

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT J. ALLEN, et al., : Civil Action No. 1:08cv1780
: :
Plaintiffs, : :
: : Judge Oliver
v. : :
: :
TERRY COLLINS, et al. : PLAINTIFFS' RESPONSE TO
: DEFENDANTS' NOTICE OF RECISSION
Defendants. : OF 2007 GUIDELINES (DOC. 77)
:

PLAINTIFFS' RESPONSE TO DOC. 77

In compliance with the Court's Order (Doc. 79) that Plaintiffs respond to Defendants' Notice of Recession of the 2007 Parole Guidelines Handbook, Plaintiffs submit the following Memorandum of Law. The case should not be dismissed because it falls within the exception to the mootness doctrine for cases which are capable of repetition yet evading review.

I. INTRODUCTION

This civil rights class action lawsuit challenges the retroactive application of Ohio regulations governing parole suitability, in violation of the Ex Post Facto Clause of the United States Constitution. Some of these regulations were memorialized in the 2007 Parole Guidelines Handbook. Others have been issued as internal policies and rules of the Ohio Department of Rehabilitation and Correction (ODRC).¹ There are also informal and unwritten practices that guide the parole board members in their decision-making. Taken together, the ad hoc parole regulations disadvantage Plaintiffs by altering the definition of criminal conduct and increasing the length of punishment for their crimes. *Collins v. Youngblood*, 497 U.S. 37, 50 (1990). The retroactive application of parole regulations that create a significant risk of prolonging Plaintiffs' incarceration violates the Ex Post Facto Clause. *Garner v. Jones*, 529 U.S. 244, 253 (2000).

¹ See *First Amended Complaint*, Doc. 34-1, ¶26-27, 42-47, 113-116; and the *Ohio Parole Board Handbook*, effective April 1, 2010 at 20-21, listing ODRC policies that are applicable to parole. Attached as Exhibit 1.

On April 1, 2010, Defendants rescinded the 2007 Parole Guidelines Handbook and replaced it with a new version of the handbook.² Defendants contend that this case is now moot because the practices that Plaintiffs are challenging have allegedly been rescinded.³ The 2010 Handbook formally removed the guidelines chart and all the explanatory policies.⁴ However, as Plaintiffs pointed out in both their Rule 56(f) Motion to Complete Discovery and their Memorandum in Opposition to Summary Judgment, Defendants had already announced that the APA had stopped using guidelines chart in its suitability determinations.⁵

The new handbook recites the same legal arguments and describes the same suitability process that the APA explained in its summary judgment motion.⁶ It lays out the factors that are listed in OAC Rule 5120-1-1-7 that the APA must consider in determining eligibility for parole. The 2010 Handbook does not elaborate on how the APA will use its discretion to make suitability determinations, or what weight they give to each factor. Defendants had objected (and still object) to disclosing how the APA applies its regulations.⁷ This was the same issue that Plaintiffs needed to clarify in discovery, when they requested access to historical information about the various parole standards, individual parole files and statistical evidence.⁸ Plaintiffs still must have discovery on the standards for suitability determinations so they can develop the facts relevant to the ex post facto violation.

The adoption of new parole handbook does little to clarify the central issues in this case: what an inmate must prove to demonstrate fitness for parole, and whether the criteria have become unconstitutionally more difficult since the inmate was sentenced. The new Handbook only perpetuates the ex post facto harm that existed before, in essence creating a problem that is

² Exhibit 1, *Ohio Parole Board Handbook* (April 1, 2010)

³ Doc. 77.

⁴ Exhibit 1, p. 1-2 (*Ohio Parole Board Handbook*)

⁵ Docs. 64 and 61.

⁶ Doc. 54.

⁷ See Doc. 61 at 6: “The boilerplate objection is completely without merit. Defendants now claim they no longer use the parole guidelines chart to assess the parole suitability of inmates serving non-mandatory life sentences. Thus it is very important to secure evidence of what they do use.”

⁸ Doc. 61, p. 4-10.

capable of repetition yet evading review. The case should not be dismissed. Rather, plaintiffs' discovery plan should be approved and implemented.

II. ARGUMENT

A. The April 1, 2010 Handbook Creates a Problem that is Capable of Repetition, Yet Evading Review.

Defendants assert that the Court should dismiss the case because the adoption of a new handbook mooted the controversy. Although a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome, a case is not moot if the challenged activity is capable of repetition, yet evading review. *Chirco v. Gateway Oaks, L.L.C.* 384 F.3d 307, 309 (6th Cir. 2004). Under this exception to the mootness doctrine, the plaintiff must demonstrate that (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again. *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); see also *Gerstein v. Pugh*, 420 U.S. 103, 110 n. 11, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). This exception was first developed by the Supreme Court because of concern that underlying legal issues at stake could be permanently defeated by the issuance of short-term orders which are capable of being reissued. *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498 (1911).

1. The Parole Regulations are a Moving Target that Change Before they can be Fully Litigated.

To determine the first part of the test, the complaining party must show that the challenged action is too short in duration to be completely litigated. Short-term conduct that has met this standard include *Roe* (gestation period as limit to impact of abortion law); *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1976) (one year residency requirement for divorces); *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (one year residency period for eligibility to vote); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d

683 (1976) (“gag order” limited to duration of trial); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 125-27, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974) (welfare benefits to striking workers); *United States v. New York Telephone Co.*, 434 U.S. 159, 165 n. 6, 98 S.Ct. 364, 54 L.Ed.2d 376 n. 6 (1977) (“pen register” order of limited duration). *Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975) (pretrial detention); *Olmstead v. L.C.*, 527 U.S. 581 594 n.6 (1999) (confinement of mentally disabled patient).

The APA has already demonstrated that it frequently changes its parole standards, often in the midst of litigation.⁹ Defendants made significant changes to the parole handbooks in 2000, 2005, 2007 and 2010. They made at least one policy statement changing parole standards in 2009.¹⁰ Sometime in 2009 or 2010, they informally stopped using the guidelines chart in their suitability determinations – yet they continued to report the Plaintiffs’ offense scores, criminal history risk scores and recommended sentencing range on their decision sheets, as if that information was considered in the decision to deny their parole. On April 1, 2010, the Defendants changed their Handbook to reflect the practice of not using the guidelines chart to make suitability determinations. Plaintiffs have already been heard under several different sets of parole standards.¹¹ They will continue to receive parole hearings under the shifting standards. Because the parole standards are constantly evolving, Plaintiffs can show that the parole regulations are likely to be rescinded and modified before they can be fully litigated.

2. The APA’s Unconstitutional Actions are Capable of Repetition

To meet the second prong of the doctrine, the complaining party must show that there is a reasonable expectation that the same person would be subjected to the same action again. The Supreme Court has stated that the purpose of the second prong is to determine “whether the

⁹ Mausser Affidavit submitted in *Hall v. Hageman* case no. 0f-CVH-05-5459 (Franklin County, 2009)(see Exhibit A to Defendants Motion for Summary Judgment); compare Mausser Affidavit submitted in *Allen*. (Doc. 77-1)

¹⁰ See Rule 56(f) Motion to Complete Discovery, Doc. 61-18, Exhibit B, and *Memorandum re: Full Board Hearing Process*, dated February 27, 2009. (Document not secured from defendants)

¹¹ See Amended Complaint, Doc. 34-1.

controversy was *capable* of repetition and not ... whether the claimant had demonstrated that a recurrence of the dispute was more probable than not.” *Honig v. Doe*, 484 U.S. 305, 319 n. 6, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988) (emphasis in original). Plaintiffs satisfy this prong by showing that the wrong is likely to recur – even if the original complaining party would not necessarily be harmed again. In *Lawrence v. Blackwell* 430 F.3d 368 (6th Cir. 2005) the controversy was capable of repetition yet evading review because of short interval between primary and general election. Although there was no evidence that the candidate himself would seek to run again, the controversy was likely to recur since it was reasonably certain that some independent candidate would run in the future. Although Defendants cite *Speer v. City of Oregon*, 847 F.2d 310, 311 (6th Cir. 1988), which held that a residency requirement for a local election was not capable of evading review, the plaintiff in *Speer* failed to even suggest that the controversy would bar her or some other candidate in the future. *also United States v. Howard*, 480 F.3d 1005, 1009-1010 (9th Cir.2007)(ongoing policy of shackling pretrial detainees for initial court appearance evaded review because defendants could not have brought challenges to magistrate judges' shackling decisions before the harm of shackling at their initial appearances was completed, and even if the defendants did not have recurring initial appearances in criminal cases, the ongoing shackling policy would be applied to other defendants); *Okpala v. Jordan*, 193 Fed.Appx. 850, 852 (11th Cir. 2006)(Although warranty on federal inmate's headset had expired, court would review inmate's challenge to prison regulation establishing procedure for warranty work on inmates' watches and radios, because it arose from a situation that was capable of repetition, yet evading review, as inmate could buy another headset, which could break within its 90 day warranty period, and yet another action to invalidate the prison regulation could not be fully litigated before that warranty's cessation.)

Defendants cite *U.S. Parole Commission v. Geraghty*, 445 U.S. 388, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) for the proposition that the rescission of the 2007 guidelines “moots

Plaintiffs' claims because the presented issues are no longer live." Doc. 77 at 1. However *Geraghty* articulated three important principles that weigh in plaintiffs' favor. Geraghty was a prisoner who filed a class action challenging the validity of parole guidelines. The Supreme Court held that he could continue the appeal of lower court ruling denying class certification even though he had been paroled while appeal was pending. The case established that (1) an action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied; (2) the named plaintiff could continue to appeal the District Court's ruling denying class certification even though he was released from prison while the appeal was pending; (3) the named plaintiff was a proper representative for the purpose of appealing the ruling denying class certification.

3. Collateral Consequences Keep the Case from being Moot

Collateral consequences may prevent a case from being moot, even if some of the relief requested is moot. In *Reno v. Bossier Parish School Board*, 528 U.S. 320, 120 S. Ct. 866 (2000) a voting rights case, the Supreme Court rejected the argument that an action for declaratory judgment was moot because the regulation that was being challenged, a 1992 redistricting plan, would never again be used. The School Board had argued that the case was moot because the next scheduled election would occur in 2002, when the Board would have a new plan in place based upon data from the 2000 census. The Supreme Court held that the 1992 plan would have a probable continuing effect: it would serve as the baseline against which the next voting plan would be evaluated for purposes of pre-clearance by the Department of Justice. *Id.* 322. The question of when and how any future plan would change from that baseline, and whether it had any retrogressive effect, would depend on the appropriateness of the 1992 plan. *Id.*

Dismissal of this case now would have collateral consequences. To prove an ex post facto claim, Plaintiffs must show that the new regulations create a sufficient risk of prolonging the period of incarceration when compared with the prior regulations. *Michael v. Ghee*, 498 F. 3d 371, 380 (6th Cir. 2007). Plaintiffs need a declaratory judgment about the constitutionality of the

2007 regulations that have been repealed, such as the elevation of scores on the guidelines chart, so that it can assess whether the new regulations are ex post facto laws. Plaintiffs allege that each successive major revision to the parole regulations makes it harder to attain parole, increasing the measure of punishment for their offenses. The Plaintiffs still need discovery of the historical regulations so they can compare the effect of each revision on the length of Plaintiffs' incarceration. Defendants consistently misrepresent Plaintiffs' lawsuit as an attack *only* on the elevation of the offense scores in the guidelines chart. But the guidelines scores were only one piece of the suitability puzzle. Even if that part of the case is moot, the rest of the claims must proceed.

B. Defendants Must Exercise Discretion within the Bounds of the US Constitution.

In the 2010 Handbook, the Defendants expansively claim total discretion, suggesting that the APA's discretion is not restrained by the U.S. Constitution. "[T]he Board may modify conditions of parole, or modify release procedures, as long as the modifications are not contrary to Ohio statute."¹² This statement continues the APA's longstanding disregard of basic constitutional principles. Article Six establishes the Constitution as the supreme law of the land. "At the state level, the construction of parole statutes and regulations is for the States alone, save as they implicate the Federal Constitution in which event the Supremacy Clause controls." *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972).

But historically and throughout this case the APA has argued that it has exclusive discretion and total authority over parole release decisions. See e.g., *Ankrom v. Ohio Adult-Parole Authority*, 2005 WL 737833, ¶31 (Ohio App. 10 Dist. 2005). However, its discretion is not unfettered. "[A]lthough parole is within the powers of the executive branch, such cannot possibly mean that the APA's powers in this regard are unfettered. Indeed, the Ohio Supreme Court has explicitly recognized that the APA's wide-ranging authority and discretion over parole matters must yield when they run afoul of statutory enactments and contractual law. See *Layne*, at 28.

¹² Exhibit 1, p. 2. (*Ohio Parole Board Handbook*) Emphasis added.

The same must hold true when the APA's authority and discretion run afoul of the constitutional doctrine of separation of powers.” *Id.* at ¶ 32. The same must hold true when the APA’s authority and discretion violate the constitutional doctrine against ex post facto laws.

In *Ankrom* the Court rejected the APA’s claim that it had total authority and discretion when an inmate is transferred to its custody.

When the authority of the judiciary ends procedurally is not relevant to the present issue. Neither is the procedural scope of its own “authority” relevant. Rather, what is relevant to the present analysis is the underlying “function” the APA assumed in executing its authority. Although the APA may be correct that the judiciary branch lost “authority” over the sentencing long before the APA took its actions in executing its parole determinations, the APA was still capable of impermissibly attempting to exercise the same “function” of the judiciary in executing its own authority, as the trial court found it did.

Ankrom at ¶31.

Here the APA makes a similar error by relying on the timing of the 1975 administrative rule governing parole decisions. The APA argues that since the factors listed in the Rule have remained the same since 1975, nothing the APA does in applying those factors can run afoul of the Ex Post Facto Clause. This is incorrect. See argument outlined in *Plaintiffs’ Response to Defendants’ Notice of Supplemental Authority*, Doc. 73 at 3-6. Although the Defendants asserted that their parole guidelines charts, memoranda and parole handbooks, “do not guide, restrict, or otherwise influence”¹³ parole decisions, Plaintiffs have amassed substantial evidence to the contrary.¹⁴ Indeed, in the 2010 Handbook, the Defendants finally concede that their parole suitability determinations have been guided by many tools in addition to the administrative rule.¹⁵ This is a material issue of disputed fact. This Court must not accept the APA’s invitation to focus on the procedural scope of its discretion rather than its substantive function as a decision-maker.

¹³ *Defendants’ Motion for Summary Judgment*, Doc. 54 at 20.

¹⁴ Indeed, in the new Handbook, the Defendants finally concede that their parole suitability determinations are guided by many tools, not just the Parole Guidelines Handbook. see p. 2.

¹⁵ Exhibit 1, p. 2. (*Ohio Parole Board Handbook*)

C. The Subjective Exercise of Discretion authorized by the 2010 Handbook will Likely to Lead to Prolonged Incarceration.

The APA states that the old assessment tools were necessary because it wanted to promote consistency in decision making, given the large diversity of crimes committed by old law inmates.¹⁶ Strangely, now that the old law inmate population is more homogenous, i.e. overwhelmingly made up of just two types of offenders (sex and homicide), the APA concludes that the old law inmates are too disparate to assess with objective risk assessment tools, such as the guidelines chart.

The majority of pre-Senate Bill 2 inmates who were committed for commonly-seen crimes that demonstrate ordinary risk patterns have been heard and released. However, many parole eligible inmates remain incarcerated because the uncommon and serious nature of their crimes does not conform with general risk patterns. Most of these cases have unique factors that thwart any effort to generalize a suggested range of time or specify common risk factors.

Exhibit 1, 2010 Handbook, at 2.

There is no indication that this conclusion is evidence-based. The subjective processes the Chair describes proved to be problematic in the 1970s and 1980s. As the APA's own History Book observed, "[p]rior to the 1980's, parole hearings and the decision to release were made with few external constraints. The Parole Board was given broad discretion to determine each inmate's suitability for release. Discretion was limited only by the maximum sentence imposed by the sentencing court."¹⁷ Serious problems with this system led the APA to adopt evidence-based standards in 1987. The Matrix adopted in 1987 represented "a movement away from the traditional decision-making strategy which has been in use in Ohio and most other states for a century, and toward a system-oriented and more objective approach." The emphasis on actual risk

¹⁶ Exhibit 1, p. 2-3 (*Ohio Parole Board Handbook*)

¹⁷ Exhibit 5 *Ohio APA History Book* p. 38. (Not provided by defendants in discovery, this document is also available online at <http://www.drc.ohio.gov/web/APAHistoryBook.pdf>)

and rehabilitation that was inherent in the Matrix led to more prisoners being paroled.¹⁸ The Matrix was thus abandoned in 1998 in favor of a tougher system. The guidelines chart and accompanying Handbook that replaced the Matrix retained some objective measures, but they increased the sentencing ranges for most old law inmates. These standards were in effect between 1998 and 2009.¹⁹

As for the 2010 Handbook, Defendant Mausser does not anticipate the number of inmates paroled will increase dramatically. "I don't see a significant change," she said. "Every case has its own unique set of facts and circumstances. It's going to be a weighing and balancing."²⁰ Defendants' current theory could have grave consequences for public safety, because it returns discretion to the APA to act in a subjective, non-evidence-based manner. Plaintiffs' expert, Dr. James Austin, will disagree with the APA's conclusion that the nature of the Plaintiffs' offenses defies general risk patterns.

Dr. Austin observed that historically parole boards tend to rely on their own professional clinical judgments. "Generally no forms are required to be filled out, and no tests for reliability and validity are needed. Unfortunately, it has also been shown that professional judgments are, by far, the least accurate risk assessment method. Too often, these judgments are no more than "gut" reactions that often vary from expert to expert on the very same offender. Ironically, corrections tend to rely upon this risk methodology for some of its most important decisions..."²¹ The 2010 approach to parole is in line with a common methodology used in corrections that relied on the "gut feelings" of the parole board. However, as Dr. Austin noted

Dissatisfaction with that approach led to the development of what some have called actuarial based assessments. These methods are very common classification tools in correctional settings. Longitudinal studies on prisoners and offenders identify those

¹⁸ Prisoners who were evaluated under the Matrix served less time than prisoners whose fate was decided under future versions of the regulations. See *Dotson v. Wilkinson*, 2008 WL 162901, at p. 2-3 (6th Cir. 2008).

¹⁹ See Plaintiffs' briefing at Docs. 43-1, 61, 64, 73,

²⁰ *Old parole guidelines tossed for good: 90 percent of inmates now doing time under 1996's 'flatsentencing' law*, Alan Johnson, Columbus Dispatch (April 1, 2010), Exhibit 2

²¹ *The Proper and Improper Use of Risk Assessment in Corrections*. Exhibit 3, p. 2.

prisoner attributes that are associated with misconduct, escapes, and recidivism. These risk factors are then translated into a scoring system, which produces a numeric score that can then be converted into a risk category. A major advantage of these methods is that it significantly enhances the level of reliability and validity associated with risk assessment. Further, the skill required to do the assessment is not as great as it is for professional judgment based methods.²²

Dr. Austin warns that the failure to use risk assessment tools will lead to the release of offenders who are likely to re-offend.²³ Plaintiffs argue that the current parole regulations continue the trend challenged in the lawsuit of allowing the board members to “go with their gut” about who should be released, and that this structure inevitably results in disproportionate weighing of the “nature of the crime” against risk assessment and rehabilitative measures. Plaintiffs can show that they are therefore serving longer sentences than they would have under prior parole regulations.

CONCLUSION

The APA’s standards for suitability determinations are the disputed fact in this case. The 2010 Handbook appears to have ratified the status quo. The case is not moot because the challenged actions are capable of repetition, yet evading review. The case should not be dismissed. Plaintiffs’ discovery plan should be approved.

Respectfully submitted,

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²² *Id.* at note 21.

²³ *THE DIMINISHING RETURNS OF INCREASED INCARCERATION, A Blueprint to Improve Public Safety and Reduce Costs*, by Dr. James Austin and Dr. Tony Fabelo, p. 15. “Parole guidelines were first developed by the U.S. Parole Commission which still uses its pioneering Salient Risk assessment model. They were developed to provide consistency in the decision-making process as well as to improve public safety. The latter goal was to be achieved by grounding the guidelines in a risk assessment component. Yet few states have these. Risk assessments can be used to determine the likelihood of an offender being re-arrested and returned to custody. If more parole boards used these, they could combine public policy concerns about severity with risk assessments to allay the public’s concern about the improper and early release of dangerous prisoners.” Exhibit 4.

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 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. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

/s/Andrea L. Reino
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