

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

This Memorandum demonstrates that the detailed factual allegations in the Complaint state claims for relief under both the Due Process and the *Ex Post Facto* Clauses of the United States Constitution.

Standard of Review on a Motion to Dismiss

As the Court is well aware, when considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court must assume that the plaintiffs' factual allegations are true, and it must view those allegations, and all reasonable inferences from them, in their favor. *Ambrose v. Blue Cross & Blue Shield of Virginia*, 891 F. Supp. 1153, 1157 (E.D. Va. 1995). Furthermore, under *Ashcroft v. Iqbal*, Plaintiffs must have alleged facts in the Complaint which “state a claim to relief that is plausible on its face” to overcome a motion to dismiss. *Id.* 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2008)).

Here, Plaintiffs' Complaint easily meets these standards, and Defendants have not argued that Plaintiffs' allegations are implausible or lacking in particularity. Rather, Defendants simply argue that Plaintiffs cannot, as a matter of law, state a claim for relief under the Due Process Clause and the *Ex Post Facto* Clause, regardless of the facts alleged. As demonstrated below, Defendants' arguments are unfounded.

ARGUMENT

I. The Complaint States a Claim for Relief Under the Due Process Clause

A. Due Process Requirements Under Virginia's Parole Statutes

The fundamental flaw in Defendants' challenge to the due process claim is revealed in a single sentence on page 5 of their Memorandum: “Since the Plaintiffs have been furnished with statements of the reason(s) for the denial of parole, and this is all the process

constitutionally required of the Virginia Parole Board, Plaintiffs have received the process to which they are entitled....” In other words, according to the Defendants, the Due Process Clause does not require either fair or meaningful consideration for parole before deciding whether to deny an inmate his or her liberty. It requires only that the inmate be furnished with some reason -- any reason -- for the denial of parole. Thus, according to Defendants, the Board can recite the same words about the “serious nature of the offense,” on the same form letter, year after year after year, without actually considering any of the factors governing suitability for release established by Virginia law, and comply with the Due Process Clause.

Plainly, the Defendants’ position -- which eviscerates the Due Process Clause and empties “due process” of any meaning -- is contrary to the law. As the Supreme Court has made clear time and again, the Due Process Clause guarantees more than a “meaningless ritual.” *Evitts v. Lucey*, 469 U.S. 387, 394 (1985). As recently as last year, the Supreme Court reaffirmed not only that due process requires “fundamental fairness in [the] operation” of a correctional system, but also that inmates are entitled “to procedures essential to the realization of the parent right” of fundamental fairness. *District Attorney’s Office v. Osborne*, 129 S. Ct. 2308, 2319 (2009). Indeed, even in the face of accusations of treasonous behavior during war, the Court has insisted on meaningful due process rights, because “an unchecked system of detention carries the potential to become a means of oppression and abuse.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004), *rev’g* 316 F.3d 450 (4th Cir. 2003). And, as Justice Powell recognized more than thirty years ago, “Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 18 (1979) (concurring in part and dissenting in part). Thus, the Due Process Clause prohibits the arbitrary administration of parole

that Defendants attempt to justify and, instead, requires a fundamental fairness that the Parole Board is *not* providing.

Consistent with these principles, this Court and the Fourth Circuit have repeatedly recognized that Virginia law governing parole (like the Nebraska law addressed in *Greenholtz*) creates a liberty interest protected by due process. In *Franklin*, Judge Butzner construed the relevant provisions of the applicable Virginia law (which Defendants concede are essentially unchanged today) to mean “that a prisoner will be released if he meets th[e] exacting standard [for release] as interpreted by the Board in its guidelines....” *Franklin*, 569 F.2d at 797. Accordingly, the Due Process Clause requires that the procedures used in the system be fundamentally fair and not arbitrary. *See also Hill v. Jackson*, 64 F.3d 163, 170 (4th Cir. 1995); *Gaston v. Taylor*, 946 F.2d 340, 344 (4th Cir. 1991) (en banc) (recognizing a right to parole consideration at the time specified by Virginia law for parole eligibility); *Krawetz v. Murray*, 742 F. Supp. 304 (E.D. Va. 1990).

Defendants’ Memorandum pays lip service to these controlling cases, but, tellingly, omits the word “fair” from its description of the nature of the consideration for parole that is required by due process. *See* Memorandum at 5, 7, 10. Similarly, Defendants’ Memorandum cites more than once the statement in *Hill*, 64 F.3d at 170, that inmates have “no protected interest in the [parole] procedures themselves, only in the subject matter to which they are directed” (Memorandum at 7, 10), thus implying that there is no protected interest whatsoever in whatever parole procedures Defendants choose to employ. Defendants misconstrue *Hill* and ignore the legal principles underlying the Due Process Clause discussed above. Moreover, Defendants overlook the key due process right on which the Complaint is based, *i.e.*, the right to a system that is “fundamentally fair” and includes “fair” and

“meaningful” consideration of all the factors that Virginia law requires to be taken into account when making parole determinations regarding parole-eligible inmates.

B. Plaintiffs' Factual Allegations State a Claim for Due Process Relief

Given the established due process right to fair consideration for parole as required by Virginia law, Plaintiffs' Complaint states a claim for due process relief. The Complaint contains detailed, specific and plausible allegations about a parole system that has gone fundamentally awry. At the heart of the Complaint is the allegation that, beginning with the abolition of discretionary parole for offenses committed on or after January 1, 1995, the Defendants have administered the parole process in a manner that has eliminated fair and meaningful consideration of parole for inmates convicted of violent offenses. Complaint ¶¶ 1, 39. Specifically, when making parole determinations concerning such inmates, the Defendants focus solely or primarily on the crimes committed and do not give fair or meaningful consideration to the other factors that Virginia law requires to be considered. *Id.*¹ As a result, inmates convicted of violent offenses routinely receive virtually automatic denials of parole even when other parole factors strongly favor release. Complaint ¶ 39. Significantly, Defendants' Memorandum simply ignores these key allegations at the heart of the Complaint.

The allegations of the Complaint establish far more than a mere possibility that the Board no longer accords fair and meaningful consideration to violent offenders as candidates for parole. As the Complaint details:

- Defendants have eliminated the Board's prior use of risk assessment guidelines before the abolition of parole, which are uniformly recognized in Virginia and elsewhere as important standards for informing discretionary parole decisions. Complaint ¶ 37.

¹ These other factors include the prisoner's history, physical and mental condition and character and his conduct, employment and attitude while in prison. *See* Va. Code § 53.1-155.

- Defendants have rendered Virginia's geriatric release statute a dead letter, by requiring candidates for geriatric release (who are all age 60 or older) to demonstrate "compelling reasons" for release. Complaint ¶ 56.
- Defendants have abandoned personal Board interviews of parole candidates that continue to be used in most other states, were important to the Supreme Court's due process analysis in *Greenholtz*,² and were implemented by the Board during and in response to the *Franklin v. Shields* litigation. Complaint ¶ 41.³
- Defendants have replaced Board interviews with parole examiner reports that have become purely perfunctory and they do not solicit information from prison wardens or staff about the suitability for release of inmates under their care. Complaint ¶¶ 41, 42.
- Defendants have eliminated regular consultations among Board members about candidates for parole, and they no longer even regularly meet in the Board's Richmond office. Complaint ¶ 43.
- Defendants have arbitrarily used three-year deferrals without regard to any change in the inmate's institutional conduct. Complaint ¶ 44.
- Defendants have acted to reduce the already limited opportunities for the inmate's family members to meet with even a single Board member. Complaint ¶ 45.

Each of these actions and omissions provides further support for and evidence of Defendants' violation of the Due Process Clause.⁴

² See 442 U.S. at 4-5, 15.

³ See 569 F.2d at 793.

⁴ Rather than address Plaintiffs' key allegations at the heart of the Complaint, *i.e.*, that the Defendants are not considering all the required parole factors and are instead automatically denying parole solely because of the crime, the Defendants create a straw man and then knock it down. They characterize each of the foregoing actions and omissions as a separate due process claim and then cite cases rejecting such individual claims. Memorandum at 5-10. This misconstrues the nature of Plaintiffs' claims, as explained above. Moreover, many of the cases cited by Defendants involved claims by individual inmates challenging their denials of parole. *E.g.*, *Bloodgood v. Garraghty*, 783 F. 2d 470 (4th Cir. 1986), and *Jennings v. Virginia*, 61 F. Supp 2d 462 (E.D. Va. 1999). Plaintiffs do not allege that they been wrongfully denied parole, but that they have been wrongfully denied *fair consideration* for parole. At the Rule 12(b)(6) stage, the question is whether the Plaintiffs' due process claim is supported by specific and credible allegations, which as noted above include numerous changes in the procedures that the Board previously used at a time when violent offenders still had realistic prospects for parole.

The Complaint also alleges the results of Defendants' failure to provide fair and meaningful consideration for parole, thereby further evidencing the plausibility of Plaintiffs' claim for due process relief. It is the cumulative nature of the changes which result in the denial of due process. Following the abolition of parole, Defendants' policies and procedures have transformed the parole process from a discretionary balancing of the required factors in which parole was granted approximately 42% of the time, into a rote denial of parole for violent offenders based solely or primarily on the nature of their offenses. Complaint ¶¶ 30, 47. In each of the last seven fiscal years for which data is available, the parole grant rate for violent offenders ranged from a mere 2.1% to 3.7%. Complaint ¶ 47. The handful of inmates granted discretionary parole often receive it only at the very end of their sentences, long after they became eligible for parole. Complaint ¶ 48. Both the Board and the Office of the Governor have themselves conceded that the virtual non-existence of parole for violent offenders is precisely because they are violent offenders, without consideration of or regard for other factors⁵ that make them "suitable for parole."⁶ Complaint ¶¶ 49, 50. In fiscal years 2006 and 2007, the "serious nature and circumstances of the crime" was the sole reason given for almost half of the Board's denials of parole. Complaint ¶ 52. The Board's rubber-stamp denials based on "serious nature and circumstances of offense" extend even to inmates who have been incarcerated for many years (even decades) and are now at the age when sentencing authorities (such as the Virginia Criminal Sentencing Commission) recognize they are generally at very low risk of reoffending. Complaint ¶¶ 54-56.

⁵ In its due process analysis in *Greenholtz*, the Court stated that "The behavior of an inmate during confinement is critical in the sense that it reflects the degree to which the inmate is prepared to adjust to parole release." 442 U.S. at 15.

⁶ Virginia law requires the Board to release those "found suitable for parole...." Va. Code § 53.1-136.

The Board's lack of fair or meaningful consideration of violent offenders for parole is also starkly evidenced by its treatment of the eleven named Plaintiffs. Complaint ¶¶ 60-71. None of the named Plaintiffs had any record of prior violent offenses as an adult. Almost all of them committed their offense at a young age. They include inmates (Plaintiffs Carter, King, Perdue, and Stump) who were acting under the influence of drugs or alcohol at the time of their offenses but who have completed substance abuse programs while in prison and have been drug and alcohol-free for many years. They include inmates (Plaintiffs Burroughs and Tabor) who were not principals but accessories to the crime. Each Plaintiff has a record of model institutional conduct, exemplary annual evaluations, and a solid release plan. Their files include testimonials from corrections staff about their "exceptional institutional conduct" expressly supporting the grant of parole, and include such statements as "I don't know of anyone who deserves a second chance more." Yet, each Plaintiff has been denied parole, year after year, going back many years -- some of them more than 20 times -- based solely or primarily on the violent nature of his or her offense. They have been incarcerated for periods ranging from 23 to 36 years. Three of them are in their 60s. Most of them have already served more than twice the average time served for the same offense prior to the abolition of parole in 1994.

In short, the Complaint makes specific factual allegations in support of Plaintiffs' due process claim that are more than sufficient to state a claim. The Complaint asserts a detailed and plausible claim that, following the abolition of parole for offenses committed after 1994, the Board has arbitrarily abdicated its statutory responsibility to provide fair and meaningful consideration of each violent offender's suitability for release once he or she has served the time

required by statute to become eligible for parole.⁷ Indeed, the Board has conceded as much by defending its low grant rate solely by reference to the violent nature of the offenses of those denied parole. Complaint ¶ 50.

In essence, the Board has substituted for the eligibility period established by the General Assembly (and relied upon by sentencing courts) its own determination that, for some additional period of time, it will automatically deny parole to violent offenders solely because of the “serious nature and circumstances of the crime,” without reference to any other factor relating to suitability for release. The Board’s longer period of time appears to include, at a minimum, the period established by sentencing guidelines for violent offenses committed *after* 1994, which are required by law to exceed by from 134% to 513% the time served by similar offenders released from 1988 through 1992. Complaint ¶¶ 58-59, citing Va. Code § 17.1-805. Such conduct, as fully alleged in the Complaint, is more than sufficient to state a claim for relief under the Due Process Clause.

C. Other Courts Have Agreed That Similar Allegations State a Claim for Due Process Relief

Although Defendants suggest that Plaintiffs’ allegations cannot state a claim for relief under the Due Process Clause, other courts have recognized just such a claim. In a recent case with allegations very similar to those presented here, the United States District Court for the Southern District of New York denied a motion to dismiss and held that the inmate plaintiffs had stated a claim under the Due Process Clause based upon the unfair and arbitrary administration of parole in New York. *Graziano v. Pataki*, 2006 U.S. Dist. LEXIS 52556, at *22-28 (S.D.N.Y.

⁷ Virginia law provides that eligibility for parole consideration generally ranges from 12 to 15 years, depending on the nature of the offense, with reductions for good conduct and other factors. Va. Code § 53.1-151. The statute also provides longer periods for eligibility for certain specified crimes or sentences. E.g., § 151.D (twenty years for a person sentenced to two or more life sentences).

July 17, 2006). Like here, the plaintiffs in *Graziano* alleged that the New York parole board had an “unofficial policy of denying parole release to prisoners convicted” of violent crimes and not considering any other relevant or statutorily mandated factor. *Graziano*, 2006 U.S. Dist. LEXIS 52556, at *4-5. The court concluded that “while there is no due process right to being *granted* parole, there is a due process right to have the decision made only in accordance with the statutory criteria.” *Graziano*, 2006 U.S. Dist. LEXIS 52556, at *27 (emphasis in original). See also *Irons v. Carey*, 505 F.3d 846, 854 (9th Cir. 2007) (“in some cases, indefinite detention based solely on an inmate’s commitment offense, regardless of the extent of his rehabilitation, will at some point violate due process....”); *Biggs v. Terhune*, 334 F.3d 910, 917 (9th Cir. 2003) (“A continued reliance in the future on an unchanging factor, the circumstance of the offense and conduct prior to imprisonment, runs contrary to the rehabilitation goals espoused by the prison system and could result in a due process violation”). Thus, notwithstanding Defendants’ arguments to the contrary, Plaintiffs’ allegations do state a valid claim under the Due Process Clause, and other courts have reached the same conclusion.

D. Plaintiffs’ Complaint States a Claim for Which Relief Can Be Granted Under the Due Process Clause.

As alleged in the Complaint, the Defendants’ conduct is the antithesis of fair and meaningful consideration for parole, or of the kind of “informed predictions” contemplated by the Fourth Circuit in *Gaston*. It is instead the kind of arbitrary action that Justice Powell recognized strikes at the very core of personal liberty. *Greenholtz*, 442 U.S. at 18 (concurring in part and dissenting in part). It is no answer to argue, as Defendants do, that the Board “has absolute discretion in matters of early parole release.” Memorandum at 9. Although “the Board has discretion in weighing different issues ... in accordance with the governing procedures, it does not have the discretion to not use those procedures.” *White v. Director, Virginia*

Department of Corrections, 105 F. Supp. 2d 515, 519 (W.D. Va. 2000), *appeal dismissed*, 243 F.3d 545 (4th Cir. 2000). The Complaint alleges that the Defendants are *not* exercising discretion because they are not considering all the factors required by Virginia law in making parole determinations about violent offenders. Hence, Defendants' motion to dismiss Count I should be denied.

II. The Complaint States a Claim for Relief Under the *Ex Post Facto* Clause

The essence of Defendants' argument against the *ex post facto* claim is found in their assertions that "Plaintiffs contend that it is the changes in attitudes, practices and policies which constitute the *ex post facto* violation ... [and that] Plaintiffs cannot establish an *ex post facto* violation based on Defendants adopting less favorable attitudes, guidelines, policies, or practices." Memorandum at 11-12. In support of this argument they cite *Warren v. Baskerville*, 233 F.3d 204, 207 (4th Cir. 2000), where the court stated that "the *ex post facto* prohibition applies to 'laws' ... [and not to a] change in an administrative policy that was in effect at the time of a criminal's underlying offenses...."

Defendants again misconstrue Plaintiffs' allegations. Plaintiffs' claim is that the Defendants' policies, practices and procedures have altered Virginia law by automatically denying the Plaintiffs and class members parole solely or primarily because of their crimes and eliminating consideration of the other parole-relevant factors required by Virginia law. Stated another way, Defendants have replaced the system for fair and meaningful parole consideration provided for by Virginia law with a scheme of their own in which violent offenders are deprived of any fair or meaningful consideration for parole until long after they became eligible for parole, if ever. As demonstrated below, Plaintiffs have alleged sufficient facts to state a valid claim under the *Ex Post Facto* Clause.

A. The Prohibitions of the *Ex Post Facto* Clause are not Limited to Changes of Statutory “Law”

The Constitution of the United States prohibits the enactment of *ex post facto* laws. U.S. CONST., Article I, §10, cl. 1. The Clause “guards against” the danger that the government “might disfavor certain persons after the fact....” *Garner v. Jones*, 529 U.S. 244, 246 (2000).⁸ Among other things, the *Ex Post Facto* Clause bars retroactive enhancement of punishment beyond what was contemplated by the law at the time a crime was committed. *Id.* at 249. In the context of parole, the controlling inquiry is whether the retroactive application of a change in laws or policies creates a “sufficient risk of increasing the measure of punishment attached to the covered crimes.” *Id.* at 250.

In *Garner*, the Supreme Court addressed an inmate’s *ex post facto* challenge to a rule issued, not by Georgia’s legislature, but by its parole board. The rule changed the presumptive frequency with which inmates serving life sentences must be considered for parole from once every three years to once every eight years, with discretion to reduce that period upon changed circumstances or new information. *Id.* at 247. The Court of Appeals for the Eleventh Circuit held that the rule violated the *Ex Post Facto* Clause. *Id.* at 248-49. The Supreme Court reversed and remanded for further proceedings consistent with its opinion to address what the Court had stated earlier in its opinion was the determinative question: whether the amended Georgia rule created “a significant risk of prolonging respondent’s incarceration.” *Id.* at 251, 257.

⁸ Cf. Complaint ¶ 35 (at the time of parole abolition in Virginia, the Virginia Commission on Sentencing and Parole concluded – “regrettably” that “the benefits and limitations of the existing parole system must...remain available for those inmates currently serving time in the prison system”).

Garner makes clear that the prohibitions of the *Ex Post Facto* clause are *not* limited to changes in “statutory ‘law,’” as Defendants contend. Memorandum at 11. For one, the challenged conduct in *Garner* was an amended parole board rule, not a Georgia statute. The *Garner* majority did not hesitate to consider the parole board rule under the *Ex Post Facto* clause or otherwise suggest that the challenged conduct was not subject to an *ex post facto* challenge.⁹ Moreover, while the Court noted that the terms of the amended rule did not show a significant risk of prolonging the inmate’s incarceration, that did not end the inquiry. The Court noted that “[t]he presence of discretion does not displace the protections of the *Ex Post Facto* Clause” (*Id.* at 253),¹⁰ and stated that the inmate could establish the requisite risk of prolonging his incarceration by “evidence drawn from the rule’s practical implementation by the agency ... that its retroactive application will result in a longer period of incarceration.” *Id.* at 255. Significantly, in its remand the Supreme Court instructed the lower courts to address the inmate’s claims that he had not been permitted sufficient discovery to make the requisite showing. *Id.* at 257. Thus, as *Garner* recognized, the prohibitions of the *Ex Post Facto* Clause reach not just the text of the law at issue, but also to the practices, procedures, attitudes and other factors that affect the way in which that law is actually implemented.

⁹ Only the concurring opinion of Justice Scalia made such an argument, but this argument was not joined by the other justices. *Garner*, 529 U.S. at 257-259.

¹⁰ As noted in Part I above, the essence of the Complaint in this case is that Defendants are *not* engaging in a discretionary balancing of the statutory factors governing parole with respect to violent offenders. However, under *Garner*, even if the Board were exercising some discretion that would not end the inquiry as to whether the Board’s new policies and practices have created a significant risk of prolonging the Plaintiffs’ incarceration. *See also Mickens-Thomas v. Vaughn*, 321 F.3d 374 (3d Cir. 2003), *cert. denied*, 540 U.S. 875 (200_); *but cf. Foster v. Booker*, Nos. 08-1371 et al. (6th Cir. Feb. 18, 2010), slip op. at 15, 18-19 (*pet for reh’g and suggestion for reh’g en banc* March 2, 2010) (finding *Garner* test not met after discovery where new Board informed and exercised its discretion differently, based in part on conclusion that old and new parole rates did not differ significantly)

Since *Garner*, most lower courts have agreed that application of the *Ex Post Facto* Clause is not limited to statutes. *See, e.g., Michael v. Ghee*, 498 F.3d 372, 382-83 (6th Cir. 2007) (overturning precedent which only applied *ex post facto* analysis to statutes); *Fletcher v. Reilly*, 433 F.3d 867, 876 (D.C. Cir. 2006) (citing *Garner*, 529 U.S. at 251). *See also Brown v. Williamson*, 314 Fed. Appx. 492, 495 (3d Cir. 2009) (applying *ex post facto* analysis to new parole guidelines); *United States v. Restrepo-Suares*, 516 F. Supp. 2d 112, 117 (D.D.C. 2007) (discussing circuit split on whether *Garner* applies to all parole regulation or only legislative rules). Defendants cite only a single case, *Warren*, for the proposition that “the *ex post facto* prohibition applies to ‘laws.’” Memorandum at 12. The *Warren* court’s discussion on this point is *dictum*, however, because the court concluded that the *Ex Post Facto* clause was inapplicable for other reasons (*i.e.*, because there had been no real change between the old and the new law and no change in the effect on the prisoner). *Warren*, 233 F.3d at 207. In any event, to the extent that *Warren* can be read to bar an *ex post facto* challenge to administrative policies, practices and procedures as distinct from such a challenge to a statute, its analysis of such challenges in the context of parole has been superseded by the analysis of the Supreme Court in *Garner*, 529 U.S. at 250-51.

B. Plaintiffs' Factual Allegations State a Claim for *Ex Post Facto* Relief

Parole eligibility is “part of the law annexed to the crime” at the time of the offense and sentencing. *Fender v. Thompson*, 883 F.2d 303, 305 (4th Cir. 1989). The Complaint includes specific and plausible allegations in support of the claim that, under *Garner*, the Board’s challenged conduct since the abolition of parole has created a significant risk of prolonging the

Plaintiffs' incarceration beyond that contemplated at the time they were sentenced. Under *Garner*, this is the key question raised by Plaintiffs' *ex post facto* claim.¹¹

The Complaint alleges that, prior to 1995, Virginia judges, prosecutors, and defense counsel were well aware of the availability of parole, and that lengthy sentences imposed at the time of the offense were based upon their expectation that the Parole Board would continue to provide a fair and meaningful opportunity for reducing those sentences by granting parole to those who demonstrated rehabilitation and suitability for release. Complaint ¶¶ 30-32. The Complaint also alleges that:

- the Board has systematically dismantled procedures previously employed to ensure fair and meaningful consideration for parole. Complaint ¶¶ 36-46.
- violent offenders who are eligible for parole today are serving far longer for the same offense than they would have served prior to that time, as evidenced by the dramatic drop in the parole grant rate beginning in 1995. Complaint ¶¶ 30, 47.
- hundreds of members of the proposed class have already served longer than they would have served even under the "truth-in-sentencing" guidelines established for offenses committed after 1994 (which were intended to result in far greater time served for violent offenses). Complaint ¶¶ 58-59.

Indeed, the Complaint alleges far more than a significant risk of increased time served: all eleven Plaintiffs have *already* served substantially more than the 12.4 years that was the median sentence for the same offense during fiscal years 1988 through 1992 – some more than twice as long. Complaint ¶¶ 57-71.

These allegations are more than sufficient to state an *ex post facto* claim. *See, e.g., Dotson v. Collins*, 317 Fed. Appx. 439 (6th Cir. 2008) (*citing Michael*, 498 F.3d at 384)

¹¹ The question is not whether the Parole Board's actions have increased the "measure of punishment" by extending the sentence imposed by Virginia courts and juries, as Defendants suggest. Memorandum at 12. Nor is it whether there has been at least one inmate convicted of a violent offense who has been granted parole since 1995, or whether Plaintiffs "have served the full term of their criminal sentences." Memorandum at 12. Such assertions misread *Garner*.

(unpublished opinion); *Brown v. Palmateer*, 379 F.3d 1089 (9th Cir. 2004); *Brown v. Williamson*, 314 Fed. Appx. 492, 495 (3d Cir. 2009); *Fletcher v. Reilly*, 433 F.3d 867 (D.C. Cir. 2006); *Mickens-Thomas v. Vaughn*, 321 F.3d 374 (3d Cir. 2003) (citing elimination of risk assessment guidelines), *cert. denied*, 540 U.S. 875 (2003); *Mickens-Thomas v. Vaughn (Mickens II)*, 355 F.3d 294 (3d Cir. 2004); *Sellman v. Reilly*, 551 F.Supp. 2d 66 (D.D.C. 2008); *Graziano v. Pataki*, 2006 U.S. Lexis 52556 (S.D.N.Y. 2006). *See also Rodriguez v. United States Parole Commission*, 594 F.2d 170, 176 (7th Cir. 1979) (“Denial of any meaningful opportunity for parole” following changed policy constitutes *ex post facto* violation).

C. Plaintiffs’ Complaint States a Claim for Which Can Be Granted Under the *Ex Post Facto* Clause.

In short, the *Ex Post Facto* Clause prohibits the retroactive application of a change in laws or policies that creates a “sufficient risk of increasing the measure of punishment attached to the covered crimes.” *Garner*, 529 U.S. at 250-251. Here, Plaintiffs have alleged more than sufficient facts to support their claim that the Parole Board’s retroactive changes in the policies and procedures governing parole have created a significant risk of increasing the punishment of Plaintiffs and the class members. As the court recognized in *Graziano v. Pataki*, a claim that “discretionary parole has been materially altered by an outright policy to deny parole to certain prisoners, regardless of positive considerations” states a valid claim for relief under the *Ex Post Facto* Clause under the analysis required by *Garner*. *Graziano*, 2006 U.S. Dist. LEXIS 52556, at *33. Hence, the Defendants’ motion to dismiss Count II of the Complaint should be denied.

CONCLUSION

For the reasons stated in this memorandum, the Defendants' Motion to Dismiss should be denied.

Dated: March 15, 2010

SHARON BURNETTE, PAMELA K. BURROUGHS,
FRANK CARTER, JR., EDWARD CONQUEST,
DONALD W. HOFFMAN, MONTY KING,
LARRY MACON, MARVIN MCCLAIN,
BENJAMIN PERDUE, JR., HENRY STUMP and
BARBARA TABOR, suing on behalf of themselves
and all others similarly situated

By _____ /s/ _____
Of Counsel

Stephen A. Northup, VSB No. 16547
Robert A. Angle, VSB No. 37691
Robert M. Luck, VSB No. 78763
TROUTMAN SANDERS LLP
Post Office Box 1122
Richmond, Virginia 23218-1122
(804) 697-1240
(804) 698-5120 (fax)

Alex R. Gulotta, VSB No. 37097
Abigail Turner, VSB No. 74437
Gail Starling Marshall, VSB No. 7737
LEGAL AID JUSTICE CENTER
100 Preston Avenue
Charlottesville, Virginia 22903
(434) 977-0553

William R. Richardson, Jr., VSB No. 16139
2674 Marcey Road
Arlington, Virginia 22207
(703) 447-8328

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of March 2010, I caused to be served by hand delivery and electronically filed the foregoing pleading with the Clerk of the Court using the CM/ECF system, which then will send automatic notification of such filing (NEF) to the following:

Richard C. Vorhis, SAAG, VSB #23170
Office of the Attorney General
Public Safety and Enforcement Division
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-4805
Facsimile: (804) 786-4239

Counsel for Defendants

/s/

Stephen A. Northup, VSB #16547
steve.northup@troutmansanders.com
TROUTMAN SANDERS LLP
Troutman Sanders Building
1001 Haxall Point
Richmond, Virginia 23219
Telephone: (804) 697-1240
Facsimile: (804) 698-5120