

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

ROBERT ALLEN<sup>1</sup>, : Civil Action No. 1:08CV1780  
JOHN MCDERMOTT, :  
JERRY DAVID, : JUDGE: SOLOMON OLIVER  
CHRYSTAL PFEIFER, :  
GARY MEEK, :  
DONALD MARTIN, :  
LUTHER JOHNSON, :  
CLAUDE SPENCER : FIRST AMENDED COMPLAINT  
FRANK SPRENZ, :  
CARL NELSON, : CLASS ACTION FOR INJUNCTIVE  
DONALD NICKERSON, : RELIEF ONLY  
THOMAS NAGY, :  
WILLIAM J. CAMPBELL, :  
OWEN KILBANE, :  
VICTOR HARTNESS, :  
JACK BEATTY, :  
MARTIN TIMPERIO, :  
DWAYNE BROOKS, :  
LAMONT CLARK, :  
WILLIE HILL, :  
WILLIAM PERRYMAN, :  
RALPH F. GARDUNO, :  
FRED SCOTT, :  
ELIZABETH GOLEBIEWSKI, :  
PATRICIA MURRAY, :  
DEBORAH CLARK :  
Individually and on Behalf of all others :  
Similarly Situated :

c/o Gerhardstein & Branch  
432 Walnut Street  
Cincinnati, OH 45202

Plaintiffs,

v.

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<sup>1</sup> Robert Allen has been released on parole since the Complaint was filed. Doc. 1. He remains a member of the class but is no longer a representative plaintiff. According to Northern District practice his name remains in the caption.

**TERRY COLLINS, CYNTHIA B.  
MAUSSER, ROBERT  
MASZCZYNSKI, KATHLEEN  
KOVATCH, ELLEN VENTERS, R.F.  
RAUSCHENBERG, BOBBY BOGAN,  
TRAYCE THALHEIMER**

**770 West Broad Street  
Columbus, OH 43222**

**In their Individual Capacity as  
Officials of the State of Ohio  
Department of Rehabilitation and  
Correction.**

**Defendants.**

### **I. PRELIMINARY STATEMENT**

1. This civil rights class action lawsuit challenges the 2007 Ohio Parole Guidelines on their face and as applied to the class of inmate plaintiffs. Plaintiffs claim that the policies and practices of the Ohio Adult Parole Authority (APA), in effect, alter the definition of the crimes of which plaintiffs were convicted or increase the penalty by which their crimes are punishable. These policies and practices cause the Plaintiffs to face a risk of increased punishment for their crimes that is sufficient to violate their rights to due process and to be free of punishment pursuant to ex post facto laws.

2. Through this amended complaint several of the original plaintiffs are replaced as representative plaintiffs and additional inmates are added in their place. This action was originally filed pro se by inmates and counsel was appointed by the court. This amended complaint continues the core purpose of the lawsuit but reflects changes

deemed necessary based upon the investigation and research of court appointed counsel. This lawsuit seeks injunctive relief only. It is not a damage action.

## **II. JURISDICTION**

3. Jurisdiction over the federal civil rights claims is conferred on this Court by 28 U.S.C. §§ 1331 and 1343(3) and (4). Venue is proper in this division.

## **II. EXHAUSTION OF ADMINISTRATIVE REMEDIES**

4. Pursuant to O.A.C. §5120-9-31(B) all legislative actions, policies and decisions of the Adult Parole Authority are non-grievable. Thus, no administrative remedies are available for exhaustion under 42 U.S.C. §1997(e)(a).

## **III. PARTIES**

5. Plaintiff Robert Allen has at all times relevant to this action been a resident of the State of Ohio. He was in the custody of the Ohio Department of Rehabilitation and Correction (“ODRC”) from 1980 to 2009.<sup>2</sup> His inmate number was A159-045.

6. Plaintiff John McDermott is currently incarcerated at Grafton Correctional Institution. He has been in the custody of the ODRC since 1981. His inmate number is A163-037.

7. Plaintiff Jerry David is currently incarcerated at Madison Correctional Institution. He has been in the custody of the ODRC since 1991. His inmate number is A251-041.

8. Plaintiff Chrystal Pfeifer is currently incarcerated at Ohio Reformatory for Women. She has been in the custody of the ODRC since 1988. Her inmate number is W020-890.

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<sup>2</sup>Mr. Allen was released on parole in November 2009. He remains a member of the class. See footnote 1.

9. Plaintiff Gary Meek is incarcerated at Chillicothe Correctional Institution. He has been in the custody of the ODRC since 1994. His inmate number is A284-741.

10. Plaintiff Donald Martin is incarcerated at Chillicothe Correctional Institution. He has been in the custody of the ODRC since 1996. His inmate number is A326-499.

11. Plaintiff Luther D. Johnson is incarcerated at Ross Correctional Institution. He has been in the custody of the ODRC since 1982. His inmate number is A166-904.

12. Plaintiff Claude Spencer is incarcerated at Chillicothe Correctional Institution. He has been in the custody of the ODRC since 1993. His inmate number is A267-640.

13. Defendant Terry Collins is presently and at all material times herein Director of the ODRC. As Director, Collins is the responsible party for all Board actions by Adult Parole Authority pursuant to R.C. §5120.01. He is sued individually for injunctive relief only.

14. Defendant Cynthia B. Mausser is presently, and at all material times herein Chair of the Adult Parole Authority. As chair, the defendant is responsible for the allocation of assignments to parole board members pursuant to R.C. §5149.10(A). She is sued individually for injunctive relief only.

15. Defendants Robert Maszczyński, Kathleen Kovatch, Ellen Venters, R.F. Rauschenberg, Bobby Bogan and Trayce Thalmeier are presently, and at all material times herein, members of the Board of the Ohio Adult Parole Authority (APA). They are sued individually for injunctive relief only.

#### **IV. FACTS**

##### **A. The Ohio Adult Parole Authority and Its Changing Parole Standards**

16. The APA consists of up to twelve members, one of whom is designated as Chair by the Director of the ODRC. There are currently seven members of the board.

17. The APA administers pardons, community control sanctions, post-release control and parole.

18. The APA is required to make parole decisions for all inmates who were convicted and sentenced to indeterminate sentences before January 1, 1996.

19. At all times relevant to this action a decision by the APA that an inmate be placed on parole is all that is needed to effect the discharge of that inmate from custody and the placement of that inmate on parole.

20. At all times relevant to this action individual members of the APA could implement final release of inmates to parole.

21. On July 1, 1996 Senate Bill 2 (SB2) and Amended SB 269 (SB 269) became effective. Through these statutes the Ohio Legislature accomplished a dramatic overhaul of the criminal statutes in Ohio. These new sentencing statutes, however, are by their terms not retroactive to persons such as plaintiffs who were sentenced *prior* to July 1, 1996.

22. Inmates sentenced prior to July 1, 1996, who remain subject to the jurisdiction of the APA are commonly referred to as “old law” inmates. Approximately 3,200 “old law” inmates remain incarcerated in Ohio.

23. All of the named plaintiffs in this action are “old law” inmates.

24. The APA is supposed to make its parole determinations consistent with the Ohio Statute establishing the APA and the Ohio Administrative Code, specifically, ORC 5120-1-1-01, et seq.

25. However, since July 1, 1996 the APA has frequently changed the substantive standards for determining parole eligibility that it applies to these old law inmates.

26. The APA frequently issues memoranda changing its parole practices and procedures, but these memoranda have not always been promulgated as rules. As a result, the APA has changed the substantive standards for determining parole eligibility without following appropriate administrative procedures.

27. The Procedures utilized to determine parole from 2007 through the present reflects not only new guidelines formally adopted by the Defendants but also practices informally adopted, all of which have a cumulative effect with respect to the punishment received by plaintiffs.

#### **B. Changing Parole Standards for Prisoners Sentenced to Life**

28. Old law inmates include many who were sentenced to “non-mandatory life” or to sentences that include a definite minimum but indefinite maximum.

29. In the past, inmates serving indeterminate sentences, including those with non-mandatory life maximum sentences, were routinely told how many months they would need to serve until release.

30. For example, the preface to the 1998 manual says, “the guideline ranges are designed for the typical or average cases and presume good institutional behavior. The use of a guideline “range” rather than a “point” is to allow the Parolee Board some discretion to address individual case factors without departing from the guidelines.”

31. The intent of the 2007 revisions to the parole guidelines manual was to increase punishment for certain offenses.

32. The preface to the 2007 manual indicates that published guidelines should not be relied upon to predict release dates: “The guideline ranges are a suggestion of time to be served for the typical or average cases and presume good institutional behavior. However the ranges should not be interpreted as mandating release within the range...The applicable guideline range is meant solely to suggest an initial threshold (a suggesting starting point of analysis)...” (2007 Manual, preface, i)

33. The 2007 guidelines removed the presumption that inmates serving non-mandatory life sentences would ever be released. “By making this change, *any presumption that an offender convicted of murder will be released after a definitive amount of time and will not have to serve Life is removed.*” (2007 APA Guidelines Manual, p. 3)

34. Under standards in place prior to 2007, the APA provided inmates serving indeterminate sentences, including those with non-mandatory life maximum sentences, with a means for determining when they could expect to be released provided they maintained good institutional behavior and participated in appropriate programming directed toward their rehabilitation.

35. The 2007 standards eliminated any means for inmates serving indeterminate sentences to determine when they would be released on parole. For example, the 2007 standards explicitly adopted a policy that *non-mandatory lifers would serve life in prison*. O.A.C. 5120:1-1-10(E). This has dramatically altered the prospects of such inmates from having a target maximum incarceration to parole to having no expectation at all of parole.

### **C. Changing Parole Standards For Prisoners Sentenced for Homicide and Sex Offenses**

36. The 2007 guidelines eliminated separate offense categories for aggravated murder and murder, ignoring the different elements of the crimes and the different penalties required by Ohio criminal law.

37. The 2007 guidelines manual eliminated a definition of aggravated murder. As a result, both murder offenses are automatically rated in the guidelines with an offense score of 13. Inmates convicted of murder are for all practical purposes treated as if they were convicted of aggravated murder.

38. The new category 13 in the 2007 guidelines provides a range of the statutory minimum to life.

39. The 1998 guidelines made no distinction between rape convictions that received life sentences and rape convictions with determinative sentences. The category score was determined by the circumstances of the crime, which are defined in the manual. The highest category score for rape was 10.

40. But the 2007 guidelines manual automatically assigns inmates with non-mandatory life sentences for rape to category 13.

41. Rape convictions with life sentences were elevated to category 13 “to prevent any impression or presumption that an offender convicted of Rape with a Life sentence will be released after a definitive amount of time served, and will not be required to serve Life.” (2007 Guidelines Manual, p. 8)

#### **D. Changing Parole Standards Regarding Victim Rights**

42. Victims have long been heard at sentencing when an inmate is originally sentenced for his crime. The APA has also routinely collected and considered victim

input. But in recent months the power of victims over parole decisions has grown a great deal.

43. The Governor and Director of the ODRC appoint one person who has been a victim of crime, a member of a victim's family, or a victims' advocate to the APA.

44. The victim's representative is an unclassified employee of the ODRC.

45. Prior to February, 2009, an inmate could be granted parole by the seven member APA. In February of 2009, Defendants adopted by memorandum a procedure that requires referral of such an inmate to the Office of Victim Services (OVA). The OVA works with the registered victim, family or victim's advocacy group to petition the APA for a full hearing.

46. If the victim objects to the parole, the APA will conduct a full hearing. Victims can appear at such hearings. Inmates are not permitted to appear.

47. After the full hearing, the APA can revoke the parole and can give the inmate a continuance of up to ten years until his next hearing. The inmate can go from being granted parole and awaiting his projected release date to in effect being "re-sentenced" to ten more years.

#### **E. Cumulative Impact of Changing Parole Standards**

48. The 2007 Parole guidelines and the cumulative changes in parole standards and procedures have increased the length of incarceration before parole for members of the class based on circumstances that have not changed since each class member was sentenced and over which each class member has no control.

49. All the changes have been applied retroactively, with the result that plaintiffs convicted before July 1, 1996 are no longer receiving meaningful parole review.

50. These changes in parole law and policy, when applied retroactively, violate the ex post facto and due process clauses of the U.S. Constitution

51. The representative plaintiffs each are irreparably harmed by the 2007 guidelines and the cumulative changes to parole standards and procedures, including those set out above.

**F. Facts Related to Plaintiff John McDermott**

52. John McDermott is incarcerated at Grafton Correctional Institution. In 1981, Mr. McDermott was convicted of murder and sentenced to 15 years to life. He was statutorily eligible for parole in 1991.

53. Under the standards in place at the time of his conviction, all other things being equal, Mr. McDermott had a constitutional expectation that the parole criteria in effect at the time of the crime would be applied to his sentence.

54. Mr. McDermott's criminal history/risk score has remained 1 throughout his incarceration.

55. Mr. McDermott has had thirteen parole hearings. The APA used the 1998 guidelines at five of his hearings. At all five hearings Mr. McDermott was placed in offense score 11, with a corresponding range of 180-240 months (20 year maximum).

56. At Mr. McDermott's 1999 hearing, the hearing officer told him that the APA wanted him closer to 20 years before release. He had served 18 years.

57. In 2000 an APA staff member told Mr. McDermott that he would be released after serving 25 years. He had served 19 years.

58. At the 2005 parole hearing, the APA rejected Mr. McDermott's parole because of "aggravating factors" surrounding the murder. The APA told Mr. McDermott that he would be continued for 68 months, but "this will be it." He had served 24 years.

59. Mr. McDermott appealed the 2005 decision because the APA decision sheet described his crime as aggravated murder rather than the crime he was convicted of, murder.

60. Chairperson Cynthia Mausser rejected the appeal claiming that the APA used the word "aggravated" in the sense of the dictionary definition of the word, rather than as the legal definition of "aggravated murder" used in the Ohio criminal statutes.

61. In April 2009, Mr. McDermott had another parole hearing. The 2007 guidelines were used. His offense score was elevated from 11 to 13 because murder has been assigned to the same category as aggravated murder.

62. Mr. McDermott has served 346 months (28 years). His next parole hearing is in 2012, when he will have served 31 years.

63. Under the 2007 guidelines, Mr. McDermott's offense score of 13 and risk score of 1 give him a recommended sentence range of "min - life."

64. The parole guidelines, on their face and as applied to Mr. McDermott, created a sufficient risk of increasing the measure of punishment attached to his offense in the following ways:

- a. Under the 1998 guidelines, Mr. McDermott was consistently told he needed to serve to the top of the range of 20 years. When he served 20 years, the APA improperly applied the standards applicable to aggravated murder, a crime Mr. McDermott did not commit.

b. Under the 1998 guidelines chart, Mr. McDermott was given a range of 180-240 months because he was in category 11. But the 2007 guidelines chart increased the offense score category to 13, changing his range to *min – life*, reflecting the APA’s policy of “life means life.”

c. Under current APA policy Mr. McDermott has no realistic chance for parole. The APA changed Mr. McDermott’s non-mandatory life sentence to one of mandatory life without parole.

65. The 2007 guidelines have increased the length of incarceration before parole for Mr. McDermott based on circumstances that have not changed since he was sentenced and over which he has no control.

**G. Facts Related to Plaintiff Jerry David**

66. Plaintiff Jerry David is incarcerated at Madison Correctional Institution. In 1991 he was convicted of two counts of rape and one count of felonious sexual penetration. He was sentenced to life-life in prison.

67. At all times relevant to this case Mr. David has demonstrated good institutional behavior and taken advantage of rehabilitation programming that has been available to him.

68. Under the standards in place at the time of his conviction, all other things being equal, Mr. David had a constitutional expectation that the parole criteria in effect at the time of the crime would be applied to his sentence.

69. Under the parole criteria in effect at the time of Mr. David’s crime in 1991, he would have been placed in a guideline that usually released inmates on parole after approximately eleven years.

70. In 1991, the average time served to parole for inmates convicted of felony one rape was 7 years.

71. Since his sentence was imposed Mr. David has been considered and rejected for parole on three occasions: 2001, 2004 and 2008. At each review, the APA retroactively applied substantive standards and parole laws and policies that were not in effect when Mr. David was convicted, and that are far more stringent than the standards, laws and policies that were in effect in 1991.

72. At Mr. David's first parole hearing in 2001, the APA retroactively applied the 1998 guidelines. He was assigned an offense category score of 10 and a criminal history/risk score of 2. The guidelines placed him in the guideline range of 150-210 months.

73. The APA rejected Mr. David's parole because he had not served the minimum sentence established by the 1998 guideline range. The APA noted that David would be "a good candidate for release at his next hearing."

74. In January 2004, Mr. David had his second parole hearing. The 1998 guidelines were applied. He was again assigned an offense category score of 10 and a criminal history/risk score of 2, placing him in the same guideline range of 150-210 months.

75. The APA rejected Mr. David's second application for parole because of the seriousness of the crime and the age of the victim. He had served the 150 month minimum in the guideline range

76. Mr. David's next hearing before the APA was in February 2008. The APA told Mr. David that his institutional programming and record were excellent.

77. The 2007 guidelines were applied , which elevated Mr. David's offense score from 10 to 13, which carries a guideline range of 300 months to life.

78. The APA denied David's 2008 parole application. David has now served 210 months.

79. The cumulative changes to the Ohio parole laws increased the measure of punishment for Mr. David in the following ways:

- a. Under the standards in place at the time of his sentencing in 1991 Mr. David reasonably expected to serve a minimum of 120 months (10 years).
- b. Even under the 1998 guidelines, Mr. David's maximum sentence was 210 months (17.5 years). But pursuant to the 2007 guidelines, Mr. David's *minimum* sentence is 300 months (25 years) - exceeding his former maximum sentence of 210 months by more than eight years.

80. The 2007 guidelines have increased the length of incarceration before parole for Mr. David based on circumstances that have not changed since he was sentenced and over which he has no control.

#### **H. Facts Related to Plaintiff Chrystal Pfeifer**

81. Chrystal Pfeiffer is incarcerated at the Ohio Reformatory for Women. On February 1, 1988, she pled guilty to complicity to commit murder. Complicity to commit murder was a lesser included offense of complicity to commit aggravated murder.

82. Ms. Pfeifer's plea agreement sentenced her to term of 15 years to life in prison.

83. Throughout her incarceration, Ms. Pfeifer has had a criminal history/risk score of 1.

84. Under the standards in place at the time of her conviction, all other things being equal, Ms. Pfeifer had a constitutional expectation that the parole criteria in effect at the time of the crime would be applied to her sentence.

85. Under the parole criteria in effect at the time of Ms. Pfeifer's conviction in 1988, she would have been placed in a guideline that usually resulted in release on parole after her second parole hearing, or after serving approximately 15 years.

86. In 1988 the average time served to parole for female inmates convicted of murder was 10 years.

87. Ms. Pfeifer received her first parole hearing on her statutory eligibility date in 1997. The APA retroactively applied the 1998 guidelines rather than the parole standards in effect at the time she was sentenced.

88. The APA denied Ms. Pfeifer's 1997 parole application. They gave her a ten year continuance. She had served 10 years in prison.

89. In 2002 Ms. Pfeifer had her second parole hearing. The APA retroactively applied the 1998 guidelines and assigned Ms. Pfeifer an offense category score of 13.

90. In calculating the offense score of category 13, the APA relied on the charges in Ms. Pfeifer's indictment, complicity to commit aggravated murder, instead of the charge she pled guilty to, complicity to murder.

91. Ms. Pfeifer's offense score of 13 put her in the guideline range of 300 months to life. She had served 180 months.

92. Ms. Pfeifer's offense score under the 1998 guidelines should have been offense score category 11, with a guideline range of 180-240 months (20 year maximum).

93. In 2003, Ms. Pfeifer was given another parole hearing. The APA corrected her offense score to category 11, corresponding to the offense for which she was convicted. She was given a guideline range of 180-240 months. Her parole was denied.

94. At the 2003 hearing, the APA informed Ms. Pfeifer that she would “be required to serve to the top of the aggregate guideline range of 180-240 months. She will be awarded 20 months credit for OPA (outstanding programming achievement) leaving the total amount to be served of 230 months. To date, she has served 195 months.” (2003 Decision Sheet)

95. In 2003 Ms. Pfeifer was awarded with twelve months good time for outstanding program achievement. Under the parole laws effective on the date her offense, good time was applied to shorten the time between parole hearings. As a result of her good time, Ms. Pfeifer qualified for another parole hearing in 2006, one year earlier than her originally scheduled parole hearing.

96. At the 2006 parole hearing, Ms. Pfeifer was given an offense score of category 11. The APA gave her a guideline range of 0-240 months. The APA denied Ms. Pfeifer’s parole because of the serious nature of the offense and “co-defendant parity.”

97. The 20 months of good time that Ms. Pfeifer earned was eliminated by the APA.

98. At the time of the 2006 hearing, she had had served 228 months (19 years).

99. Ms. Pfeifer’s next parole hearing was in November of 2009.

100. Her institutional conduct and institutional programming were rated superior, the highest rating an inmate can achieve. She has completed Alcoholic’s Anonymous, Narcotics Anonymous, community service, the juvenile offenders program and 12 Steps.

101. Ms. Pfeifer has completed every rehabilitative and educational program available to her. She received an associate's degree and a bachelor of arts. Ms. Pfeifer has not had a discipline since 1991.

102. The APA retroactively applied the 2007 guidelines, with its elevated offense scores. Ms. Pfeifer was moved up to offense score category 13. As a result of the offense score of 13 Ms. Pfeifer's new recommended sentence range is *min-life*.

103. Her parole was denied due to the seriousness of the crime. She was given a three-year continuance. Her next hearing is not until 2012.

104. Ms. Pfeifer has served 270 months (21 years).

105. The parole guidelines, on their face and as applied to Ms. Pfeifer, created a sufficient risk of increasing the measure of punishment attached to her offense in the following ways:

- a. Under the parole standards in effect when Ms. Pfeifer was sentenced, Ms. Pfeifer was likely to have been released after her second hearing, after serving between approximately 15 years.
- b. Under the 1998 APA guidelines, Ms. Pfeifer's guideline range was 180-240 months. Consistent with the APA's practice at the time, she was told she would be released after serving to the top of the range established by the guidelines chart.
- c. Ms. Pfeifer has served 270 months, over two years longer than she should have served according to the APA's 1998 practices. Under the 2007 standards, she will serve at least three more years.
- d. Under the 2007 guidelines, Ms. Pfeifer's guideline range is *min-life*, reflecting the APA's policy of "life means life."

106. The 2007 guidelines have increased the length of incarceration before parole for Ms. Pfeifer based on circumstances that have not changed since she was sentenced and over which she has no control.

#### **I. Facts Related to Plaintiff Gary Meek**

107. Plaintiff Gary Meek is incarcerated at Chillicothe Correctional Institution. In 1994 Mr. Meek plead guilty to rape, gross sexual imposition and corruption of a minor. He was sentenced to 6 ½ to 26 ½ years. His sentences were to run concurrently.

108. Under the standards in place at the time of his conviction, all other things being equal, Mr. Meek had a constitutional expectation that the parole criteria in effect at the time of the crime would be applied to his sentence.

109. Throughout his incarceration, Mr. Meek's criminal history risk score was 0, the lowest likelihood of re-offending.

110. Under the 1987 parole standards, Mr. Meek would have been released at his statutory first hearing or after one continuance. Mr. Meek's statutory minimum sentence was 48 months.

111. At most, assuming one continuance of 12-17 months, Mr. Meek would have been released after serving 67 months (5 years).

112. Under the new guidelines system, Meek's minimum sentence started at 180 months (15 years) .

113. In 1995 the DRC opened the Sex Offender Risk Reduction Center (SORC). DRC Policy 67-MNH-12 governed SORC and outlined programming for sex offenders.

114. Under 67-MNH-12, all sex offenders entering the prison system undergo a risk assessment. Programming is provided based on the level of risk to reoffend.

115. The DRC only enrolled inmates in the sex offender program if they had a moderate to high-risk score on their risk assessment.

116. Mr. Meek was ineligible for sex offender programming because of his low risk score.

117. At Mr. Meek's 2002 parole hearing, the APA denied his parole because he had not participated in sex offender programming. But according to APA policies, Mr. Meek was ineligible to participate in programming.

118. In 2002 Mr. Meek was given the offense score of 12, with a recommended sentence of 240-300 months.

119. In February 2006, Mr. Meek received an *Anrkom* hearing. He was placed back in category 11, which carried a recommended sentence of 180-240 months.

120. Before Mr. Meek's 2006 hearing, he was informed that the risk assessment rendered him ineligible for sex offender programming. However, the APA denied Meek's parole and recommended that he participate in sex offender treatment programs.

121. Senate Bill 260 became effective on January 1, 2007. It requires that a person convicted of rape when the victim was less than 13 years old or when the offender compels the victim to submit by force or the threat of force, to be sentenced to an indefinite prison term of 25 years to life. The statute applied *prospectively* to offenses committed on or after its effective date.

122. Mr. Meek's next hearing was in December of 2008. For the first time the APA conceded that he was not able to participate in sex offender programming because he was a low risk offender.

123. However, the APA's decision denying Mr. Meek's parole listed S.B. 260 as a factor considered by the APA.

124. The APA informed Meek that as of January 2009, the policy had changed to allow the APA to refer inmates to sex offender programming, even if they were low-risk according to the DRC's risk assessment.

125. The APA gave him a 12-month continuance due to the nature of the crime. By December he will have served 202 months (16 years).

126. The parole guidelines, on their face and as applied to Mr. Meek, created a sufficient risk of increasing the measure of punishment attached to his offense in the following ways:

- a. Under the parole standards in effect at the time Mr. Meek was sentenced in 1994, he reasonably expected to be released after approximately 5 years.
- b. Under the cumulative changes to the parole standards since 1998, Mr. Meek's minimum recommended sentence was 180 months (15 years), an increase of punishment of 10 years.
- c. The DRC's objective risk assessment tools – the inmate risk score worksheet and the sex offender analysis –rated Mr. Meek as an offender who was low risk to re-offend. But the APA disregarded the objective risk assessments in order to impose a significantly longer sentence.

127. The 2007 guidelines have increased the length of incarceration before parole for Mr. Meek based on circumstances that have not changed since he was sentenced and over which he has no control.

#### **J. Facts Related to Plaintiff Donald Martin**

128. Plaintiff Donald Martin is incarcerated at Chillicothe Correctional Institution. In 1996 he was convicted of voluntary manslaughter and theft. He was sentenced to an indefinite term of 9 to 35 years.

129. Under the standards in place at the time of his conviction, all other things being equal, Mr. Martin had a constitutional expectation that the parole criteria in effect at the time of the crime would be applied to his sentence.

130. At the time Mr. Martin was convicted, parole standards would have recommended release after one continuance, after he served approximately 9 years.

131. In 1996, the average time served by inmates convicted of voluntary manslaughter was 9 years. The average time served by inmates convicted of theft was 1 and ½ years.

132. Mr. Martin became eligible for parole in 2001, after serving 5 years. His hearing was delayed while the APA waited for his indictment paperwork, which showed that Mr. Martin had been indicted for murder.

133. At the 2001 hearing, the APA retroactively applied the 1998 parole guidelines. The APA gave Mr. Martin an offense score of 10, corresponding to the category for murder rather than voluntary manslaughter. His recommended sentencing range was 180-240 months.

134. In 2004, Mr. Martin had another hearing. He was given the correct offense score under the 1998 guidelines chart, 9, with a corresponding guideline range of 132-168 months.

135. The APA's decision denying Mr. Martin's parole noted that it was "requiring him to serve the high end of his range (168 months)."

136. At time of the 2004 hearing, the APA could grant conditional parole to an offender serving time for manslaughter without the approval of the full board.

Consequently, Mr. Martin's parole was prospectively granted for June 1, 2009, if Mr. Martin maintained good institutional adjustment.

137. Mr. Martin's scheduled parole date was moved up to January 2009 because of outstanding program achievement and good conduct.

138. However, by 2009, the APA's policy for release of offenders with murder convictions had changed, requiring full board hearings for all manslaughter and homicide cases.

139. Mr. Martin had not received any tickets and programming and behavior were good. However, the APA denied Mr. Martin's parole because of "significant aggravating factors." He was given a continuance to 2014.

140. Mr. Martin has served 172 months (14 years). By his March, 2014 hearing date Mr. Martin will have served 213 months (17 years).

141. The cumulative changes to the Ohio parole standards increased the measure of punishment for Mr. Martin in the following ways:

- a. Under the standards in place at the time of his sentencing in 1996, Mr. Martin reasonably expected to serve a minimum of 9 years.
- b. Under the 1998 guidelines, Mr. Martin was told he would serve 168 months (14 years) and was granted conditional release by 2009 if he met certain conditions.
- c. Mr. Martin fulfilled all conditions of his projected release. However, in 2009 the parole standards had been changed. Mr. Martin was denied parole despite fulfilling the conditions in effect in 1998 that permitted conditional release.

d. Despite complying with the terms of the conditional parole, Mr. Martin's parole was denied because of a retroactively applied policy of the board that required full board approval.

e. The APA increased the period of incarceration relying only on facts related to a crime of that Mr. Martin was not convicted of.

142. The cumulative changes to the parole standards have increased the length of incarceration before parole for Mr. Martin based on circumstances that have not changed since he was sentenced and over which he has no control.

**K. Facts Related to Plaintiff Luther D. Johnson**

143. Plaintiff Luther D. Johnson is incarcerated at Ross Correctional Institution. In 1982 he was convicted of aggravated murder, burglary and robbery. He was sentenced to 15 years to life.

144. At Mr. Johnson's sentencing hearing, the judge recommended Mr. Johnson serve 15 years maximum because he was at the scene of the crime but did not kill the victim.

145. Under the standards in place at the time of his conviction, all other things being equal, Mr. Johnson had a constitutional expectation that the parole criteria in effect at the time of the crime would be applied to his sentence.

146. Under the parole standards in effect at the time of Mr. Johnson's conviction, he would have been released after approximately 13-16 years.

147. Mr. Johnson has had two parole hearings. At Mr. Johnson's first hearing in 1996, the 1998 guidelines were used. He was given an offense score of 11. He should have received an offense score of 10.

148. At Mr. Johnson's second parole hearing in 2001, the 1998 guidelines applied. He was given the correct offense score of 10. The APA nonetheless denied his parole and stated that he would be required to serve an additional 10 years (150 to 210 months).

149. Under the 2007 guidelines, Mr. Johnson's new offense score is 13. As a result, Mr. Johnson's new range is *min-life*.

150. The cumulative changes to the Ohio parole standards increased the measure of punishment for Mr. Johnson in the following ways:

- a. Under the standards in place at the time of his sentencing in 1982 Mr. Johnson reasonably expected to serve a minimum of 13 years.
- b. Under the 1998 guidelines, Mr. Johnson has been given two different offense scores – 10 and 11. The guidelines range for offense score 10 was 150-210 months.
- c. Mr. Johnson already served the maximum recommended sentence of 210 months (17.5 years) under the 1998 guidelines. However, at his next hearing, the 2007 guidelines were applied. Mr. Johnson is now a category 13, which carries the range of *min-life*. He has served 334 months (27 years).
- d. The APA changed Mr. Johnson's non-mandatory life sentence to one of mandatory life without parole.

151. The 2007 guidelines have increased the length of incarceration before parole for Mr. Johnson based on circumstances that have not changed since he was sentenced and over which he has no control.

#### **L. Facts Related to Plaintiff Claude Spencer**

152. Plaintiff Claude Spencer is incarcerated at Chillicothe Correctional Institution. In 1992, he pled guilty to murder. He was sentenced to 15 years to life.

153. Under the standards in place at the time of his conviction, all other things being equal, Mr. Spencer had a constitutional expectation that the parole criteria in effect at the time of the crime would be applied to his sentence.

154. Mr. Spencer was eligible for parole after serving 9.6 years. Under the parole standards in effect at the time of Mr. Spencer's conviction, he would have been released at his second parole hearing, after serving approximately 15 years.

155. Mr. Spencer is a former corrections officer who has maintained an outstanding institutional record and low risk score throughout his incarceration.

156. At Mr. Spencer's first parole hearing in 2002, the APA retroactively applied the 1998 guidelines rather than the parole standards in effect at the time he was sentenced.

157. The APA denied Mr. Spencer's 2002 parole application. He was assigned to category 13, which carried a recommended sentence range of 300 months to life.

158. In calculating the offense score of category 13, the APA relied on the charges in Mr. Spencer's indictment, aggravated murder, instead of the charge he pled guilty to, murder.

159. Mr. Spencer should have been placed in category 11, with a recommended maximum sentence of 240 months. He was given a 12-year continuance.

160. In 2003 Mr. Spencer was given a second parole hearing. The APA corrected his offense score to category 11, corresponding to the offense for which he was convicted. He was given a guideline range of 180-240 months. His parole was denied.

161. In 2007 and 2008, the APA retroactively applied the 2007 guidelines to Mr. Spencer's sentence. Mr. Spencer was given offense score 13, the same incorrect score he was given before..

162. Mr. Spencer's recommended sentence range under the 2007 parole standards was *min-life*. His parole was denied. He was given five more years to his next parole board hearing.

163. Mr. Spencer has now served 21 years.

164. The parole guidelines, on their face and as applied to Mr. Spencer, created a sufficient risk of increasing the measure of punishment attached to his offense in the following ways:

a. Under the parole standards in effect at the time Mr. Spencer was sentenced, he reasonably expected to serve between 10-15 years.

b. Even under the 1998 APA guidelines, Mr. Spencer's maximum recommended sentence was 240 months (20 years). But pursuant to the 2007 guidelines, Mr. Spencer's sentence range has been changed to *min-life*, reflecting the APA's policy of "life means life," effectively re-sentencing his non-mandatory life sentence to life without parole.

c. Mr. Spencer has now served 21 years. His next hearing is in 2012, when he will have served 24 years. His sentence exceeds the recommended maximum sentence of 20 years under 1998 guidelines and the recommended maximum of 15 years under the 1987 parole standards.

165. The 2007 guidelines have increased the length of incarceration before parole for Mr. Spencer based on circumstances that have not changed since he was sentenced and over which he has no control.

## **V. CLASS ACTION ALLEGATIONS**

166. Plaintiffs bring this action on behalf of themselves and on behalf of all others similarly situated. The action is brought under the provisions of Fed. R. Civ. Proc. 23(a) and (b)(2).

167. The Proposed Class definition is:

Robert Allen, John McDermott, Jerry David, Chrystal Pfeifer, Gary Meek, Donald Martin, Luther D. Johnson, Claude Spencer, Frank Spreng, Carl Nelson, Donald Nickerson, Thomas Nagy, William J. Campbell, Owen Kilbane, Victor Hartness, Jack Beatty, Martin Timperio, Dwayne Brooks, Lamont Clark, Willie Hill, William Perryman, Ralph F. Garduno, Fred Scott, Elizabeth Golebiewski, Patricia Murray, Deborah Clark and all prisoners in the custody of the Ohio Department of Rehabilitation and Corrections (“ODRC”) who are serving indeterminate sentences under the criminal sentencing laws that were in effect before Senate Bill No. 2 (SB2) became effective on July 1, 1996, and whose parole the APA has denied, passed over, or otherwise rejected or deferred.

168. The 2007 Parole guidelines and the cumulative changes in parole standards and procedures have increased the length of incarceration before parole for members of the class based on circumstances that have not changed since each class member was sentenced and over which each class member has no control.

169. All the changes in parole standards described above have been applied retroactively, with the result that class members are no longer receiving meaningful parole review.

170. The plaintiffs allege in their complaint that such changes in parole law and policy, when applied retroactively, violate the ex post facto and due process clauses of the U.S. Constitution.

171. In light of the parole board's 2007 changes to the parole laws, more individual lawsuits under § 1983 are certain to be filed by parolable inmates whose parole has been denied by the board using the 2007 parole laws.

172. One § 1983 action has already been filed in the Northern District raising the same (or substantially the same) issues that are presented here. At least five § 1983 actions have been filed in the Southern District of Ohio raising the same (or substantially the same) issues.

173. Judicial economy will be served by certifying a class, so that all of the challenges to the parole changes can be heard as one case, and a single appeal can follow if necessary.

174. Class certification will also afford the plaintiffs the chance to conduct discovery in a centralized way, and will give experienced lawyers, rather than pro se prisoner-plaintiffs, the responsibility for building a record that the Court can use to decide the legal issues presented.

175. The class, totaling approximately 3,200 prisoners in the custody of the ODRC, is sufficiently numerous to justify class certification.

176. There are common questions of law and fact: every member of the class has been injured by the defendants' conduct, and the present challenge will raise the same, or substantially the same, issues of law and fact for every member of the class. The common questions include but are not limited to:

- a. The extent of the changes in Parole standards and procedures imposed by Defendants;
- b. The extent to which the parole policies and procedures cause the Plaintiffs to face a risk of increased punishment for their crimes that is sufficient to violate their rights to due process and to be free of punishment pursuant to ex post facto laws;
- c. The extent to which the changes in standards and procedures impact meaningful parole review.

177. The claims of the named plaintiffs are typical of those of the class and the nature of the harm is identical between them.

178. The named plaintiffs will be able to serve as adequate class representatives. Their interests are the same as the interests of the class, and each named plaintiff has vigorously prosecuted his claims and will continue to do so in the interests of the class.

179. The undersigned attorneys have litigated prisoners' rights cases in the federal court systems for many years. Plaintiffs' counsel have the time, the resources, and the expertise to prosecute the case on behalf of the class.

180. Defendants have acted, or refused to act, on grounds generally applicable to the class, thereby making final injunctive and corresponding declaratory relief appropriate with respect to the members of the class.

181. All members of the class have had their parole release delayed and their punishment increased or are at risk of that harm. This lawsuit is the only means to ensure

fair procedures are applied to parole. All members of the class are therefore suffering irreparable harm.

#### **VI. FIRST CLAIM FOR RELIEF - §1983**

182. The Defendants have, under color of law, deprived Plaintiff of clearly established rights, privileges and immunities secured by the Fourteenth Amendments to the United States Constitution including but not limited to the right to due process of law, the right to be free of Cruel and Unusual Punishment as guaranteed by the Eighth Amendment to the United States Constitution and the prohibition on ex post fact violations guaranteed by Article I, Section 10, Clause 1 of the United States Constitution.

#### **VII. RELIEF REQUESTED**

**WHEREFORE**, plaintiffs request that this court:

- A. Certify this action as a class action pursuant to Fed. R.Civ. Proc. 23(a) and (b) (2);
- B. Issue a declaratory judgment that the practices at issue in this case violate the constitutional and statutory rights of the class members;
- C. Issue a preliminary and permanent injunction against the defendants and all those acting in concert prohibiting the practices at issue in this action;
- E. Award to plaintiffs reasonable costs, expenses and attorney fees;
- F. Award such other and further relief as this court shall deem just and reasonable.

Respectfully submitted,

/s/ Alphonse A. Gerhardstein  
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**CERTIFICATE OF SERVICE**

I hereby certify that on November 30, 2009, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Alphonse A. Gerhardstein  
Attorney for Plaintiffs