

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

<b>ROBERT ALLEN, et. al.,</b>	:	<b>Civil Action No. 1:08cv1780</b>
	:	
<b>Plaintiffs,</b>	:	<b>Judge Oliver</b>
	:	
<b>v.</b>	:	<b>Magistrate Judge McHargh</b>
	:	
<b>TERRY COLLINS et. al.</b>	:	<b>PLAINTIFFS' MOTION FOR CLASS</b>
	:	<b>CERTIFICATION</b>
<b>Defendants.</b>	:	
	:	

**PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

The plaintiffs, by their counsel, move for class certification pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, stating as follows:

1. This action challenges the retroactive application of the 2007 parole guidelines including cumulative parole changes that have been applied with and through those guidelines, on behalf of all parolable old law prisoners who were sentenced before July 1, 1996 and whose parole the Ohio Adult Parole Authority has denied, passed over, or otherwise declined.

2. The proposed class definition is:

Robert Allen, John McDermott, Jerry David, Chrystal Pfeifer, Gary Meek, Donald Martin, Luther D. Johnson, Claude Spencer, Frank Sprenz, 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.

3. Plaintiffs request that class certification be granted and that this court appoint as class representatives Robert Allen, John McDermott, Jerry David, Chrystal

Pfeifer, Gary Meek, Donald Martin, Luther D. Johnson, Claude Spencer. The plaintiffs further move that undersigned counsel be appointed as class counsel.

4. This motion is supported by the amended complaint (Doc. 34-1) and the memorandum of law.

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**MEMORANDUM**

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**I. Introduction**

The U.S. Constitution provides that “No State shall ... pass any ... ex post facto Law.” U.S. Const. art. I, § 10. The ex post facto clause “is aimed at laws that retroactively alter the definition of crimes or increase the punishment for criminal acts.” *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 504, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995). Retroactive application of parole provisions falls within the ex post facto prohibition if such an application creates a “sufficient risk of increasing the measure of punishment attached to the covered crimes.” *Garner v. Jones*, 529 U.S. 244, 250 (2000). The fact that a parole board’s decisions are discretionary “does not displace the protections of the Ex Post Facto Clause,” because there is always the “danger that legislatures might disfavor certain persons after the fact even in the parole context.” *Id.* at 253.

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.

Prior to 1996, the APA's parole regulations were applied prospectively to inmates who were convicted after the date that the regulation was implemented. Since 1996, when the Ohio legislature abolished parole, the APA has made all changes to its parole regulations retroactive. The most significant amendments occurred in 1998<sup>1</sup> and 2007. The purpose and effect of the amendments made between 1998 and 2007 was to increase the length of incarceration for certain offenses. As a result, plaintiffs have served extended periods of incarceration and have been denied meaningful consideration for parole. Plaintiffs seek a declaratory judgment that the cumulative changes to the parole guidelines, as formalized by the 2007 regulations cannot be applied retroactively.

## **II. Argument**

### **A. Standard for Certification of Class Action**

The determination that an action will be maintained as a class action involves a two step process. First, the Court must find that the four prerequisites of Rule 23(a) – numerosity, commonality, typicality, and adequacy of representation – have been satisfied. The court must then decide whether the proposed class qualifies under one or more of the three alternative bases of certification set forth in Rule 23(b).

In this case the class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to the class; the plaintiffs' claims are typical of the class; and plaintiffs will fairly and adequately protect the interest of the class. In

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<sup>1</sup> The APA admitted inmates serve longer periods of incarceration under the 1998 guidelines than they did under prior guidelines. *Dotson v. Collins*, 2008 WL 162901 (6<sup>th</sup> Cir. 2008)(citing defendants' brief for writ of certiorari before the Supreme Court in that case.)

addition, plaintiffs satisfy the requirements of Fed. R. Civ. Pro. 23(b)(2) because the primary relief sought by plaintiffs is injunctive and declaratory.

B. The Requirements Of Rule 23(a) Are Satisfied.

1. The Class Is So Numerous That Joinder Of All Members Is Impracticable.

Rule 23(a)(1) requires that, for certification purposes, the class be so numerous that the joinder of all members is impracticable. Impracticability means only difficulty or inconvenience of joining all members of the class. *Senter v. General Motors Corp.*, 532 F.2d 511,523 (6th Cir. 1976), *cert. denied*, 429 U.S. 870 (1976); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 158 (S.D. Ohio 1992). While the exact number of class members is unknown at this time, plaintiff believes that the class consists of more than three thousand persons. The sheer number of class members establishes that the numerosity requirement is satisfied. *In re American Medical Systems, Inc.*, 75 F.3d 1069, 1079 (6<sup>th</sup> Cir. 1996).

The transient and fluctuating nature of the prison population makes joinder impracticable. *Pabon v. McIntosh*, 546 F. Supp. 1328 (E.D. PA 1982). The constant turnover of a prison population makes a case such as this only maintainable as a class action. Due to the nature of varying periods of detention, the claims of anyone individual would, in all likelihood, become moot. Therefore, a class action is the only vehicle whereby the constitutionality of the operation of the parole board can be reviewed. *Jones v. Wittenburg*, 323 F.Supp. 93, 99 (N.D. Ohio 1971).

2. Questions Of Law Or Fact Are Common To The Class.

The alleged nature of the defendants' conduct in this case together with the similar legal status of the class members requires the Court to find that questions of law or fact are indeed common to the class. The claims of the named individual and

representative plaintiffs are typical of the claims of the class, for plaintiffs and all class members sustained and continue to suffer injury arising from defendants' wrongful conduct as alleged herein. Every member of the class has been injured by the defendants' conduct. The representative plaintiffs and the class members share the following nonexhaustive list of problems encountered because of retroactive application of parole guidelines: non-mandatory life sentences being treated as mandatory life sentences, longer periods of incarceration for inmates convicted of murder and sex crimes and increasing influence of victim advocates in parole determinations.

Common questions exist whenever the action arises from a nucleus of operative facts. *Thompson v. Midwest Foundation Independent Physicians Association*, 117 F.R.D. 108, 112 (S.D. Ohio 1987). *See also, Sterling v. Velsicol Chemical Corporation*, 855 F.2d 1188 (6th Cir. 1980). The focus of the Court's consideration of class certification should be directed at, and fixed upon, the factual and legal nature of defendants' liability and course of conduct as it uniformly affects all plaintiffs. *Thompson* at 109. This prerequisite is satisfied "as long as the members of the class have allegedly been affected by a *general* policy of the defendant, and the general policy is the focus of the litigation." *Sweet v. General Tire & Rubber Co.*, 74 F.R.D. 333, 335 (N.D. Ohio 1976)(emphasis in original). That standard has certainly been met in this case.

The common questions include but are not limited to: the extent of the changes in Parole standards and procedures imposed by Defendants, 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 and the extent to which the changes in standards and procedures impact meaningful parole review. (Doc. 34-1, p. 29)

3. The Claims Of The Plaintiffs Are Typical Of The Claims Of The Class.

One of the purposes of the typicality requirement is to ensure that the named representatives' claims are similar enough to those of the class to ensure that the named representatives will adequately represent the class. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157, n.13 (1982). To be typical, "a representative's claim need not always involve the same facts or law, provided there is a common element of fact or law." *Senter v. General Motors Corporation, supra*, at 525, n.31. While a representative's claims need not mimic the claims of every class member, the named plaintiff must advance the interests of the class members. *American Medical Systems*, 75 F.3d at 1082.

An examination of the complaint reveals that plaintiffs' claims are certainly typical of the claims of the other class members. They focus upon the APA's alleged wrongful conduct with respect to retroactive application of parole standards. Thus, the claims "are typical of the claims . . . of the class." *Sweet v. General Tire & Rubber Co.*, 74 F.R.D. 333, 335 (N.D. Ohio 1976). In such circumstances, a class action may be the best suited vehicle to resolve such a controversy. *Sterling v. Velsicol Chemical Corporation*, 855 F.2d at 1197 (6th Cir. 1980). As long as the theories of liability transcend factual differences among the plaintiffs, this Court should find that plaintiffs have satisfied the typicality requirement. *Sterling v. Velsicol Chemical Corporation*, 855 F.2d at 1197. "While the focus is on the relatedness of the named plaintiffs' claims and

those of the class members, the harm suffered by the named plaintiffs may differ in degree from that suffered by the other members of the class so long as the harm suffered *is of the same type.*” *Boggs v. Divested Atomic Corp.*, 141 F.R.D. 58, 65 (S.D. Ohio, 1991) quoting *In re Asbestos School Litigation*, 104 F.R.D. 422, 430 (E.D. Pa. 1984)(emphasis in original).

The Sixth Circuit has provided a framework for inmates to satisfy the typicality requirement in parole cases. A class action was filed challenging the 1998 amendments to the APA’s parole regulations. *Michael v. Ghee*<sup>2</sup>, 498 F. 3d 371, 380 (6<sup>th</sup> Cir., 2007). But the class was not certified because there were too many disparities among the plaintiffs. The class included too many types of crimes to conduct a uniform analysis of the plaintiff’s ex post facto claims (sex crimes, homicide, assault, property crimes, drugs, kidnapping, and child endangerment.) *Id.* 385. In this case the opposite is true. The 2007 regulations target offenders with two types of offenses: homicide and sex crimes. They are all being similarly harmed by implementation of the 2007 guidelines. The theory of liability transcends the minor factual differences between inmates. Accordingly, the representative plaintiffs raise typical issues that harm the entire class when they are reviewed by the APA.

4. The Representative Plaintiffs Will Fairly And Adequately Protect The Interest Of The Class Members.

Rule 23(a)(4) requires that the named plaintiff “will fairly and adequately protect the interests of the class.” The adequacy inquiry under Rule 23(a)(4) serves “to uncover conflicts of interest between named parties and the class they represent.” *Amchem*

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<sup>2</sup> Michael did not rule on the ultimate issue, whether the 1998 amendments violated the ex post facto clause. “This decision was reached without making a decision about the constitutionality of the 1998 parole guidelines.” *Dotson v. Collins*, 2008 WL 162901 at fn. 4 (6<sup>th</sup> Cir. 2008)

*Products, Inc., supra*, at 31. The adequacy of representation requirement “tends to merge” with the commonality and typicality criteria of Rule 23(a) which “serve as guideposts for determining whether . . . maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.” *Amchem Products, Inc.* at 32 quoting *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157, n.13 (1982).

In determining the adequacy of class representation, the Sixth Circuit has directed that the Court must examine two factors: 1) whether the named representatives have common interests with the unnamed class members; and 2) whether the named representatives will vigorously advance the interests of the class through qualified counsel. *See, Senter v. General Motors Corporation, supra*, at 525. *See also, Bowling v. Pfizer, Inc.*, 143 F.R.D. at 159 (S.D. Ohio 1992).

Here, the named representatives’ claims are so interrelated to the other class members’ claims that the plaintiffs will be fair and adequate representatives. In the case at bar, there are no conflicts of interest between the proposed class representatives and the members of the class since the claims of all parties arise from an identical fact pattern and are based upon identical theories of law. The proposed class representatives are knowledgeable about the facts which are key to the issues presented in this case. They understand the duty owed all plaintiffs in protecting their legal rights.

The second prong of the Sixth Circuit’s adequacy of representation test, the qualifications of class counsel, is also satisfied. The lawsuit was initiated by pro se prisoners in July of 2008. (Doc. 1) The Court appointed the undersigned counsel who entered their appearance on August 25, 2009. (Docs. 17-18). Proposed class counsel is experienced

in the prosecution of class actions, including cases arising from the deprivation of civil rights in the criminal justice system and experienced in cases involving complex litigation. The undersigned counsel satisfy all the requirements of Rule 23(g). Class certification will 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.

C. The Present Action Is Appropriate For Class Certification Under Rule 23(b)(2).

The injunctive relief sought by the class in this case is the primary relief requested, and is directed towards policies that affect each and every member of the class. The relief sought by the class can be awarded to the class as a whole rather than on a class member by class member basis. Thus, plaintiffs satisfy the requirements contained in Rule 23 (b)(2).

Plaintiffs challenge an action which was directed towards the class as a whole and final class-wide declaratory injunctive relief would be appropriate. This is all that is required under sub-section 23(b)(2).

*Bower v. Bunker Hill Co.*, 114 F.R.D. 587, 596 (E.D. Wash. 1986).

In the proposed amended complaint none of the original plaintiffs are dismissed as class members. The proposed amended complaint lists them as class members but substitutes a number of additional inmates as proposed representative parties. (Doc. 34-1) The original plaintiffs filed a letter with the Court expressing their fear that the defendants will retaliate against them if they are not named as representative plaintiffs. (Doc. 49) The original plaintiffs stated that they “do not mind the newly chosen plaintiffs being representative of the class, but if we win we want to secure our rights as original named plaintiffs.” (Doc. 49). In

fact all class members have the same rights and class representatives have no more rights than any other plaintiffs.

Without class certification, these cases will be decided piecemeal. At least five § 1983 actions have been filed in the Southern District of Ohio raising the same (or substantially the same) issues.<sup>3</sup> 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.

Certification of a 23(b)(2) class is the most effective method available to properly manage and adjudicate all issues and claims.

### **III. Conclusion**

The plaintiffs respectfully request that this Court order this action be maintained as a class action, that the named plaintiffs be appointed class representatives, and that the undersigned counsel be appointed counsel for the class.

Respectfully Submitted,

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<sup>3</sup> *Bruggeman v Collins, et. al.*, case no. 2:09cv00381 *Powers v. Collins, et. al.* case no. 2:09cv501; *Varney v. Collins, et. al.* 2:09-cv-00576; *Steele v. Collins et al*, 2:09-cv-00631; *Beaman v. Collins*, 2:09-cv-00702.

**CERTIFICATE OF SERVICE**

I hereby certify that on January 21, 2010, 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