



pleadings and accordingly applied the standard for summary judgment.<sup>2</sup> All other pending motions will be denied, as set forth in the accompanying Order.<sup>3</sup>

## I. BACKGROUND

Plaintiffs Dana Carter and Richard Carter are both incarcerated in the Pennsylvania prison system. In Pennsylvania, a sentencing judge imposing state prison time establishes both a minimum sentence and a maximum sentence. The minimum sentence is generally 50% of the maximum, and a prisoner is not eligible for parole until he or she has served the minimum sentence. 42 Pa. C.S.A. § 9756 (c).

Plaintiffs' Complaint alleged that, in order to obtain

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2. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A fact is material if it might affect the outcome of the case under the governing substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A disputed factual matter presents a genuine issue "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. In considering a summary judgment motion, the court is required to accept as true all evidence presented by the non-moving party, and to draw all justifiable inferences from such evidence in that party's favor. Id. at 255.

3. The February 6, 1998 Order allowed Plaintiffs to amend their Complaint in order to expand upon their ex post facto claims. Because Richard Carter had previously filed an amended complaint on February 2, 1998, I directed Plaintiffs to either file a new amended complaint or notify the court that they intended the February 2, 1998 document to serve as the Amended Complaint. I received a letter from Richard Carter on February 17, 1998 stating that the February 2, 1998 document should serve as the Amended Complaint, and I stated as much in my February 19, 1998 letter to the parties. Plaintiffs' subsequent request for an extension of time in which to file the amended complaint ignores this procedural history. Regardless, it is clear that no amendment would save Plaintiffs' ex post facto claims. Because Plaintiffs cannot sustain their claims, no purpose would be served by granting their other motions, especially as their discovery seek information not relevant to their ex post facto claims.

federal money for prison construction under the Department of Justice's Violent Offender Incarceration and Truth in Sentencing ("VOI/TIS") Grant Programs, 42 U.S.C. §§ 13701, et seq., the Pennsylvania Board of Probation and Parole ("BPP")-- without legislative authorization -- raised the eligibility threshold for parole from 50% of time served to 85%.

It is uncontested that Pennsylvania has received VOI/TIS grants exceeding \$1,000,000 since 1996. Pennsylvania is an "indeterminate sentence state" under the TIS, which therefore requires that:

a) [T]o be eligible to receive a grant award under this section, a State shall submit an application to the Attorney General that demonstrates that --

3) in the case of a State that on April 26, 1996, practices indeterminate sentencing with regard to any part 1 violent crime --

A) persons convicted of a part 1 violent crime on average serve not less than 85 percent of the prison term established under the State's sentencing and release guidelines.

28 U.S.C. § 13704 (a)(3)(A).

Because the Commonwealth has not enacted a law which would require that persons convicted of certain violent crimes serve at least 85% of their sentence, i.e., their maximum sentence, Plaintiffs alleged that the BPP has tacitly implemented new, more stringent policies to satisfy the VOI/TIS grant requirements, and that, in pursuit of this policy, the BPP

routinely provides false reasons for denying parole to inmates -- including, they implied, them<sup>4</sup> -- serving between 50% and 85% of their sentences.

In response, Defendants relied upon the BPP's vast discretion in parole matters. See 61 P.S. § 331.19 (setting forth factors for BPP to consider in making parole recommendations). The December 15, 1997 Memorandum and Order acknowledged that this discretion rendered Plaintiffs' substantive and procedural due process claims unlikely to succeed, and I denied Plaintiffs requests for injunctive relief, class certification and counsel. In a February 6, 1998 Memorandum and Order, Plaintiffs dismissed the due process claims but allowed their ex post facto claims to proceed, noting that neither side had put forth facts sufficient to determine their validity.

The law regarding ex post facto claims in the context of parole is broadly sketched. See Royster v. Fauver, 775 F.2d 527, 534 (3d Cir. 1985) ("This circuit, alone among all others,

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4. In fact, Dana Carter's minimum sentence will not expire until May 28, 1998, (Def. Exh. 4, ¶14), though he was due to be considered for parole in April 1998. (Def. Exh. 4, ¶ 22; Def. Exh. 4-E). Thus, Dana Carter has failed to satisfy the bare requirement that his Complaint be based upon an actual injury to him. Regardless of whether Dana Carter has standing to pursue this complaint, it is clear that neither he nor Richard Carter is able to state a claim. Richard Carter also has dubious standing to pursue an ex post facto claim, as his most recent denial of parole, on March 14, 1996, was based, inter alia, on a new conviction for receipt of stolen property. (See Amended Complaint at ¶ 9; Exhibit 4-B). Although I have already dismissed Plaintiffs' due process claims, the BPP clearly based its decision to deny Richard Carter parole on a valid factor.

maintains that parole regulations may be laws for purposes of ex post fact[o] analysis."); see also United States ex rel. Forman v. McCall, 709 F.2d 852, 859 (3d Cir. 1983); Jubilee v. Horn, 959 F.Supp. 276, 282 (E.D. Pa. 1997). Accordingly, my December 15, 1997 Memorandum directed that:

In further developing the ex post facto claims, the parties should examine whether there actually is a new parole eligibility standard; whether that standard is applied "without sufficient flexibility," and is thus a law, McCall, 709 F.2d. at 859, or merely a change in internal board policy, which would arguably not implicate the Ex Post Facto Clause, see Jubilee, at 959 F.Supp. at 282; see also Geraghty v. United States Parole Commission, 579 F.2d 238, 267 (3d Cir. 1978), vacated and remanded on other grounds, 445 U.S. 388 (1980); whether it has in fact been applied to plaintiffs, and whether that application worked to their detriment. See Crowell v. United States Parole Com'n, 724 F.2d. 1406, 1408 (3d Cir. 1984).

It is now apparent that there is no such policy, and I will dismiss this complaint and enter judgment for Defendants. While Plaintiffs charge that Defendants have skirted the issue of the policy or policies' actual application, it is unnecessary to reach those questions, as Plaintiffs cannot make a threshold demonstration that Pennsylvania increased the percentage of a prison sentence which must be served before an inmate is considered for parole.

Defendants' evidence demonstrates that Pennsylvania has based its representations to the DOJ not on the maximum sentence imposed, but on the minimum sentence, and on the percentage of

the minimum sentence served. (Exh. 6; Exh. 6-B). Because Pennsylvania prisoners are generally ineligible for parole prior to the expiration of their minimum sentence, the average inmate serves 100% of his or her minimum sentence. (Def. Exh. 5). Thus, as Jeffrey Beard of the Pennsylvania Department of Corrections, states in his affidavit, "[e]ven if every inmate were released upon expiration of his minimum sentence, that would not effect [sic] Pennsylvania's eligibility for TIS funds." Ex. 6, ¶ 8 (emphasis in original). Pennsylvania thus did not change the BPP policy to qualify for federal grant funds, but merely based its application for those funds upon the nearly-unanimous completion of the existing statutory minimum sentence.<sup>5</sup>

While Plaintiffs' misconception that the BPP surreptitiously denies parole in order to qualify for federal funds is apparently widely held, (see e.g., at Def. Exh 6-C, January 5, 1998 letter of Pennsylvania Secretary of Corrections Martin Horn to the Graterfriends inmate newsletter explaining that Pennsylvania bases VOI/TIS grant applications on the minimum sentence), the record establishes that the Commonwealth has based its representations for federal money on the percentage of the minimum sentence served, that the DOJ has granted money based on those representations, and that no new parole policies have been

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5. Additionally, where Pennsylvania has represented that inmates serve longer sentences, these longer sentences result from changes in Pennsylvania law and sentencing guidelines promulgated prior to the initiation of the VOI/TIS grant program.

applied. Indeed, the Commonwealth's Fiscal Year 1997 application for VOI/TIS grant monies made clear to the DOJ that "[p]arole is discretionary at any time between expiration of minimum sentence and maximum sentence." (Def. Exh. 5-A). Finally, while the Commonwealth has noted that Pennsylvania prisoners often serve more than the minimum sentence, it has made no representation that prisoners serve 85% of their sentence or anything approaching that number. Accordingly, Plaintiffs are unable to maintain an ex post facto claim, and judgment will be entered for defendants.<sup>6</sup>

An Order follows.

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6. Moreover, Plaintiffs lack standing to bring two new challenges found in their Amended Complaint. Neither can show that he was affected by 61 P.S. § 331.34 (a), which prohibits the BPP from acting on a parole application for violent offenders until an applicant has spent one year in a prerelease center, as Richard Carter has certainly had his applications acted upon and Dana Carter was not even parole-eligible when the Amended Complaint was filed. Nor were either injured by the requirement that, as violent offenders, three rather than two BPP members vote for their release. 18 Pa. C.S.A. § 6102.



- (2) Plaintiffs' pending motions are **DENIED**;
- (3) The Clerk shall mark this case **CLOSED**.

BY THE COURT:

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RONALD L. BUCKWALTER, J.