention whatsoever in issuing parole. Rather, the parole review hearing becomes the vehicle for stripping away years of good time and earned credits, so that another addition can be made to this fluid pool of Old Law inmates. The ulterior motive driving this behavior is to keep the prisons full and maintain the illusion that Ohio truly needed all of this additional prison capacity.

This adds up to Bad Faith.

FIFTH CROSS CLAIM

VIOLATIONS OF THE EX POST FACTO LAW

Introduction

The discussion of *Parole Review* in our Answer to Defendant's Motions for Summary Judgment, including the hearing, the Guidelines and the parole decisions and documentation, is hereby incorporated by reference and inserted into this Fifth Cross Claim as if this material has been fully reproduced here. The First, Second, Third and Fourth Cross Claims are also incorporated by reference in their entirety into this Fifth Cross Claim and inserted here.

Our basis for this Fifth Cross Claim can be found in Plaintiffs Fourth Cause of Action, Violations of U.S. Constitutional Rights and Laws pursuant to 42 U.S.C. 1983. Claim 4, Ex Post Facto Violation and paragraph 167, is the basis for this Cross Claim.

Facts

The following facts are uncontradicted and irrefutable.

All of these Named Plaintiffs were convicted of crimes committed before July 1, 1996. At time of sentencing, inmates under the Old Law, including Named Plaintiffs to this law suit, received two sentences. The trial court issued a minimum sentence. By operation of law, every judge was further required to issue a maximum sentence.

The maximum sentences were virtually ignored.[360]

[360] To support this point, we are attaching copies of a Time Served Report compiled by the

Under Ohio's prior sentencing law, inmates were entitled to reduce their minimum sentences by 30%, in some cases by 33%, for good behavior (5120:1-1-05), for productive program participation (5120:1-1-06), for maintaining minimum security (5120:1-1-07) and for meritorious conduct (5120:1-1-08). The above quoted Administrative Regulations were enacted to implement former R.C. 2967.19. Although R.C. 2967.19 has been repealed, the quoted administrative rules are still in force.[361] These credits operated as entitlements. The Parole Board was required by law to consider these credits when inmates became eligible for parole. To this day, the Parole Board is still acknowledging these credits by moving forward the date of an inmate's first parole review hearing.

At time of sentencing, these enumerated credits against the minimum sentence constituted one of the determinants used by judges for calculation of the sentence to be imposed.[362]

These enumerated credits towards early release were also a determining factor considered by defendants, before entering into plea agreements. Defendants were told by defense counsel that they possessed some control over their term of incarceration. If they followed the rules and participated actively in programs, they could reasonably expect to control their destiny and get themselves released before their minimum sentence.

Old Law inmates, and specifically these Named Plaintiffs, entered prison and began serving their terms of incarceration under these rules. These Named Plaintiffs

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Department of Rehabilitation and Correction for 1991, 1992, 1993, 1994 and 1995. Out of 1043 offenders convicted of first degree felonies, all of them with maximum sentences of 25 years, the average amount of time served was 6.34 years in 1991, which is 25% of the maximum. This gradually rose to 7.4 years in 1995, or 30% of the maximum sentence. Throughout this period, offenders primarily served their minimum sentence. The maximum sentence was imposed chiefly as a deterrent, to assist in managing the prison population.

[361] These administrative rules were previously attached as exhibit 18 to our complaint, and they are also becoming Plaintiff's Exhibit 56 to this filing.

[362] *See* Plaintiff's Exhibit 39 - Michael Poluka v. Ohio Adult Parole Authority, Case #00CVH08-7676, Franklin County Common Pleas, at pp.'s 14 - 16. Judge Miller reprints the entire schedule, called a Good Time Reduction Chart that she was given in January, 1995, upon first becoming a Judge.

consciously accrued good time, earned credits for productive employment, earned credit for maintaining minimum security and, in some cases, earned credit for meritorious services with the expectation that this would be applied as a deduction against their minimum sentence. By July 1, 1996, when Ohio switched from indeterminate sentencing to determinate sentencing, many Named Plaintiffs had accrued years of credit toward the reduction of their minimum sentences.

Pursuant to Ohio R.C. 2967.13, these Named Plaintiffs are eligible for parole. The Parole Board acknowledges this statutory requirement of eligibility for parole and refers to this as the *statutory first parole board hearing*.[363]

When approximately 70% of the minimum sentence has been served, this statutory first parole board hearing is convened.[364]

Prior to adopting these Guidelines, and while the Old Law still governed parole board practices, the mechanics for determining an inmate's accrued good time were administered as follows. The minimum sentence was determined. Next, this date would be reduced by an inmate's earned credit, which would be factored as a deduction from the minimum sentence. Next, an inmate's good time credit would be calculated and this would be factored as a deduction from the date established after calculating the earned credit. After factoring the earned credit and good time credit, and deducting these from the minimum sentence, the inmate's parole eligibility date would be determined.[365]

While the Old Law still governed parole board practices, an inmate's prospects for getting released at their *statutory first parole board hearing* were reasonably assured, particularly if they were a first time offender or if they had maintained a clean institutional record. As a consequence, the amount of time served between the years 1991 to 1995, computed as a percentage of the maximum sentence, averaged between 25% and 29% for a 1st degree felony,[366] between 26% and 33% for a second degree

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[363] *See* Plaintiff's Exhibit 57 - Affidavit of Richard Spence, dated April 24, 2001, attached as Exhibit 19 to Complaint, paragraph 10. This is a different affidavit then the Defendant Exhibit A.

[364] *See* Affidavit of Richard Spence, Plaintiff's Exhibit 57, attached as Exhibit 19 to Complaint, paragraph 10.

[365] *See* Affidavit of Richard Spence, Plaintiff's Exhibit 57. This is a different affidavit from Defendant's Exhibit A.

[366] This is based upon the Time Served Reports of the Ohio Department of Rehabilitation and

felony,[367] and between 15% and 18% for a third degree felony.[368]

In April, 1998, the Ohio Parole Board adopted new Guidelines [hereafter referred to both as *Guidelines* or as the *1998 Guidelines*]. These Guidelines have been applied to the sentences of Old Law inmates convicted of crimes before April of 1998, and occurring before the adoption of Ohio's New Law on July 1, 1996. This applies to all of the Named Plaintiffs to this law suit.

After these Guidelines were adopted, the *statutory first parole board hearing* changed dramatically. At an inmate's statutory first parole board hearing after adopting these Guidelines, the subjects of parole and release were no longer discussed. Instead, the purpose for this first parole review was to place the inmate into the current guidelines by determining their offensive behavior score and criminal history risk score. At the conclusion of this meeting, the inmate was given an Ohio Parole Board Decision form, advising him of his placement in these Guidelines.

Many Named Plaintiffs had already been incarcerated for such an extended period of time, that even when placed in the guidelines under the offense seriousness category dictated by their conviction, they were still eligible for release under these new Guidelines. These offenders had served the amount of time required for this guideline range and sometimes more. In these cases, the Parole Board determined that the offender had violated a crime more serious than their offense of conviction, and these offenders would be placed in a higher offense category commensurate with this more serious criminal conduct. Application of this higher offense category required a continuation for these offenders, because they still had to do more time to meet these new Guidelines.

Correction for the years 1991, 1992, 1993, 1994 and 1995, and represents an average of the time served for approximately 1,000 1st degree felonies during each of these years. See Time Served Reports, Plaintiff's Exhibit 58.

[367] These figures are based upon the Time Served Reports issued by the Ohio Department of Rehabilitation and Correction. During these years, the averages were based upon the time served for between 1,300 and 1,500 2nd degree felony sentences each of these years. See Plaintiff's Exhibit 58.

[368] These percentages are derived from Time Served Reports issued by the Department of Rehabilitation and Correction for 1991, 1992, 1993, 1994 and 1995. The total number of cases fluctuated between 600 to over 3,000 per year. See Plaintiff's Exhibit 58.

Under these adopted Guidelines, the parole board considered credits toward early release to be fully acknowledged and settled by the act of moving forward the date of an inmate's statutory first parole board hearing to 70% of the minimum sentence, instead of conducting this hearing upon reaching the minimum sentence. Upon receiving this earlier parole review, these credits were considered used. The Parole Board only considered these credits redeemable for early release at the inmate's first hearing. If the inmate did not earn a parole at their first hearing, these credits became worthless. Since inmates were getting slotted into Guidelines during this first hearing and not even considered for release, these credits were all lost.

Under these 1998 Guidelines, credit is no longer issued for good time, for productive employment or for meritorious service. Consequently, under these 1998 Guidelines, prisoners have no means of replacing the earned credits lost at their *statutory first parole board hearing*.

Application of these new Guidelines severs the connection that previously existed between prisoners and their minimum court sentence. And once this connection has been severed, there is no way available for them to resurrect this connection.

After this statutory first parole board hearing, the sentence of an Old Law inmate has been altered as follows. The minimum sentence has been set aside and, in its place, the inmate is placed in the current guidelines. Credits earned for early release are lost. The only term remaining from the court imposed sentence is the maximum sentence.

Consequently, these Named Plaintiffs are left to serve their sentence day for day with their release subject to the discretion of the Parole Board. Since these Guidelines have taken affect, the amount of time required to be served has been substantially increased. Old Law inmates are now being expected to serve substantially all of their maximum sentences.

LAW AND ARGUMENT

Applicable Law

Article I, Section 10 of the U.S. Constitution provides, "no State shall... pass any... ex post facto Law." This incorporates a term of art with an established meaning at the time of framing the U.S. Constitution.[369] The ex post facto prohibition forbids the

[369] California Dept. of Corrections v. Morales, 514 U.S. 499, at 504 (1995).

Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; *or imposes additional punishment to that then prescribed.'"* Weaver v. Graham, 450 U.S. 24, at 28 (1981) [Ital added]. For our purposes, it is the second part of this test, whether an act of the government imposes additional punishment to that then prescribed, which engages our interest. The critical query is whether or not the "quantum of punishment" has been changed. Dobbert v. Florida, 432 U.S. 282, at 293-294 (1977).

In the Sixth Circuit, parole consideration is part of the law annexed to the crime.[370] Further, the focus in determining whether a new law violates the ex post facto clause is the time the offense was committed.[371]

Plaintiffs are challenging the introduction of Guidelines by the Parole Board in 1998, and claiming that these Guidelines violated their rights under the Ex Post Facto Clause of the U.S. Constitution. 42 U.S.C. 1983 requires a showing that the Parole Board, acting under color of state law, deprived them of rights, privileges or immunities secured by the U.S. Constitution.[372] To determine whether a law violates the Ex Post Facto Clause, we must examine the relevant law in effect at the time an offense was committed and compare it with the retroactively-applied version of the law.[373]

Because we are discussing parole, we must begin our review of the law with Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979). In this decision, the U.S. Supreme Court held that a prisoner has no vested interest in parole under the U.S. Constitution. If this vested interest exists at all, it must be found under state law. The wording of Ohio's statue has been construed to be strictly discretionary.[374] These Named Plaintiffs have no vested liberty interest under Ohio law.

For purposes of the Ex Post Facto Clause, the existence of a vested interest is

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[370] Shabazz v. Gabry, 1223 F.3d 909, at 912 (6th Cir. 1997).

[371] Shabazz v. Gabry, 1223 F.3d 909, at 912 (6th Cir. 1997).

[372] Shabazz v. Gabry, 1223 F.3d 909, at 912 (6th Cir. 1997)

[373] Shabazz v. Gabry, 1223 F.3d 909, at 912 (6th Cir. 1997)

[374] Inmates of Orient Correctional Institution v. Ohio State Adult Parole Authority, 929 F.2d 233, 236 (6th Cir. 1991), *citing* R.C. §2967.03

irrelevant. [375] As the U.S. Supreme Court held in Weaver v. Graham, 450 U.S. 24 (1981) [hereafter *Weaver*]:

> "Contrary to the reasoning of the Supreme Court of Florida, a law need not impair a 'vested right' to violate the ex post facto prohibition. Evaluating whether a right has vested is important for claims under the Contracts or Due Process Clause, which solely protect pre-existing entitlements. (citations deleted) The presence or absence of an affirmative, enforcement right is not relevant, however, to the ex post facto prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of a fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense. *Weaver*, 450 U.S. at 30-31.

The U.S. Supreme Court has been vigilant about protecting the Ex Post Facto Clause. In an early decision, it stated, "The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of citizens should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised."[376]

The subject of *good time* has been linked to the Ex Post Facto Clause in one U.S. Supreme Court ruling. In Florida, it was called *gain time*, but it served the same identical purpose as the *good time* created under Ohio's statute.

Hoyt Weaver pled guilty to second degree murder in 1976. At the time of his conviction, the state statute provided a formula for deducting *gain time* credits from the sentences of prisoners who committed no infractions and performed their duties in a satisfactory manner. These *gain time* credits were entitlements. They were calculated

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[375] *See* Weaver, 450 U.S. at 29, footnote 13, "it is irrelevant whether the statutory change touches any vested rights."

[376] *Weaver*, 450 U.S. 24, at 31, footnote 15, *citing* Cummings v. Missouri, 4 Wall 277, 325 (1867).

automatically by the month and accumulated at an increasing rate, as the prisoner served more time.[377] In 1979, the State implemented a new law for computing *gain time* and applied this law to all prisoners, including Weaver. This new law reduced the amount of *gain time* that could be earned. The Florida Supreme Court upheld this law. Florida argued that *gain time* was not part of an offender's sentence. The U.S. Supreme Court reversed. In Weaver v. Graham, 450 U.S. 24 (1981), the Court found that this statute did violate the Ex Post Facto Clause of the U.S. Constitution.

> "First, we need not determine whether the prospect of the gain time was in some technical sense part of the sentence to conclude that it in fact is one determinant of petitioner's prison term - and that his effective sentence is altered once this determinant is changed." (citations deleted) We have previously recognized that a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *Weaver*, 450 U.S. at 32

Florida argued that its law was implemented only prospectively. This also applies to Ohio's Guidelines. Superficially, these have only been applied prospectively. But on this question, the *Weaver* decision cut through form and focused upon substance.

> "This argument fails to acknowledge that it is the effect, not the form of the law that determines whether it is ex post facto. The critical question is whether the law changes the legal consequences of acts completed before its effective date. In the context of this case, this question can be recast as asking whether Fla Stat 944.275(1) (1979) applies to prisoners convicted for acts committed before the provision's effective date. Clearly, the answer is in the affirmative.... Thus, the provision attaches a legal consequence to a crime committed before the law took effect." *Weaver*, 450 U.S. at 31.

For the U.S. Supreme Court, it was obvious that a reduction in gain-time accumulation lengthens the period that someone must spend in prison. *Weaver*, 450 U.S. at 33.

In *Weaver*, a Florida statute was under consideration. In Garner v. Jones, 529 U.S. 244 (2000) [hereafter *Jones*], the Ex Post Facto Clause was employed to examine a Georgia parole board rule.

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[377] *Weaver*, 450 U.S. 24, at 35.

Robert Jones began serving a life sentence after being convicted of murder. He escaped from prison and committed another murder. When caught, he was sentenced to a second life term. In Georgia, the State's Board of Pardons and Paroles was required to consider an inmate for parole after serving seven years. If denied parole at this first hearing, the parole board's rules required reconsiderations to take place every three years. [378] After Jones began serving his second life sentence, the Georgia parole board amended its rules to provide for reconsideration of inmates serving life sentences at least every eight years, instead of every three years. The question presented was whether this rule change by the Georgia parole board, increasing reconsiderations from three years to eight years, constituted an Ex Post Facto violation.

In *Jones*, the U.S. Supreme Court did not find an Ex Post Facto violation in this increased interval for reconsideration. However, on parole board practices and Ex Post Facto infringements, the Court was careful to keep the door open for future review.

> "The presence of discretion does not displace the protections of the Ex Post Facto Clause... The danger that legislatures might disfavor certain persons after the fact is present even in the parole context, and the Court has stated that the Ex Post Facto Clause guards against such abuse. See Miller v. Florida, 482 U.S. 423, 429 (1987), citing Calder v. Bull, 3 Dall 386, 389 (1798)." Jones, 529 U.S. at 253.

There is another principle which weaves through Ex Post Facto decisions. For lack of a better description, this is the *as applied* principle. It is entirely appropriate, and certainly no accident, that we have a clear articulation of this *as applied* principle in *Jones*.

> "When the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule." Jones, 529 U.S. at 255.

Evidence of Retroactive Application

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[378] Ga. Rules & Regs., Rule 475-3-.05(2) (1979). *Jones*, 529 U.S. at 247.

Our beginning point must be a review of the law as it existed when these Named Plaintiffs were convicted. Under Ohio's Old Law, a carrot and stick philosophy prevailed. The terms issued by trial courts were long. Even minimum sentences were long. The maximum sentences were practically alternative definitions for eternity. Coupled with these long sentences, the law entitled inmates to earn credits toward a reduction of their minimum sentences. Like the Florida credits discussed in *Weaver*, these credits accrued automatically. If you stayed out of trouble and performed your prison job, you could be reasonably certain of reducing your period of incarceration by 30%. It would have been a contradiction of policy to reward inmates with this credit, and then refrain from acknowledging this performance at the first parole review hearing. This explains why most inmates could be reasonably assured of being released at their first hearing.

In addition to benefiting inmates, these long prison terms and the accrual of credits toward early release also benefited the Ohio Department of Rehabilitation and Correction. Long prison terms had an effective deterrent effect upon inappropriate behavior. Early release credits were an important tool for managing the behavior of the prison population.

The carrot portion of this philosophy can be seen in our next chart. *[Please see Chart BB, Average Time Served By Offense Type]* We did not make up this chart. This chart has been issued by the Ohio Department of Rehabilitation and Correction. Every offender represented on this chart entered prison with extremely long maximum sentences. Felony 1 offenders had maximum sentences of 25 years. We can see that the upper range for this chart stops at eight years, and not one of these bars touches this line. Felony 2 offenders had maximum sentences of 15 years. These sentences dip below four years and then rise to between five and six years. Felony three offenders have maximum sentences of 10 years. These terms remain consistently between the two year mark. These bars reflect averages. They take in the best of these inmates and they also include the worst. Our Named Plaintiffs know these offenders. They have served time together. The supporting data for this chart consists of Time Served Reports issued by the Department of Rehabilitation and Correction. We have made Time Served Reports for the years 1991, 1992, 1993, 1994 and 1995 Plaintiff Exhibits. This chart crystallizes and assembles the data of thousands of felony convictions. In fact, there are 23,675 felony convictions for just the categories Felony 1, Felony 2 and Felony 3.[379]

[379] Based upon our count, there are 3,229 felony convictions in these three categories for 1991, 3,597 for 1992, 5,508 for 1993, 5,541 for 1994 and 5,800 for 1995.

Chart BB corroborates our point that under the Old Law, maximum sentences were virtually ignored.

Now, please take another look at Chart V. *[Chart V, Average of Time Served to Date and Average of Total Time Required for Named Plaintiffs]* Where offenders convicted of third degree felonies served less than two years under the Old Law, they are now serving on average 10.7 years. *They have already served 8.5 years.* Look at the back-up data for this chart on page 1, middle of the page. This sets out the specific amount of time that each of the people reflected on this graph must serve. The shortest sentence is 6.8 years. In 1991, 1992 and 1993, the average amount of time served for a 1st degree felony conviction was less than 6.8 years.[380] We could walk through and repeat this exercise with 2nd and 1st degree felonies, but our next chart makes this unnecessary. *[Please see Chart CC, Average Time Required for Ohio Offenders from 1979 to 1995 Compared to Average Amount of Time Currently Required]* Now, we have placed the Ohio Department of Rehabilitation and Correction chart next to our own. The unit of measurement for the left axis is identical for both charts. Placing these charts next to one another truly underscores the tremendous disparities in time being served currently and formerly.

In analyzing an Ex Post Facto issue, the following principles are pivotal to the facts of this case. It is the effect, not the form of the law that determines whether or not it is ex post facto. Has the "quantum of punishment" been changed and, if so, has it been changed to the disadvantage of the offender? Finally, where there is exercise of discretion, we must provide evidence to prove the *as applied* principle. Namely, when a rule does not by its own terms show a significant risk, it must be shown with evidence drawn from the rule's practical implementation that its retroactive application will result in a longer period of incarceration than under the earlier rule.

We believe these Guidelines fail the test and violate the Ex Post Facto Clause on several levels.

When these Named Plaintiffs entered prison prior to July 1, 1996, they had minimum sentences. These 1998 Guidelines have severed their connections to minimum sentences, and these 1998 Guidelines have offered nothing comparable to take the place of these minimum sentences. Taking away their minimum sentences without offering

[380] It was 6.34 years in 1991, 6.63 years in 1992 and 6.74 years in 1993. See Time Served Reports for these respective years, Plaintiff Exhibit 58.

these inmates something comparable to fill this void has definitely increased the "quantum of punishment" that must be served by these Named Plaintiffs.

When these Named Plaintiffs went to the *statutory first parole board hearing*, they had accrued years of credits toward early release. As the U.S. Supreme Court found in *Weaver*, these credits toward early release were a determinant of their sentences. These 1998 Guidelines have severed their connections to early release credits, and these 1998 Guidelines offer nothing comparable to take the place of these early release credits. Taking away early release credits without offering inmates something comparable to fill this void has definitely increased the "quantum of punishment" that must be served by these Named Plaintiffs. When these credits toward early release were lost, their period of incarceration was lengthened.

When these Named Plaintiffs went to the *statutory first parole board hearing*, they all had trial court convictions. These trial court convictions were a determinant of their sentences. For two out of three of these Named Plaintiffs, the parole board panel exercised its discretion and changed their trial court convictions.[381] These 1998 Guidelines, *as applied*, have severed the connection between these offenders and their trial court convictions and replaced them with new and more onerous convictions.[382] Taking away convictions and replacing them with more onerous convictions increases the "quantum of punishment" because it ratchets upward the offensive risk score of an offender to a higher offensive category. Because these convictions are changed, their period of incarceration is lengthened.

Finally, in looking to the *as applied* principle, we have presented evidence for hundreds of offenders attesting to the fact that they are being required to serve substantially all of their maximum sentence. These statistics can be backed up with faces, institution numbers, dates and times for each of these offenders. Dr. Schwartz, a professional statistician, has conducted his own review of our files. After applying the tools of a statistician, he confirms that the experiences of inmates included in our data base are reflected as well by inmates that are not in our data base. We have approximately nine hundred Named Plaintiffs at this time. This is approaching five percent of the entire class.

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[381] *See* Chart B, Total Offensive Behavior vs Offense of Conviction.

[382] We have never seen, nor do we expect to see, a case in which the parole board replaces an offense of conviction with a new crime that is less serious.

All of the opportunities available to our Named Plaintiffs to reduce their maximum sentences have been stripped away. When they entered prison, the prospect of doing substantially all of their maximum sentence was not even fathomed. If trial courts had even hinted that doing the maximum sentence was a real possibility, many additional Named Plaintiffs would have insisted upon a trial.

> "In Lindsey v. Washington, 301 U.S. 397, at 401-402 (1937), we reasoned that it is plainly to the substantial disadvantage of petitioners to be deprived of all opportunities to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15 year term." *Weaver*, 450 U.S. at 33.

This is exactly the plight faced by our Named Plaintiffs. They have been deprived of all opportunities for reducing the extremely long maximum terms of their sentences.

Finally, these Named Plaintiffs were never told that they would be required to serve substantially all of their maximum sentence. They were never given the notice that our federal constitution requires. Instead, prior to sentencing, defense counsel and prosecutors discussed the early release credits and the minimum sentence. In fact, they were told *not* to worry about the maximum terms.

Conclusion

These Guidelines were adopted in April of 1998. They are being applied to convictions that occurred before July 1, 1996. These 1998 Guidelines violate the Ex Post Facto statute *as applied*. They sever the connection between an offender and their minimum sentence. They sever the connection between an offender and early release credits. In many cases, they sever the connection between the offender and their trial court conviction. They leave these Named Plaintiffs with only their maximum sentences. They offer no opportunities for earning a release before the expiration of their maximum sentence. In *all cases*, they increase the quantum of punishment substantially. This last factor has been supported with actual case studies numbering into the hundreds.

SIXTH CROSS CLAIM

VIOLATIONS OF THE EQUAL PROTECTION CLAUSE

Introduction

The discussion of *Parole Review* in our Answer to Defendant's Motions for Summary Judgment, including the hearing, the Guidelines and the parole decisions and documentation, is hereby incorporated by reference and inserted into this Sixth Cross Claim as if this material has been fully reproduced here. The First, Second, Third, Fourth, and Fifth Cross Claims are also incorporated by reference into this Sixth Cross Claim and inserted here.

Our basis for this Sixth Cross Claim can be found in Plaintiffs Fourth Cause of Action, Violations of U.S. Constitutional Rights and Laws pursuant to 42 U.S.C. 1983. Claim 5, Access to Courts at paragraph 196 and Claim 6, Racial Discrimination at paragraph 209, both reference violations of the Equal Protection Clause and they are the basis for this Cross Claim.

Facts

The following facts are uncontradicted and irrefutable.

Ohio is holding two groups of inmates in its prisons, and each group can be defined by its affiliation to an Ohio statute. One group, hereafter referred to as Old Law inmates, has been prosecuted and sentenced under Ohio's prior sentencing statute. The other group, hereafter referred to as Ohio's New Law inmates, has been prosecuted and sentenced under the current sentencing statute passed in 1995 and known as Ohio's Truth in Sentencing Law. This condition exists, because Ohio elected against applying its New Law retroactively. These two groups of inmates are commingled together in Ohio prisons, where they are sharing common living and working spaces.

These two groups of prisoners have different sentences to serve for violating the same crimes. Old Law inmates have indefinite sentences. The minimum portion of these sentences has been served for most of these Named Plaintiffs. The maximum sentences extend out 25 years for a first degree felony, 15 years for a second degree felony and 10 years for a third degree felony. The release of these Old Law inmates before the expiration of these maximum terms is totally subject to the discretion of the Parole Board. New Law inmates have sentences set by trial courts. The Parole Board has nothing to say about the timing of exits for New Law inmates from prison. The maximum terms for these New Law inmates have been reduced to 10 years for a first degree felony, eight years for a second degree felony and five years for a third degree

felony.[383]

Because of different maximum terms attached to these two sentencing laws, Ohio is holding its Old Law inmates for a much longer period of incarceration than it is holding its New Law inmates, when both have been convicted of the same crime. Old Law inmates are being held for terms that exceed the statutory maximum limits under the New Law. Unless this policy of holding Old Law inmates for terms exceeding the statutory maximum term for New Law inmates can be connected to a compelling government interest served by this policy, this constitutes invidious discrimination and violates the Equal Protection Clause of the U.S. Constitution.

To subject one group of inmates to terms of incarceration in excess of the statutory maximum term set under the New Law, simply because this group is affiliated with a different sentencing law, does not further any legitimate government interest. Consequently, the rights guaranteed to these Old Law inmates under the Equal Protection Clause of the U.S. Constitution, as applied to the States through the 14th Amendment, are being violated.

LAW AND ARGUMENT

Applicable Law

The term *invidious discrimination* means actions likely to incur ill will or hatred, or to provoke envy, especially by discriminating unfairly. [384] The prohibition of the Equal Protection Clause goes no further than invidious discrimination. Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483, at 489.

Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race. Wolff v. McDonnell, 418 U.S. 539, at 556 (1974) *citing* Lee v. Washington, 390 U.S. 333 (1968).

> "The Equal Protection Clause of that Amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria

[383] R.C 2929.14

[384] Webster's Twentieth Century Unabridged Dictionary, 2nd Edition, 1978 at p. 966.

> wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the objective of the legislation, so that all persons similarly circumstanced shall be treated alike." Eisenstadt v. Baird, 405 U.S. 438, at 447 (1972) Royster Guano v. Virginia, 253 U.S. 412, 415 (1920)

In Williams v. Illinois, 399 U.S. 235 (1970) [hereafter *Williams*], the U.S. Supreme Court considered an invidious discrimination claim involving terms of incarceration under the Equal Protection Clause of the 14th Amendment. Williams was convicted of petty theft. The Illinois statute carried a maximum sentence of one year for this crime. It also carried a $500 fine and $5 in court costs. If a person convicted of this crime was unable to pay or in default in making payment of this fine, the statute required a person to remain in jail for the purpose of working off the monetary obligation at the rate of $5 per day. The practical effect of this clause was to require a person who could not pay this fine, to be confined an additional 101 days beyond the maximum period of confinement fixed by statute. Williams sought to have the portion of his sentence vacated that related to his inability to pay his fine. The Illinois Court upheld the statute, based upon the compelling state interest to collect fines. The U.S. Supreme Court reversed.

> "Here the Illinois statute as applied to Williams works an invidious discrimination solely because he is unable to pay the fine. On its face the statute extends to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment. In fact, this is an illusory choice for Williams or any indigent who, by definition, is without funds. Since only a convicted person with access to funds can avoid the increased imprisonment, the Illinois statute in operative effect exposes only indigents to the risk of imprisonment beyond the statutory maximum. By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment." 399 U.S. at 242.

Williams has come to stand for the proposition, that once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and

policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency." *Williams*, 399 U.S at 241-242.

Evidence of Invidious Discrimination

In the facts of this case, we have two groups of inmates being treated differently because each is subject to a different law. The Old Law inmates are serving substantially more time for the same crimes, as compared to the New Law inmates. *[Please see Chart DD, New Law Sentence vs. Old Law Sentence]* In this chart, we are comparing the sentences of Old Law inmates to sentences of New Law inmates for the same crimes. A graph in the upper left portion of this chart compares the trial court sentences. Old Law sentences are slightly longer then New Law sentences, and these Old Law sentences are calculated at 70% of the minimum sentence. In the upper right graph, we compare New Law sentences to the Parole Board time that Old Law inmates must serve. It is important to appreciate that Old Law inmates serve Parole Board time *after* completing their minimum trial court sentence. Parole Board time is significantly longer than the time required for Old Law sentences. Finally, in the main graph, we put the trial court time and the parole board time together. As the graph clearly documents, Old Law inmates are doing multiples of the New Law sentences.

There is also a major difference between how Plea Agreements are honored for Old Law and New Law inmates. *[Please see Chart EE, Trial Court Agreements under the New Law and Plea Agreements under the Old Law]* The graph on the left reflects the fact that 100% of agreements are being honored under the New Law. Only 18% of these New Law offenders are being held for the full term of their Plea agreements. The rest are actually leaving slightly before the end of their term. For Old Law inmates, 100% of these plea agreements are being violated and Old Law inmates are being held longer then their plea agreements required.

These two charts prove the existence of different treatment to two different classes of people, in this case to Old Law inmates and New Law inmates, separated from one another by different statutes. Now, we must examine the legal elements of an invidious discrimination claim within the context of our facts.

What is the objective of these two statutes? In this case, we are talking about the penalties portion of the Ohio Revised Code for felony offenses. The objective is to punish people for anti-social behavior. Both groups of inmates have committed crimes

and both groups are being incarcerated. In this regard, individuals similarly circumstanced are being treated alike. The statutes in question have not been used to further an unintended objective of the legislature. Because these statutes are being used for their intended purpose, one form of invidious discrimination can be ruled out.

Next, has one class been singled out for oppressive treatment? The answer is *yes*. Because Old Law inmates are serving between two and a half times to more than four times as much time in prison, as compared to New Law inmates, this is certainly oppressive treatment.

Finally, can the government demonstrate that this treatment is advancing a legitimate government purpose or policy? At this juncture, it is time to analyze the facts of this case under the criteria set forth by the U.S. Supreme Court in its *Williams* decision.

The holding in *Williams* states, that once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum. When Ohio passed its New Law, it established a new statutory maximum sentence for first degree felonies, second degree felonies and third degree felonies.[385] Instead of 25, 15 and 10 years, these maximum limits dropped to 10 years, 8 years and 5 years, respectively. Today, Ohio is requiring Old Law prisoners to serve substantially more than these maximum limits. This different treatment is due to their inclusion in a particular class, namely their affiliation with Ohio's prior sentencing law.

When Ohio reduced the maximum limits of incarceration for first, second and third degree felonies, it also redefined what was necessary to satisfy its penological interests and policies. Presently, the state has visited a different consequence upon one of two classes of inmates. They are holding Old Law inmates beyond this maximum limit of incarceration, as it has been redefined in the New Law. In doing so, the line is being crossed. Requiring Old Law inmates to serve more than the statutory maximum currently required for their respective crimes constitutes invidious discrimination. Consequently, the rights of these Old Law inmates guaranteed to them under the Equal Protection Clause of the 14th Amendment are being violated.

After a Parole Board Member or Hearing Officer has just informed an Old Law

[385] *See* R.C. 2929.14.

inmate that they are getting *another* ten years, the inmate typically goes into shock. It is almost like reliving the nightmare of being sentenced by the judge. When they can find their voice, they ask *why*. Parole Board Members and Hearing Officers have a pat answer.

Because we can.

They are wrong. The U.S. Constitution and Chief Justice Burger, the author of the *Williams* decision, beg to differ with them. After an inmate has reached Ohio's current statutory maximum for the crime they committed, *they cannot*.

Conclusion

Holding Old Law inmates beyond the statutory maximum term set in Ohio's New Law constitutes invidious discrimination and violates the Equal Protection Clause of the U.S. Constitution, as applied to states through its 14th Amendment.

Affidavit of Counsel

The undersigned certifies, pursuant to 28 U.S. 1746 and N.D. Ohio L.R. 7.1(g) that this memorandum complies with the length restrictions set forth in N.D. Ohio Rule 7.1(g) as modified by this Court's Order on Plaintiff's unopposed Motion for Leave to Waive the page limitation for this filing and for the filing of Cross Claims.

Respectfully submitted by,

Norman L. Sirak #0038058
4035 Cinwood Street N.W.
P.O. Box 7468
Canton, Ohio 44705
(330) 478 1947

Peter Wagner #0034083
5th 3rd Center - 14th Floor
608 Madison Ave.
Toledo, Ohio 43604
(419) 242 1400

Certificate of Service

A copy of the foregoing has been mailed to the Office of the Attorney General, Corrections Litigation Section, to the attention of Todd Marti, at 140 East Town Street, 14th Floor, Columbus, Ohio 43215, this 28th day of June, 2002.

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By Norman L. Sirak