

The Law Firm of
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 Attorneys for Plaintiffs

IAN HAWKER, NELSON MILES
 and JERMAINE LAWRENCE,
 on behalf of themselves
 and all others similarly
 situated,

 Plaintiffs

v.

ANDREW CONSOVOY,
 WILLIAM T. McCARGO,
 LORAIN KULICK,
 PETER W. LOOS,
 DOMINIC PORROVECCHIO,
 ROLANDO GOMEZ RIVERA,
 RACHEL TORRES-CHOWANIEC and
 RUBY J. WASHINGTON,

 Defendants

:
 : UNITED STATES DISTRICT COURT
 : DISTRICT OF NEW JERSEY
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 : CIVIL ACTION NO.
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Hawker v. Consovoy



PC-NJ-0006-0001

CLASS ACTION COMPLAINT

Introduction

1. This action is brought on behalf of those persons least favored among the citizens, politicians and political entities in the State of New Jersey - persons convicted of crimes.

2. For at least the last year, this class of persons has made repeated attempts to obtain even the rudiments of due process.

3. Yet because they are an unfavored group, unpopular, with no political power, no lobbying mechanism and an inability to

raise either funds or public consciousness, the political

appointees of the New Jersey State Parole Board (hereinafter known collectively as "the defendants") have ignored the plaintiff class' pleas for justice, and trampled upon their clearly defined, undisputed constitutional rights.

4. This action enlists the help of the federal courts, as the prisoners' last avenue of hope, to enforce their well established, recognized, federal constitutional right to due process.

5. In short, this action demands that the federal courts impose the rule of law on the board members of a runaway state agency, who appear to be acting in an arbitrary, capricious, abusive and vindictive manner.

6. By doing so, the federal court can restore a modicum of dignity to a class of human beings who most need its help.

7. The defendants have embarked upon a studied, intentional pattern and practice which denies plaintiffs and the class their constitutional right to parole.

8. This action does not seek the release of any inmate, but merely demands that the defendants comply with the mandatory procedures and deadlines set forth in the New Jersey Parole Act governing the manner in which parole is administered.

Jurisdiction and Venue

9. This court has jurisdiction over this matter under 28 U.S.C. §1331, as plaintiffs' claims arise under 42 U.S.C. §1983

and the Fourteenth Amendment.

10. The named plaintiffs and class representatives in this action are inmates currently incarcerated at Riverfront State Prison, in Camden, New Jersey. The acts and omissions alleged herein occurred, inter alia, in Camden, New Jersey.

The Parties

11. Plaintiff Ian Hawker, New Jersey Inmate #313963, is an inmate currently incarcerated at Riverfront State Prison.

12. Plaintiff Nelson Miles, New Jersey Inmate #277614, is an inmate currently incarcerated at Riverfront State Prison.

13. Plaintiff Jermaine Lawrence, New Jersey Inmate #301353, is an inmate currently incarcerated at Riverfront State Prison.

14. The State of New Jersey and/or the New Jersey State Parole Board are not defendants in this action.

15. Defendant Andrew Consovoy is the current Chairman of the New Jersey State Parole Board. He is sued in his official capacity as to the class claims for injunctive relief. To the extent the class seeks a class wide award of nominal damages, he is sued in his individual capacity only.

16. Defendant William T. McCargo is Vice Chairman of the New Jersey State Parole Board. He is sued in his official capacity as to the class claims for injunctive relief. To the extent the class seeks a class wide award of nominal damages, he is sued in his individual capacity only.

17. Defendant Loraine Kulick is a member of the New Jersey State Parole Board. She is sued in her official capacity as to the class claims for injunctive relief. To the extent the class seeks a class wide award of nominal damages, she is sued in her individual capacity only.

18. Defendant Peter W. Loos is a member of the New Jersey State Parole Board. He is sued in his official capacity as to the class claims for injunctive relief. To the extent the class seeks a class wide award of nominal damages, he is sued in his individual capacity only.

19. Defendant Dominic Porrovecchio is a member of the New Jersey State Parole Board. He is sued in his official capacity as to the class claims for injunctive relief. To the extent the class seeks a class wide award of nominal damages, he is sued in his individual capacity only.

20. Defendant Rolando Gomez Rivera is a member of the New Jersey State Parole Board. He is sued in his official capacity as to the class claims for injunctive relief. To the extent the class seeks a class wide award of nominal damages, he is sued in his individual capacity only.

21. Defendant Rachel Torres-Chowaniec is a member of the New Jersey State Parole Board. She is sued in her official capacity as to the class claims for injunctive relief. To the extent the class seeks a class wide award of nominal damages, she is sued in

her individual capacity only.

22. Defendant Ruby J. Washington is a member of the New Jersey State Parole Board. She is sued in her official capacity as to the class claims for injunctive relief. To the extent the class seeks a class wide award of nominal damages, she is sued in her individual capacity only.

Class Action Allegations

23. Plaintiffs bring this action, inter alia, as a class action pursuant to Fed.R.Civ.P. 23, seeking primarily injunctive and declaratory relief on behalf of all inmates in New Jersey State Prisons who have reached a parole eligibility date without receiving the pre-parole report mandated by N.J.S.A. 30:4-123.54(a) or the parole hearing mandated by N.J.S.A. 30:4-123.55(c).

24. This action does not seek the release of any inmate. Instead, plaintiffs seek primarily injunctive and declaratory relief requiring the defendants to comply with the mandatory deadlines set forth in the New Jersey Parole Act for provision of pre-parole reports and parole hearings.

25. Plaintiffs are unable to state the exact number of class members without discovery of defendants' records. Upon information and belief, however, there are potentially 1,000 class members.

26. There are numerous common questions of law or fact

affecting the rights of class members, including inter alia:

a. whether the New Jersey Parole Act creates a constitutionally protected liberty interest in the procedures by which parole may be deferred, delayed or denied;

b. whether the class is entitled to a declaratory judgment that the failure to follow the statutorily mandated procedures set forth in the New Jersey Parole Act for deferral, delay or denial of parole violates the due process rights of the class;

c. whether the failure to provide pre-parole reports within the deadline mandated by N.J.S.A. 30:4-123.54(a) violates the due process rights of the class;

d. whether the failure to hold parole hearings within the deadline mandated by N.J.S.A. 30:4-123.55(c) violates the due process rights of the class;

e. whether the class is entitled to a class wide award of nominal damages for the violation of their statutory right to a pre-parole report and parole hearing before the parole eligibility date.

27. Plaintiffs are all members of the class they seek to represent; i.e. they are all inmates who have reached their parole eligibility date without receiving the statutorily required pre-parole report or parole hearing.

28. Plaintiffs will thoroughly and adequately protect the interests of the class, having retained qualified and competent legal counsel to represent them and the class.

29. The prosecution of separate actions by individual class members will and have created a risk of inconsistent or varying

adjudications.

30. Numerous actions are being prosecuted in the state and federal courts on these very issues with varying results.

31. Moreover, upon information and belief, it has been the policy of the defendants to provide the required pre-parole reports and hearings to any inmate who files an individual action challenging these same practices.

32. This is simply an effort to render the individual actions moot, to undercut the standing of those who challenge these very clear violations and to avoid a remedy for the violation of the rights of all class members as described herein.

33. The defendants have acted and refused to act on grounds generally applicable to the class, thereby making appropriate injunctive and declaratory relief for the class as a whole.

34. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

**The New Jersey Parole Act and
the Liberty Interest it Creates**

35. The New Jersey Parole Act, N.J.S.A. 30:4-123.53 et seq., creates a protected liberty interest sufficient to entitle inmates to federal due process and constitutional protection with respect to parole determinations.

36. N.J.S.A. 30:4-123.53 through 30:4-123.55 creates a protected expectation that each inmate will receive three things

within a specified time period before his or her parole eligibility date:

- a. a written pre-parole report;
- b. a review of that report by a hearing officer; and
- c. an actual hearing before a parole board panel.

37. Specifically, N.J.S.A. 30:4-123.54(a) requires that in every case where an inmate is approaching a parole eligibility date, staff members of the Parole Board shall prepare and file a written "pre-parole" report at least 120 days before the inmate reaches his or her parole eligibility date.

38. N.J.S.A. 30:4-123.54(c) provides that each inmate must receive a copy of this pre-parole report, at least 105 days before his or her eligibility date, so that the inmate can submit written comments on the report before the eligibility date.

39. N.J.S.A. 30:4-123.55(a) provides that "prior to" the parole eligibility date, a "designated hearing officer shall review" the pre-parole report required by N.J.S.A. 30:4-123.54.

40. N.J.S.A. 30:4-123.55(c) provides that, if the hearing officer determines from the pre-parole report that parole should be denied, a parole hearing "shall be conducted by the appropriate board panel at least 30 days prior to the eligibility date."

41. The consequences of failing to provide the statutorily guaranteed pre-parole report, the review by a hearing officer and

the parole hearing are clearly spelled out in N.J.S.A. 30:4-123.53(a): the inmate "shall be released."

42. Specifically, N.J.S.A. 30:4-123.53(a) states:

An adult inmate shall be released on parole at the time of parole eligibility, unless information supplied in the report filed pursuant to section 10 of P.L. 1979, c. 441 [N.J.S.A. 30:4-123.54] or developed or produced at a hearing held pursuant to section 11 of P.L. 1979, c. 441 [N.J.S.A. 30:4-123.55] indicates by a preponderance of the evidence that the inmate has failed to cooperate in his or her own rehabilitation or that there is a reasonable expectation that the inmate will violate conditions of parole imposed pursuant to section 15 of P.L. 1979, c. 441 [N.J.S.A. 30:4-123.59] if released on parole at that time.

43. Taken together, these sections expressly guarantee that any adult inmate "shall be released" at the time of his or her initial parole eligibility date "unless" a pre-parole report is filed, or an actual parole hearing before a board panel is held, prior to that eligibility date. See Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979).

44. The New Jersey Supreme Court itself has expressly held that the New Jersey Parole Act therefore creates a "liberty interest" which requires that due process be observed in the deferral, delay and/or denial of parole. See New Jersey Parole Board v. Byrne, 93 N.J. 192, 206 (1983), holding that the United States Supreme Court's opinion in Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979)

applied to the New Jersey Parole Act.

**The Defendants' Chronic Failure
to Meet the Mandatory Deadlines**

45. For more than a year now, the defendants have not complied with these statutory requirements.

46. Rather, for some time now, thousands of inmates in New Jersey state prisons have been held in custody past their parole eligibility date, without having the required pre-parole report prepared.

47. For some time now, thousands of inmates in New Jersey state prisons have been held in custody past their parole eligibility dates without the required parole hearing by a board panel.

48. This is in violation of the plain language of the parole statute, which requires that each of these events "shall" occur within a specified number of days before the parole eligibility date.

49. The mandatory language used in these statutes vests the defendants with no discretion whatsoever as to the meeting of these deadlines.

50. Indeed, N.J.S.A. 30:4-123.53(a) creates a presumption in favor of release on parole, expressly providing that "unless" these events take place, the inmate "shall be released on parole at the time of parole eligibility."

Defendants' Actions Are Intentional

51. Upon information and belief, the defendants' standard response to criticism of this illegal "backlog" is to claim that it will be eliminated in about three months.

52. For example, in March of 1999, the defendants promised that this "backlog" would be resolved by June of 1999. See Attachment A, Parole Board letter dated March 29, 1999, promising to eliminate "all past eligible parole cases in every institution by the end of June."

53. Despite such promises, the problem was not resolved by June of 1999 and has never been resolved.

54. Rather, the defendants have simply extended the proposed deadline, continually claiming to be only "months away" from resolving the "backlog."

55. On February 7, 2000, the New Jersey Law Journal reported that there were still more than 1,000 New Jersey inmates eligible for parole whose mandatory parole determinations had been delayed for as long as a year, without either the pre-parole report required by N.J.S.A. 30:4-123.54(a), the review by a hearing officer mandated by N.J.S.A. 30:4-123.55(a) or a parole hearing as provided by N.J.S.A. 30:4-123.55(c).

56. In a New Jersey Law Journal interview with defendant Consovoy dated February 7, 2000, defendant promised with regard to this backlog: "I guarantee you in a month or two we will be

even." See Attachment B.

57. Despite this "guarantee," the backlog still existed "in a month or two." Indeed, by March of 2000, the defendants were again extending the deadline by which they promised to eliminate the backlog; this time to "May 2000."

58. The backlog exists to this day.

59. Indeed, on April 27, 2000, counsel for the Parole Board admitted to the Association of Criminal Defense Lawyers of New Jersey that there are currently at least 300 inmates in New Jersey state prisons who have been held past their parole eligibility date without receiving the required pre-parole report or board hearing.

60. Regardless of the reasons for this "backlog," the continued detention of inmates who have reached their parole eligibility date without a pre-parole report having been filed, a review by a hearing officer or a parole hearing is absolutely precluded by the clear language of the New Jersey Parole Act.

61. Despite this, the defendants have not authorized the release of such inmates, as required by the statute.

62. Nor have they complied with the mandatory deadlines set forth in these statutes for reports and hearings.

63. The defendants continue to allow hundreds--perhaps thousands--of inmates to remain in custody past their eligibility date, without complying with the procedures specifically required

in order for parole to be lawfully deferred, delayed or denied.

64. This practice strips each inmate and class member of his or her last remaining vestige of human dignity.

65. The defendants continue to do this with impunity, secure in the knowledge that the political leaders in the state - of both parties - have no concern for the plight of prisoners.

66. The defendants' actions are knowing and intentional.

Further Evidence of Defendants' Intent

67. In the fall of 1999, the New Jersey Parole Board ceased answering calls made to its public telephone numbers.

68. Speaking at a meeting of the Association of Criminal Defense Lawyers of New Jersey in September of 1999, defendant Consovoy admitted that this action was taken in response to the large number of complaints by inmates and attorneys about the parole backlog!

69. Despite promises by Consovoy in September of 1999 that the Board's phone lines would be re-opened soon, these phones were later taken over by a voice-mail system.

70. To this day, it is impossible to reach a human voice at the Parole Board during an initial call to the publicly listed numbers, including those listed in the New Jersey Law Diary.

71. Instead, a taped message states that all callers, including attorneys, must write a letter.

72. These actions by the defendants are further evidence

that they could care less about the well established constitutional rights of the class.

COUNT I

Fourteenth Amendment and 42 U.S.C. §1983

73. Plaintiffs incorporate the allegations contained in each of the preceding paragraphs as if fully set forth at length herein.

74. Plaintiffs and the class have suffered various constitutional injuries at the hands of the defendants as described herein, committed under the color of law, which deprived the class of rights, privileges and immunities secured to them by the laws and Constitution of the United States, including but not limited to the following:

- a. The right to protection from deprivation of life, liberty and property without due process, as secured by the Fourteenth Amendment; and
- b. The right to be protected against arbitrary and capricious summary punishment, secured by the right to due process under the Fourteenth Amendment;
- c. The right to be free from cruel and unusual punishment by being subject to totally arbitrary and capricious extensions of their prison sentences without any relationship to the sentence imposed or the crime(s) of which they are convicted.

75. Specifically, the defendants have violated the due process rights of the class by pursuing a custom, practice or

policy of ignoring the mandatory statutory requirements governing the delay, deferral and/or denial of parole, including the mandatory deadlines for provision of pre-parole reports and parole hearings.

76. Regardless of whether any inmate would have been actually released on parole had the mandatory procedures been followed, the violation of these due process rights is, in and of itself, a separate violation of the constitutional rights of the class.

COUNT II

Declaratory Judgment

28 U.S.C. §2201

77. Plaintiffs incorporate the allegations contained in each of the preceding paragraphs as if fully set forth at length herein.

78. At all relevant times the defendants knew that the class was entitled to the pre-parole report mandated by N.J.S.A. 30:4-123.54(a) and the parole hearing mandated by N.J.S.A. 30:4-123.55(c), no later than the deadlines set forth in these statutory provisions.

79. Despite this, the defendants have known since at least 1998 that they have allowed a custom, policy and practice to develop which fails to meet these deadlines and thus fails to

meet the statutory requirements for the lawful delay, deferral or denial of parole.

80. Specifically, the defendants have pursued a policy under which inmates are routinely not provided with the statutorily guaranteed pre-parole report or parole hearing prior to the inmate's parole eligibility date.

81. A justiciable controversy exists between the class and the defendants with respect to the validity and legality of the aforesaid policy.

82. A decree by this court with respect to the issues of the validity and legality of this policy is reasonably calculated to prevent needless additional litigation in this jurisdiction between class members and the defendants and will provide the basis for appropriate injunctive relief.

WHEREFORE, plaintiffs request judgment:

a. Determining that the instant action is a proper class action under Federal Rule 23 (b) (2);

b. For declaratory relief holding that defendants' policies as described herein violate plaintiffs' constitutional rights;

c. For injunctive relief against the defendants in their official capacity, requiring them:

(1) to file a pre-parole report for each inmate at least 120 days prior to the parole eligibility date as required by N.J.S.A. 30:4-123.54(a);

(2) to provide each inmate with a copy of the pre-parole report at least 105 prior to the parole eligibility date as required by N.J.S.A. 30:4-123.54(c); and

(3) to provide each inmate where parole has not been recommended with a parole hearing before a board panel at least 30 days prior to the parole eligibility date;

(4) to provide an adequate alternative mechanism that will end the continual violations as soon as possible.

d. For a class wide award of nominal damages against the defendants in their individual capacity for the violations of the due process rights set forth herein;

e. For attorney's fees, costs of suit, interest and pre-judgment interest;

f. For such other legal and equitable relief as the court may deem necessary to correct the egregious situation which currently exists.

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BY: _____

Philip Stephen Fuoco
Joseph A. Osefchen

Dated: May 2, 2000