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| District Court, <u>LOGAN</u> County, Colorado Court Address: | <p style="text-align: center;">▲ COURT USE ONLY ▲</p> |
| Plaintiff/Petitioner: IMMEL, et al, v. Defendant/Respondent: OWENS, et al | |
| Attorney or Party Without Attorney (Name and Address): Daniel Immel, DOC#57862, et al, pro se SCF, Unit 35 PO Box 6000 Sterling, CO 80751 Phone Number: E-Mail: FAX Number: Atty. Reg #: | Case Number: 05CV216 Division: Ct. Room: |
| REPLY TO DEFENDANT'S MOTION TO DISMISS COMPLAINT | |

COMES NOW the plaintiffs, pro se, move to enter their reply to defendant's Motion to Dismiss Complaint. And as ground therefore, the plaintiffs state the following:

- 1.) The defendants are merely seminally accurate in their analysis of the complaint. However, they fail to address the true issues or to demonstrate a full understanding of the uncertainty and insecurity being raised by the plaintiffs concerning C.R.S. §17-22.5-404, (in its entirety), and the defendants implementation and execution of that statute.

- 2.) Plaintiffs are not asking the courts to reverse any parole decision or to otherwise grant anyone parole. However, plaintiffs are asking the court to resolve questions concerning the process and criteria the parole board uses in light of C.R.S. §17-22.5-404 in making their decisions and coming to their conclusions. The [subject matter] in this case concerns the rights, status and other legal relations of the plaintiffs, as well as the obligations of the parole board and the Dept. of Corrections in relation to applications being submitted for parole consideration.
 - a.) Under Rule 57(a), C.R.C.P., "District Courts and Superior Courts within their respective jurisdictions [shall] have the power to declare rights, status, and other legal relations [whether] or [not] further relief is or could be claim." (Emphasis added).

b.) Rule 57(k), C.R.C.P. states that a "Declaratory Judgment purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations [and] is to be liberally construed and administered." (Emphasis added).

3.) These are genuine and true controversies in this case in reference to C.R.S. §17-22.5-404, (in its entirety), and "A declaratory judgment is appropriate when it will terminate a controversy." Heron v. City and County of Denver, 159 Colo. 314, 411 P.2d 314 (1966).

4.) Plaintiffs argue that there is mandatory language within C.R.S. §17-22.5-404 that does create a due process right when it comes to parole applications. Plaintiffs claim that Governor Owens, (by & through his parole policies), The Colorado Parole Board and the Dept. of Corrections are abusing that process. Plaintiffs are seeking due process in the implementation of C.R.S. §17-22.5-404 and a decision making process that is not capricious and arbitrary, as plaintiffs claim it is now.

5.) Defendants claim that the board's decision to grant or deny parole is a subjective one. The plaintiffs agree in part to this reasoning. However, why would the parole board consistently and routinely fail to consider, [or] totally ignore, very important issues and facts, such as a prisoner's institutional behavior, programs completed, letters from professional counselors and/or doctors, a prisoner's parole plan, and a prisoner's pre-conviction history before making their [subjective] decisions. Plaintiff Immel again asserts that when these factors all present evidence for favorable decision to grant parole, the board either ignores the information or totally contradicts it. The defendants seem to be primarily concerned with the amount of time an offender has left on his total sentence and that is what their decisions are based on. Plaintiff Immel asserts he has documentary evidence to prove his allegations and this court has an obligation to allow the presentation of said evidence.

a.) The U.S. Supreme Court has held that a prisoner's institutional record is paramount in determining his/her ability to adhere to society's laws upon release. Moody v. Daggett, 429 U.S. 78, 88-90, 50 L.Ed.2d 236, 97 S.Ct. 274 (1976) (holding that an inmate's institutional record is one of the [most significant factors] in predicting an inmate's ability to assume his place in society.) (Emphasis added).

b.) Also see Cardiel v. Brittain, 833 P.2d 748 (Colo. 1992), for some analysis of C.R.S. §17.22.5-404.

6.) The defendants further argue that "the determination of how to monitor an offender's progress and what, if any,

6. cont.) weight the parole board chooses to place on the evidence before it are matters solely for the parole board's consideration and discretion." The plaintiffs do not agree with this reasoning and assert that their argument goes contrary to Colorado law and the intent of that law. The mandatory language used in §17-22.5-404, and where the mandatory language is placed within the statute go contrary to what the defendants are claiming.

a.) If the defendant's reasoning is true, then the plaintiffs assert, (as was asserted in the complaint), that C.R.S. §17-22.5-404(2)(b) creates a loophole that virtually negates the entire construction of C.R.S. §17-22.5-404 and has therefore created an ambiguity in the statute, rendering it useless, including the mandated use of the risk assessment scale. Even inmates such as Plaintiff Immel, who have consistently scored [low] on that scale, have been determined to be a [public risk] by the parole board, in direct contradiction to the score.

7.) Again, the defendants argue that "the interests protected by the due process clause are those found within the U.S. Constitution itself, [or] those created by federal [or] state law." The plaintiffs agree. However, the plaintiffs claim that C.R.S. §17-22.5-404, in its entirety, does use mandatory language that creates such due process that is due inmates of the class when applying for parole. Therefore, the claim for due process in the decision making process of the parole board would be legitimate as arising from the statutory source.

8.) The plaintiffs argue that the reasoning of the defendants is erroneous and contrary to Colorado law, specifically, C.R.S. §17-22.5-404, (in its entirety), including subsection (6), dealing with the Colorado Risk Assessment Scale and the mandatory language used to implement said tool. Plaintiffs assert in their complaint that the board's decisions are often contrary to an inmates actual score on that scale. In fact, when the evidence is presented and considered, the plaintiffs believe it would be very difficult for any court to understand how the parole board comes to some of their decisions that are clearly contrary to the evidence. These are matters that get to the very essence of the plaintiff's complaint.

a.) The parole board decisions, although subjective, [cannot] be capricious and/or arbitrary. Martinez v. Colo. St. Bd. of Parole, 989 P.2d 256 (Colo.App. 1999). (Emphasis added).

b.) In a complaint, a plaintiff need not set forth the underlying facts giving rise to the claim with precise particularity, [especially] as those matters reasonably unknown to him and within the cogizance of the defendants. Shockley v. Georgetown Valley Water & San. Dist., 37 Colo. App. 434, 548 P.2d 929 (1976).

9.) If the Board of Parole is using criteria other than those outlined by C.R.S. §17-22.5-404, what are those criteria? And, can the Board ignore the legislative mandates of C.R.S. §17-22.5-404 and rather use their own criteria?

10.) The Defendants ask for a dismissal based on "failure of the Plaintiffs to make a claim".

(a) "A motion to dismiss for failure to state a claim is viewed with disfavor, and should be granted [ONLY] if it clearly appears that the plaintiff would not be entitled to any relief under the facts pleaded." National Sur. Corp. v. Citizens State Bank, 41 Colo.App. 580, 593 P.2d 362 (1978), aff'd, 199 Colo. 497, 612 P.2d 70 (1980). (Emphasis Added).

Plaintiffs believe the issues and questions raised do satisfy an appropriate and legitimate request for Declaratory Judgment.

11.) On page 6 and 7 of the Defendants' Motion To Dismiss, they attempt to mislead and misconstrue the Plaintiffs' claims concerning "Aggravating Factors". The Defendants state that the Plaintiffs argue "that it is a violation of their due process protections to allow the Parole Board to determine that there are aggravating factors to their offenses" and that "it is an abuse of discretion to use aggravating factors as a reason for denying parole applications".

a.) Plaintiffs never claim the Board is not "allowed" to consider agravating factors - but that C.R.S. § 17-22.5-404 places those factors to be used during the process of determining "length and conditions" of parole. Why would the State Legislature distinguish between specific sections for specific phases and purposes if their intent was to allow the potential free reign in the decision-making process with no set guides? Plaintiffs contend there is a reason behind the specific sections.

b.) Plaintiffs do contend that "agravating factors", in and of themselves, and in light of the statutory intent and constructs, within the entirety of C.R.S. § 17-22.5-404, is not a sound reason for denying parole. Aggravating factors are a primary consideration at the sentencing phase, and offenders who are sentenced for aggravating factors serve more time to begin with before becoming eligible for parole than if they were sentenced within the presumptive range.

12.) Finally, Plaintiffs argue that they have provided the grounds to support their allegations. Documentary, taped, and oral testimony will demonstrate the facts in this case, and the Plaintiffs have made it clear in the Complaint that such evidence will be provided upon request of the Court. In addition, the

Defendants are in possession of the same evidence and more. This can only be procured by order of the Court through Discovery. The evidence, if pursued by the Court, will demonstrate the truthfulness of the Plaintiffs' claims.

THEREFORE, the Plaintiffs pray this Court will DENY the Defendants' Motion To Dismiss, GRANT the Plaintiffs' Motion To Continue this Case with In Forma Pauperis Status, Certify this case as a Class Action, and Appoint Counsel to represent the Plaintiffs. These requests are being made and prayed for in good faith, and in the effort to pursue and serve justice in these matters, both to the Plaintiffs and to the people of the State of Colorado.

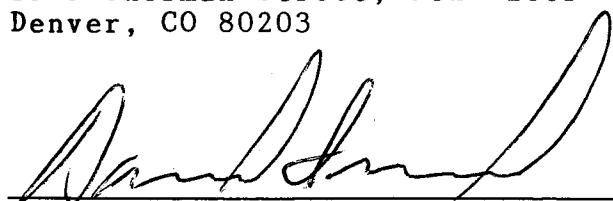
RESPECTFULLY submitted this 8th day of November, 2005.



CERTIFICATE OF MAILING

I, Daniel Immel, hereby certify that true and correct copies of the Plaintiffs' "Motion To Proceed With Case In Forma Pauperis" and Plaintiffs' "Reply To Defendants' Motion To Dismiss" were placed in the U.S. Mail, postage prepaid on 11-9-05 and addressed as follows:

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