

FILED

APR 27 2005

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

4V

1000-0100

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

RICHARD M. GILMAN C-47508

(Name of Plaintiff)

P.O. BOX 2500 Y-103L

(Address of Plaintiff)

Vacaville, CA. 95696-2500

05 CV - 830 LKK GGH P

(Case Number)

vs.

COMPLAINT

M. PEREZ, as BPT Commissioner &

Chairperson; A. SCHWARZENEGGER, as

California Governor; and DOE's #1 - 100

(Names of Defendants)

I. Previous Lawsuits:

A. Have you brought any other lawsuits while a prisoner: Yes No

B. If your answer to A is yes, how many?: 2 Describe the lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper using the same outline.)

1. Parties to this previous lawsuit:

Plaintiff RICHARD M. GILMAN

Defendants J. WOODFORD, Director CDC et al.

FORM TO BE USED BY A PRISONER IN FILING A COMPLAINT
UNDER THE CIVIL RIGHTS ACT, 42 U.S.C. § 1983

Rev'd 5/99

2. Court (if Federal Court, give name of District; if State Court, give name of County)

U.S.D.C. Eastern District

3. Docket Number CIV S-05-0337 FCD - GGH

4. Name of judge to whom case was assigned Hon. FRANK C. DAMRELL, Jr.

5. Disposition (For example: Was the case dismissed? Was it appealed? Is it still pending?)

STILL PENDING

6. Approximate date of filing lawsuit February 22, 2005

7. Approximate date of disposition SEE # 5

II. Exhaustion of Administrative Remedies

A. Is there a grievance procedure available at your institution? Yes No

B. Have you filed a grievance concerning the facts relating to this complaint?

Yes No

If your answer is no, explain why not As of 5/1/04 the Board of Prison Terms repealed its administrative grievance procedures, formerly codified at Title 15, Cal. Code Regs., § 2050 et seq.

C. Is the grievance process completed? Yes No

III. Defendants

(In Item A below, place the full name of the defendant in the first blank, his/her official position in the second blank, and his/her place of employment in the third blank. Use item B for the names, positions and places of employment of any additional defendants.)

A. Defendant MARGARITA PEREZ is employed as Commissioner & Chair of the Board of Prison Terms at 1515 K St. #600, Sacramento, CA. 95814

B. Additional defendants ARNOLD SCHWARZENEGGER, Governor of the State of California, Office of the Governor, State Capitol, Sacramento, CA. 95814; J. DOE's #1-#8, Board of Prison Terms Commissioners; and J. DOE's #9-#100, Board of Prison Terms Deputy Commissioners; all J. Does employed at 1515 K St., #600, Sacramento, CA. 95814

ADDITIONAL LAWSUIT

1. Parties to this previous lawsuit:

Plaintiff RICHARD M. GILMAN

Defendants J. WOODFORD, Director CDC et al.

2. Court U.S.D.C. Eastern District

3. Docket Number CIV-S-04-0035 DFL KJM

4. Name of Judge to whom case was assigned Hon. DAVID F. LEVI

5. Disposition STILL PENDING

6. Approximate date of filing lawsuit January 7, 2004, amended December 21, 2004

IV. Statement of Claim

(State here, as briefly as possible the facts of your case. Describe how each defendant is involved, including dates and places. Do not give any legal arguments or cite any cases or statutes. Attach extra sheets if necessary.)

SEE ATTACHED

V. Relief.

(State briefly exactly what you want the court to do for you. Make no legal arguments. Cite no cases or statutes.)

Injunctive relief per WILKINSON v. DOTSON 2005 DJAR 2669 (decided March 7, 2005): Enjoin defendants from continued reliance in the future on unchanging factor, the circumstance of the offense and conduct prior to imprisonment, per BIGGS v. TERHUNE 334 F. 3d 910, 917 (9th Cir. 2003).

Signed this 15th day of April, 2005.

Richard G. Sullivan
(Signature of Plaintiff)

I declare under penalty of perjury that the foregoing is true and correct.

April 15, 2005
(Date)

Richard G. Sullivan
(Signature of Plaintiff)

IV. Statement of Claim:

Defendants' continued reliance on unchanging factors, such as the circumstances of plaintiff's offense and conduct prior to his imprisonment, is arbitrary, runs contrary to the rehabilitative goals espoused by the prison system, and violates plaintiff's Due Process guarantees under the Fourteenth Amendment to the United States Constitution. See Biggs v. Terhune, 334 F.3d 910, 916-17 (9th Cir. 2003); Greenholtz v. Nebraska, 442 U.S. 1, 13 (1979) ("It is important ... not [to] overlook the ultimate purpose of parole which is a component of the long-range objective of rehabilitation.") and id. at 16 (due process requires that when parole is denied, the inmate be informed "in what respects he falls short of qualifying for parole"); Wolff v. McDonnell, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government"); Greenholtz, supra, 442 U.S. at 12-13 (extending Wolff's protection against arbitrary government action to parole-determination process) and id. at 13 ("The function of legal process, as that concept is embodied in the Constitution, and in the realm of factfinding, is to minimize the risk of erroneous decisions.").

1. On or about April 1982, plaintiff was convicted of first degree murder in Los Angeles County for an offense which occurred on or about August 14, 1980.
2. On or about May 11, 1982, plaintiff was sentenced to a term of 25 years to life in state prison.
3. At the time of sentencing, plaintiff had spent 525 days in custody in county jail; he received credit for a total of 787 days (including behavior credits vested under Penal Code, § 4019).
4. Plaintiff was received by the California Department of Corrections ("CDC") on or about May 18, 1982.
5. Plaintiff has no prior criminal history.
6. Plaintiff has been eligible for parole since July 22, 1995.
7. Plaintiff had parole consideration hearings before Commissioners and Deputy Commissioners of the Board of Prison Terms ("Board" or "BPT") in 1994, 1995, 1997, 1999, 2002, 2003, and most recently March 2005. He has never been found suitable for release on parole.
8. Defendant Perez was appointed by defendant Schwarzenegger to be the Chair of the Board. As Chair, defendant Perez is the administrative head of the Board and exercises all duties and functions necessary to ensure that the responsibilities of the Board are successfully discharged. She is also the designated appointing authority for deputy commissioners employed by the Board.
9. Plaintiff has demonstrated evidence of rehabilitation. He has continued to demonstrate exemplary behavior throughout his incarceration, never having been found guilty of any prison rule violation.
10. The base term for plaintiff's offense is no more than 29-31 years (i.e., 348-372 months), pursuant to the matrix in Title 15, Cal.Code Regs. ("15 CCR") § 2403, subd. (b), category II-D, reducible by postconviction credit pursuant to 15 CCR § 2290.

11. Article 11 (consisting of Sections 2400-2411) of Chapter 3 of Division 2 of Title 15 of the California Code of Regulations, which currently lists criteria and guidelines for murders committed on or after November 8, 1978, was not adopted as a regulatory measure until a month or two after plaintiff committed his offense. While the matrix of base terms applicable to plaintiff's offense is arguably located within that Article (at 15 CCR § 2403, subd. (b)), the parole consideration *criteria and guidelines* applicable to his offense are located instead in Article 5 (listing parole consideration criteria and guidelines for life prisoners generally, regardless of the date of the commitment offense), commencing with 15 CCR § 2280 of the Board's regulations.

12. The standard amount of postconviction credit awarded by the BPT to each prisoner found suitable for release on parole is four months for each year of disciplinary-free imprisonment since the prisoner began serving his "life" sentence.

13. Taking into account presentence credit, as well as a nominal amount of postconviction credit (four months for each year of disciplinary-free imprisonment since plaintiff began serving his "life" sentence), plaintiff will have served approximately 403 months by the time of his next parole consideration hearing, currently scheduled for March 2006.

14. In California, "the law itself is neutral inasmuch as it gives the governor power to either affirm or reverse a BPT's granting or denial of parole. Moreover, the governor must use the same criteria as the BPT. The law, therefore, simply removes final parole decisionmaking authority from the BPT and places it in the hands of the governor." Johnson v. Gomez, 92 F.3d 964, 967 (9th Cir. 1996).

15. The Governor has never reversed a decision of the Board proposing to find plaintiff *unsuitable* for parole.

16. In denying plaintiff parole, the Board and Governor continue to rely on the unchanging circumstances of plaintiff's offense and prior conduct.

17. Plaintiff is here challenging only the procedures used at his parole consideration hearings. He seeks injunctive relief concerning the procedures to be used at *future* parole consideration hearings.

18. The Board's regulations (and case law) permit consideration of factors other than the commitment offense and conduct prior to imprisonment in determining whether or not an applicant is suitable for release on parole. See 15 CCR § 2281, subds. (b) and (c). Accordingly, while plaintiff admittedly *hopes* this action will help bring about his earlier release, success here will *not necessarily* spell immediate or earlier release for him.

19. The defendants are here being sued in their official capacities only.