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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

MUTULU SHAKUR,

Plaintiff,

- vs -

DAVID SHINN, WARDEN, BUREAU OF PRISONS;
FEDERAL BUREAU OF PRISONS, UNITED STATES DEPARTMENT OF JUSTICE;
UNITED STATES PAROLE COMMISSION, UNITED STATES DEPARTMENT OF JUSTICE,

Defendants.

Case No. 5:18-cv-00628

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(CLASS ACTION)

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## I. PRELIMINARY STATEMENT

1. Having served over thirty years of his federal sentence under the Parole Commission and Reorganization Act of 1976 ("PRCA"), Plaintiff Mutulu Shakur became eligible for release on "mandatory parole" pursuant to 18 U.S.C. § 4206(d) on February 10, 2016. Rather than release Shakur on mandatory parole in February 2016, the U.S. Parole Commission ("Commission") scheduled a hearing to determine Shakur's mandatory parole on April 7, 2016.

2. The Commission denied Plaintiff mandatory parole under the exceptions described in 18 U.S.C § 4206(d), finding his 1990 positive drug test and four minor phone-related infractions over 30 years of incarceration to be "serious" and "frequent" institutional violations under the meaning of § 4206(d). The Commission further found a likelihood Plaintiff would commit future crimes upon release based on Mr. Shakur's absolutely non-violent political beliefs and use of the term "stiff resistance" to occasionally sign correspondence. Plaintiff has not had a single rule violation during thirty years of incarceration involving violence or the threat of violence, he has an excellent prison record according to Bureau of Prison's ("BOP") staff, and has for decades renounced the kind of criminal conduct he was engaged in more than thirty years ago to further political ends. He has consistently expressed support for peaceful and lawful steps to address issues of social justice

3. The Commission scheduled Plaintiff for a new parole hearing on May 3,



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2018. On April 18, 2018, Plaintiff through counsel submitted a letter to the Chairperson Smoot, U.S. Parole Commission, and the Hearing Examiner who would preside at Plaintiff's May 3, 2018, hearing. The detailed letter explained that there is adequate evidence that Mr. Shakur has not seriously or frequently violated prison rules while incarcerated and is unlikely to reoffend and was therefore entitled to discretionary release under the terms 18 U.S.C. § 4206(a), and mandatory release under the terms of § 4206(d). In addition to the fact that Plaintiff had now served two additional years in custody since his last parole hearing without a single rule violation, Plaintiff also provided new evidence in the form of letters by BOP Associate Warden Keilman, familial and professional support letters, consistent Bureau of Prison assessments, an analysis of Mr. Shakur's prison record, and a comprehensive risk assessment report. The aforementioned evidence overwhelmingly shows that Mr. Shakur is rehabilitated, remorseful, able to re-integrate into society, and extremely unlikely to ever reoffend. See Letter from Peter Schey to Parole Commission (April 8, 2018) filed herewith as Appendix 1.

4. Mr. Shakur had a subsequent parole hearing on May 3, 2018. At the parole hearing various BOP officials testified in essence that Plaintiff has been cooperative with staff in every way, has had no rule violations since a 2014 telephone violation (discussed *infra,* in which he spoke to a group of university professors and students and urged non-violent peaceful political



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engagement), and generally there is no reason to believe he will reoffend if released.

5. At the parole hearing Plaintiff made the following statement:

> At the time [of the crimes], we thought we were part of some violent political struggle against injustice … But that thinking was destructive, and it was hateful … I understand that no one else is to blame for my participation in these crimes – I am responsible for my choices. I understand that I alone must accept responsibility for my crimes … Having lost a brother and stepson to violence, I understand far better now the impact on those I left behind … I feel nothing but shame and disgrace for what I did …
>
> But I also want the Commission to understand how I have changed. From prison, I have watched the world change around me. I can see how my radical youthful views and behavior were pointless and destructive … [F]or many years [over 20 years, according to the record] I have totally rejected violence or the use of violence. For the past twenty years, I have encouraged the inmate population to reject gang affiliation, and to reject criminal behavior. I have repeatedly encouraged inmate groups and groups on the outside to bring about social change through peaceful, positive and constructive means …



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> Inside the prison I constantly speak out about the importance of pursuing social change through peaceful means …
>
> If I am granted release on supervised parole, I look forward to being a productive and peaceful member of my community; I look forward to continuing to promote the importance of peaceful and lawful contributions of all people to help those who have special challenges in life …
>
> I have used the past 30 years to strengthen my inner beliefs, to strengthen my belief in God, to strengthen my commitment to peaceful social change … I have cooperated with and respected the staff of the Bureau of Prisons. *I have engaged in no acts of violence or threats of violence during 30 years of incarceration*. That's the course I am committed to stay on if released from this prison on supervised parole.

Parole Hearing Statement of Mutulu Shakur, filed herewith as Appendix 2.

6. Associate Warden S. Keilman, the Associate Warden of the prison where Mr. Shakur has been incarcerated for many years, stated as follows:

> From my observation and that of my colleagues, it is widely held that … [Shakur] has consistently dedicated himself to maintain character that is consistent with our goals of the safe and orderly operation of our facility, program involvement and he's demonstrated a personal initiative to enhance the overall environment to which he is engaged by maintaining



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> a degree of respect across the various prisoner groups and my staff. Further, … this pattern has been consistent throughout the duration of his placement here; as evidenced by his direct involvement in intervention of racial conflicts as it has been specifically reported to me.

See Exhibit 1 to Appendix 1 (emphasis supplied)

7. Plaintiff has an effective and realistic rentry plan he shared with the Commission. Plaintiffs' children have all grown up to become reputable and law-abiding citizens serving their communities in numerous positive ways and offered to provide Plaintiff with permanent housing and support upon his supervised release. Appendix 1 at 2-5. Plaintiff also has firm offers of employment. *Id*. at 3-4. He also has the support of over 70 faith-based leaders who affirm that he "has consistently promoted and supported the peaceful resolution of social conflicts." Appendix 1, Exhibit 7.

8. At the parole hearing the Hearing Examiner stated that he had not had time to read the exhibits submitted to him and the Commission's Chairperson on April 8, 2018, and he did not have time to review them before rendering his adverse decision and recommendation at the conclusion of the hearing. He conceded there are only a handful of examiners assigned hundreds or more of cases throughout the country. The Commission's Hearing Examiners cannot possibly be familiar with the records in the cases they preside over given their unreasonable workload.



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9. In a Notice of Action dated May 25, 2018, the Commission denied Mr. Shakur parole stating "there have been no significant developments or changes in your case to warrant a change in the previous decision to deny mandatory parole and continue to expiration." Notice of Action (May 25, 2018) ("Notice of Action") at 1, filed herewith as Appendix 3. The Notice of Action simply states that "the Commission continues to find that, for the same reasons as stated in the Notice of Action dated April 20, 2016 ("2016 Notice of Action"), that you have seriously violated the rules of the institution and that there is a reasonable probability that you will [if released] commit Federal, State, or Local crime." *Id*.

10. The Commission included only one additional reason for denying parole in May 2018. The Commission "considered [Mr. Shakur's] statement at this hearing in which you now, for the first time ever, admit culpability for your offense of conviction …" *Id*. Without pointing to any evidence in the record, *for none exists*, the Commission ruled that the supposed recency of Plaintiff's acceptance of responsibility, made his acceptance of responsibility "suspect and … self-serving and disingenuous." *Id*.

11. The assertion that this was the "first time ever" that Plaintiff accepted culpability or expressed remorse for his crimes is erroneous and again evidences the Commission's failure to review or consider the entire



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record. Over the years, Plaintiff has repeatedly and increasingly expressed remorse and accepted responsibility for his crimes.

12. On June 25, 2018, Plaintiffs' submitted a timely Petition for Reconsideration of the new denial of parole ("2018 Petition for Reconsideration"). Plaintiff's Petition included ten arguments supporting the position that under any reasonable interpretation of the apposite federal statute, Mr. Shakur should be released on parole. *See* Appendix 4 filed herewith.

13. While traditionally such appeals would be heard by a National Appeals Board, the three-member Commission now serves as its own Appeals Board and therefore simply reviews its own decisions. There is now no independent administrative review when one appeals to the so-called National Appeals Board, which is simply the same Commission members meeting with a different name.

14. On July 25, 2018, the National Appeals Board (aka the Commission) rejected Plaintiffs' Petition for Reconsideration in all respects and reaffirmed the Commission's initial April 2018 Notice of Action. *See* Appendix 5 filed herewith.

15. Regarding federal parole determinations and Commission interpretations of federal law, a federal court may adjudicate whether the Commission has (1) acted outside of or misinterpreted its statutory or regulatory



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mandates; (2) made a decision that was arbitrary, irrational, unreasonable, irrelevant or capricious; or (3) violated the Constitution.

16. In violation of its enabling statute, promulgated regulations, fundamental fairness required by the due process and equal protection guarantees of the Fifth Amendment, and freedom of speech enshrined in the First Amendment, the Commission, as it had done in 2016 as described in Plaintiff's original Complaint, *inter alia* –

(1) misinterpreted its enabling statute § 4206 to make a denial of mandatory parole under § 4206(d) effectively a permanent denial of parole by neither discussing nor seemingly considering the factors relevant to release under § 4206(a) once the Commission denies parole under § 4206(d);

(2) proffered entirely pretextual and irrational reasons for its denial of mandatory parole, including implausible interpretations of the terms "seriously" and "frequently" as used in § 4206(d);

(3) impermissibly considered and retaliated against the content of Plaintiff's protected and entirely non-violent political speech;

(4) failed to give Plaintiff and counsel notice prior to the parole hearing, as required under its own regulations, of letters and testimony on which it relied in its denial of parole;

(5) by resting in large part on its 2016 decision, and in violation of its own regulations, the Commission considered ancient non-violent prison rule



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violations and non-violent statements made by Plaintiff not considered in prior parole hearings in 2014 and earlier;

(6) allowed and relied upon irrelevant and unsupported testimony from a former prosecutor and an FBI investigator as to Plaintiff's current state of mind and likelihood to recidivate, ignoring its mandate to operate independently of other bureaus in the Department of Justice;

(7) ignored, without explanation, the entire record of evidence that Plaintiff has for over two decades repeatedly and publicly denounced the use of violence in any form to achieve political ends, including the consistent and uniform observations of BOP officials; and

(8) erroneously and arbitrarily rejected Plaintiff's statements of remorse and acceptance of responsibility by stating, *with no support in the record*, that his statements were "suspect … self-serving and disingenuous."

17. The Commission has also treated Plaintiff far differently from similarly situated inmates who have been considered for mandatory release. Based on records released by the Commission on September 23, 2016, in response to a request for documents under the Freedom of Information Act ("FOIA") of all mandatory parole (§ 4206(d)) Notices of Decision issued over the past two years (the time period covered by the FOIA request), the Commission had not denied mandatory parole to any inmate with an institutional violation history similar to Plaintiff's prison history.



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## II. JURISDICTON AND VENUE

18. This Court has jurisdiction over this action pursuant to U.S. Const. Art. III; 28 U.S.C. § 1331 (federal question jurisdiction).

19. Plaintiffs' prayer for declaratory relief is brought pursuant to 28 U.S.C. §§ 2201 and 2202.

20. Venue is properly in this court pursuant to 28 U.S.C. § 1391(b) and (e)(1), (2), and (4), because Plaintiff is detained in this judicial district.

## III. PARTIES

21. Plaintiff Mutulu Shakur is incarcerated at the United States Penitentiary, Victorville (USP Victorville), 13777 Air Expressway Blvd., Victorville, CA 92394, under Bureau of Prisons Register No. 83205-012.

22. Defendant David Shinn is the Warden of the United States Penitentiary, Victorville (USP Victorville), 13777 Air Expressway Blvd., Victorville, CA 92394. As Warden, Defendant Shinn has custody of Plaintiff.

23. Defendant the Federal Bureau of Prisons is a United States law enforcement agency responsible for the administration of the federal prison system.

24. Defendant the U.S. Parole Commission is the federal agency responsible for making parole decisions regarding Plaintiff's release or continuation in custody.



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## IV. CLASS DEFINITION

25. The proposed class pertains only to Plaintiff's First Claim for Relief: Violation of the Parole Commission and Reorganization Act, 18 U.S.C. § 4206(d), as interpreted and applied in 28 C.F.R. § 2.53, and Fifth Amendment due process and equal protection, by effectively making denial of mandatory parole under § 4206(d) a permanent denial of parole and refusing to consider release under § 4206(a) when the Commission denies parole under § 4206(d), and by failing to issue and consistently apply standards regarding the Commission's interpretation of the terms "serious" and "frequently" as used in § 4206(d).

26. Pursuant to Rules 23(a)(1)-(4) and (b)(2) of the Federal Rules of Civil Procedure, Plaintiff brings this action as a class action on behalf of the following proposed class: All current United States Bureau of Prisons' inmates (1) denied parole under 18 U.S.C. § 4206(d) who the Parole Commission failed or refused to consider for release on parole under § 4206(a), or (2) whose parole was denied based on the prisoner having committed a "serious" rule violation or having "frequently" violated prison rules without the Commission having applied any published and known standards regarding it's interpretation of these terms.

27. The size of the class is several hundred prisoners and is so numerous that joinder of all members is impracticable.



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28. The claim of Plaintiff and those of the proposed class members raise common questions of law and fact. These questions are common to the named parties and to the members of the proposed class because Defendant, the U.S. Parole Commission has acted or continues to act on grounds generally applicable to both the Plaintiff and proposed class members. Plaintiff's claim is typical of the class claim.

29. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications establishing incompatible standards of conduct for Defendant US Parole Commission. Prosecution of separate actions would also create the risk that individual class members will secure court orders that would as a practical matter be dispositive of the claims of other class members not named parties to this litigation, thereby substantially impeding the ability of unrepresented class members to protect their interests.

30. Defendant US Parole Commission, its agents, employees, predecessors and successors in office have acted or refused to act, or will act or refuse to act, on grounds generally applicable to the class, thereby making appropriate injunctive relief or corresponding declaratory relief with respect to the class as a whole. Plaintiff will vigorously represent the interests of unnamed class members. All members of the proposed class will benefit by the action brought by Plaintiff. The interests of the Plaintiff and those of the proposed class



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members are identical. Plaintiff's counsel includes attorneys highly experienced in federal class action litigation involving issues of statutory construction.

## V. RULES RELATING TO U.S. PAROLE COMMISSION

31. Congress passed the PCRA[1] in 1976 to "provide[] an infusion of due process in Federal parole procedures,"[2] which Congress characterized at that time as "the single most inequitable, potentially capricious, and uniquely arbitrary corner of the criminal justice map."[3]

32. Under the PCRA, the Parole Commission would have nine members: a chair, three National Commissioners who would sit on the National Appeals Board, and five Regional Commissioners who would make first-level parole decisions in their geographic regions. *See* 18 U.S.C. §§ 4202, 4204(a)(5).

33. The Sentencing Reform Act of 1984 ("SRA"), at § 218(a)(5), 98 Stat. 2027, abolished federal parole. However, Section 235(b)(1)(A), 98 Stat. 2032, kept the Parole Commission alive for five years to process cases of prisoners convicted of crimes committed before the effective date of the SRA. Since that time, Congress has periodically extended the life of the Commission to provide parole hearings for a dwindling number of long-term prisoners

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1 Pub. L. No. 94-233, 90 Stat. 219 (1976), now codified (as amended) at 18 U.S.C. §§ 4201-4218.

2 H.R. Rep. 94-184, 94th Cong. 1st Sess. 2 (1975).

3 *Id*.



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sentenced under the PCRA.[4] In 1997, Congress decreased the number of Commissioners to five.[5] Currently there are only three acting Parole Commissioners.[6]

34. Under the PCRA, a Hearing Examiner presides at each parole hearing, prepares a summary of findings, and makes a recommendation. In the normal course, that recommendation is reviewed by a second examiner, and a third, if necessary, and finally by a Regional Commissioner. 28 C.F.R. §§ 2.13(a), 2.23(b).[7] In some cases, such as Plaintiff's case, the Hearing Examiner or Commissioner designates the case to be an "Original Jurisdiction" case under 28 C.F.R. §2.17. In an Original Jurisdiction case, the entire Commission (currently only three people) votes on the disposition of the parole decision and

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4 The life of the Commission was last extended by the Parole Commission Extension Act of 2013, Pub. L. 113-47, 127 Stat. 572 (extending the Commission until October 31, 2018).

5 *See* National Capital Revitalization and Self-Government Improvement Act of 1997, § 11231(d), Pub. L. No. 105-33, 111 Stat. 745-46 (1997).

6 *See* Parole Commission webpages, "Meet the Chairman" and "Meet the Commissioners" at https://www.justice.gov/uspc/meet-chairman and https://www.justice.gov/uspc/meet-commissioners (listing only three members) (last checked March 16, 2018).

7 It is not clear that the Commission currently designates any of its staff to serve as Regional Commissioners. The Commission appears now to have only three voting members.



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then also votes on a prisoner's appeal of the parole decision.[8]

35. At present, the same three Commissioners who initially deny parole in Original Jurisdiction cases then sit as a "National Appeals Board" ("NAB") to hear any appeal. As such, there is now no meaningful appellate review of denials made under Original Jurisdiction cases under C.F.R. §§ 2.17 and 2.27.

## V. STATEMENT OF FACTS

### A. Plaintiff's Pre-Conviction Background

36. Jeral Wayne Williams, now known as Mutulu Shakur, was born August 8, 1950 in Baltimore, Maryland, the only son of a single mother blinded from glaucoma. Growing up in an African American community in Queens, Plaintiff was confronted with gang violence and was profoundly disturbed by the epidemic of drug addiction, poverty and unemployment among the youth.

37. At the age of 16, Plaintiff joined the Republic of New Afrika and the New Afrikan Independence movement, a social and political movement that advocated for the establishment of an African American state within the U.S. where African Americans could live outside of institutional discrimination. These groups advocated that their goals should be achieved through plebiscites and elections.

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8 *See* 28 C.F.R. § 2.17 ("The decision in an original jurisdiction case shall be made on the basis of a majority vote of Commissioners holding office at the time of the decision.").



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38. When he was 20 years old, Plaintiff volunteered at Lincoln Hospital in the Bronx in New York. He later helped build the detox program at Lincoln. He traveled to Canada and China to study acupuncture and returned to Harlem where he and colleagues started the Black Acupuncture Advisory Association of North America (BAAANA). He was instrumental in developing protocols for acupuncture treatment of drug addiction. Plaintiff also helped prepare petitions to the United Nations in conjunction with the National Conference of Black Lawyers regarding discrimination and disenfranchisement black Americans were experiencing in the United States.

39. Unbeknownst to Plaintiff at the time, the FBI considered his lawful activities sufficient to warrant targeting him through its Counter Intelligence Program (COINTELPRO).

40. COINTELPRO became public in March 1971. FBI Director J. Edgar Hoover ordered FBI agents to "expose, disrupt, misdirect, discredit, neutralize or otherwise eliminate" the activities of movements and their leaders deemed to be subversive.[9] Under the program "[g]roups and individuals have been assaulted, repressed, harassed and disrupted because of their political views, social beliefs and their lifestyles … Unsavory, harmful and vicious

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9 Introduction and Summary (PDF), *Intelligence Activities and the Rights of Americans - Church Committee final report*. *United States Senate website* (United States Government), 1976-04-26. p. 10. Archived (PDF) from the original on 2014-04-18. Retrieved 2014-07-15.



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tactics [were] employed—including anonymous attempts to break up marriages, disrupt meetings, ostracize persons from their professions, and provoke target groups into rivalries that might result in deaths."[10] COINTELPRO in some instances encouraged committed civil rights individuals to withdraw from peaceful grassroots organizing and become involved in armed and unlawful actions.

41. United States District Judge Haight, Jr., the trial judge in Plaintiff's case, observed --

> Documents obtained by Shakur and associates under the Freedom of Information Act demonstrate that for a considerable time Shakur and the Republic of New Afrika, with which Shakur was at all pertinent times closely associated, have been the subject of illegal surveillance, harassment, and disinformation by the FBI as part of that lamented, unconstitutional project known as COINTELPRO ...[11]

Having failed to review the record, one of the few reasons the

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10 *Intelligence Activities and the Rights of Americans Book II, Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities,* United States Senate (Church Committee), Retrieved May 11, 2006.

11 *United States v. Shakur*, 1988 U.S. Dist. LEXIS 2762, pp. 16-17 (1988). In Judge Haight's view, "Petitioner while exercising constitutional liberties was illegally pursued by federal law enforcement officers … [T]he rights of Petitioner … were violated by the COINTELPRO program." *United States v. Shakur,* 1990 U.S. Dist. LEXIS 16219, 1990 WL 200646 (S.D.N.Y. Nov. 28, 1990).



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Commission provided in 2016 for denying parole was Plaintiff's *accurate* reference to himself as a victim of the COINTELPRO program. The Commission unreasonably concluded this showed he is likely to re-offend if released. In 2018 the Commission simply adopted its 2016 decision as the primary basis for its denial of parole. *See* Appendix 3 at 1.

### B. Plaintiff's Indictment, Conviction, and Sentencing

42. On April 21, 1982, Plaintiff and ten others were indicted in the Southern District of New York. The indictment alleged that from December 1976 to October 1981, an integrated "revolutionary armed task force," called simply "The Family," committed a succession of robberies of banks and armored trucks in the Northeast.[12] Additionally, Plaintiff and others were charged with participating in a 1979 prison escape of Assata Shakur. The Family's final crime, the "Brinks robbery" of October 20, 1981, resulted in the shooting deaths of a Brinks guard and two police officers as some of the defendants attempted to flee the scene of the robbery. Four participants in the Brinks robbery were apprehended fleeing the scene, including at least one who admitted killing a Brink's guard. Several others were arrested later, not

[12] The indictment charged that the defendants conspired to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), two bank robberies, two armed bank robberies and two bank robbery killings.



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including Plaintiff.[13]

43. Plaintiff was arrested on February 11, 1986. His jury trial took place in 1988. The indictment alleged a conspiracy to commit several "fund-raisers" or armed robberies to raise money for the political activities of the conspiracy members. On information and belief, no evidence at trial showed that Plaintiff ever killed anyone.[14]

44. The jury found Plaintiff and Ms. Buck guilty of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act, participation in a racketeering enterprise, bank robbery, armed bank robbery, and bank robbery murder. At the sentencing of Plaintiff, Judge Haight said, "many people have written to me on behalf of Petitioner… It is said that he is a skilled and compassionate healer who has done much good. I believe that to be true." Judge Haight added, "this case represents an American tragedy of broader dimensions than the Government is willing to acknowledge."

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13 These defendants were tried together in 1983. None were convicted of the murders. *United States v. Shakur*, 565 F.Supp. 241 (S.D.N.Y. 1987), *rev'd on other grounds*, 817 F.2d 189 (2d Cir. 1987). Six of the eleven defendants named in the indictment were tried: two of the defendants were convicted on RICO counts, two were found guilty as accessories after the fact, and two were acquitted on all charges.

14 Co-defendant Tyrone Rison admitted killing a guard during a robbery and is believed to have received a *six-year sentence* in return for testifying that Plaintiff was one of the founders of the "Family" and one of its core members. The Government alleged it had a taped statement of Plaintiff admitting that he was present or involved in a robbery where a death occurred. However, after conducting an audibility hearing, Judge Haight ruled that the tapes were unintelligible and not admissible evidence.



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### C. Plaintiff's Overall Institutional Conduct

45. Plaintiff has led a highly productive and exemplary life in prison, influencing his stepson Tupac Shakur's career as a world-wide renowned hip hop artist with messages of non-violence that reached millions of young people.

46. As established by letters in the record and Plaintiff 's statements at several parole hearings, throughout his incarceration Plaintiff has been outspoken against gang violence and crime. He has consistently expressed support for peaceful and constructive changes in all matters involving racial disparities and social justice. He has never in thirty years of incarceration supported or in any way implied support for criminal conduct or violence to achieve social justice.

47. *There is overwhelming uncontroverted evidence in the record of Plaintiff's rehabilitation and positive conduct*. Mr. Shakur's institutional history "serves as perhaps the most reliable evidence that upon release he will not reoffend." Appendix 1 at 6. In a parole hearing held sixteen years ago on July 17, 2002, the Hearing Examiner stated:

> And we've also, of course looked at your salient factor score, which gives us an idea of what kind of a parole risk you would be. And of course, you had no prior record prior to this series of events. *And so your salient factor score is the best score it can be*. It's a ten, which would indicate that you would be falling in the good parole risk category. [Emphasis added].



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48. A BOP supervisor testified at the 2002 hearing:

> Well, I'm here on Shakur's behalf. He asked me to come … and speak up for him. And also want to say as (inaudible) and *it's been honor [supervising him*]. And he's been working for me probably 5 or 6 years, I'm not sure how long. He's been an asset to the job. He's an asset to me. I can say he's an asset in general. [Emphasis added].

49. A September 29, 2002, Initial Hearing Summary provides the following assessment of Plaintiff's conduct:

> Subject has programmed extensively while in BOP custody. *His accomplishments are well documented in the record and also in the progress report dated 5/16/2002*. In addition, subject submitted a copy of a certificate dated September 2002 in which he completed 33 hours in the CHANGE Psychotherapy Group program. Subject indicated that he has been involved in educational and recreational activities from a cultural diversity standpoint, in that he has helped line up speakers for workshops ... [Mr. Shakur] is involved in working with older inmates in helping them and himself understand the impact of aging and stress-related factors associated with institution life.

50. The Statutory Interim Hearing Prehearing Assessment prepared for Plaintiff's September 9, 2004, review states in part:



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> … *[T]he Subject has satisfactory institutional adjustment.* He currently works 32 hours per week on Laundry detail. On 2/13/03, he received a certificate for completion of the Elder Inmate Psychotherapy Group. He has maintained clear institutional conduct for the past 36 months. He has completed the A&O Program and will participate in the Pre-Release Program prior to release.

While the BOP considered Plaintiff a candidate for a "pre-release program" as long ago as 2004, the Commission, which knows far less about Plaintiff's institutional history than the BOP, has still not authorized his release some fourteen years later.

51. In January 2005 Plaintiff's Unit Manager, A. Kingston, submitted a memorandum to his superiors stating –

> [Plaintiff] has participated in the programs as recommended by his Unit Team. He has completed his GED requirements and his obligations to the Inmate Financial Responsibility program. He has earned good work performance evaluations … [T]he Unit Team does not believe this inmate to be a management problem and a custody reduction would not pose a threat to the security of this institution …

52. The Hearing Summary of a February 8, 2005 hearing states:

> Since the last hearing this subject has completed Victim Impact, Stress Management and Anger Management. He participates in the Elder



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> Cycle Therapy Group and he is an active member of the Suicide Watch Team … The subject receives good work reports from his job assignment ...

53. In 2006 Plaintiff developed a proposal for the development of a program under which able-bodied inmates would provide assistance to inmates with physical or mental disabilities. The proposal included recommendations such as inmates helping disabled inmates with cell cleanliness, education, support groups, discussion groups, etc.

54. The Hearing Summary of the parole hearing conducted December 11, 2007, states in part:

> [Plaintiff] is also a founding member of the Coleman Penitentiary No. 2 NAACP Chapter and received a certificate for this. Also in Atlanta, he took 6 hours of Group Psychotherapy Courses. The subject also participated in Culture Diversity Classes in 2006 and 4 hour Suicide Prevention Course in April 2005.

55. Plaintiff's Statutory Interim Hearing Pre-Hearing Assessment dated November 5, 2007, states in part:

> … the Subject has satisfactory institutional adjustment. He currently works 32 hours per week on Laundry detail … *He has maintained clear institutional conduct for the past 36 months. He has completed*



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> *the A&O Program and will participate in the Pre-Release Program prior to release* … [Emphasis supplied].

56. Plaintiff's December 2, 2009, Hearing Summary states in part:

> *Discipline: None* ... [Plaintiff] has completed five programs since his hearing in 2007. They include Biography, Explorers in Early America, ... Engineering and Empire, and History and Science Part 1. [Emphasis added].

57. Plaintiff's March 15, 2012 Interim Hearing Pre-Hearing Assessment states:

> *[T]he subject's adjustment since his last hearing has been without incident* … He has completed seven education courses … He is currently enrolled in Human Rights … His institutional adjustment has been satisfactory. *He has participated in programs, maintained a job assignment and has not incurred any DHO infractions since his last hearing* … . [Emphasis added].

58. Plaintiff's July 30, 2014 Interim Hearing Pre-Hearing Assessment states:

> Since his last hearing on 7/2/2012 the subject has completed 98 hours of educational/vocational programming ….

59. The Hearing Summary of Plaintiff's August 12, 2014, parole hearing states in part:



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> *Testimony of Case Manager Mico: Ms. Mico stated that the offender is very respectful of staff and inmates and has continuously availed himself to programs*. She testified that the offender recently suffered a stroke … . [Emphasis added].

60. The Commission's pre-hearing disclosures made shortly before Plaintiff's May 2018 hearing includes a letter from Dr. S. Peprah, Deputy Chief Psychologist at BOP Victorville reporting on Plaintiff's commendable work as a trained Suicide Watch Inmate Companion, including updating staff on all developments during suicide watches and maintaining clear and accurate communication with BOP staff. The pre-hearing disclosures includes the results of a BOP Mock Job Fair Interview Evaluation in which Plaintiff scored "excellent" in every area and received comments such as "You have a ton experience that should be passed on the less fortunate and younger generation!" Also in the Commission's pre-hearing disclosure is a letter from Matthew Schuldt, the Assistant Supervisor of Education for the facility, who states in part that Plaintiff has been working as an adult continuing education tutor in the prison's Education Department, "maintains a good attitude and motivates other inmates to participate in education programs." Among other things, he "teaches a human rights class to other inmates."[15] As noted above, the Deputy Warden of

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15 The Commission's pre-hearing disclosure documents also contained copies of certificates Plaintiff was awarded over the previous year as a result of his



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the prison provided a letter clearly stating that in his professional opinion Plaintiff was rehabilitated and would not reoffend if released on parole. *See* Exhibit 1 to Appendix 1.

61. Throughout this time, Plaintiff maintained the best score possible on the Commission's scale of parole risk, a 10 salient factor score. The Salient Factor Score ("SFS") is explicated at length in regulations promulgated at 28 C.F.R. § 2.20 (containing Parole Guidelines and Salient Factor Scoring Manual).

## VI. THE COMMISSION'S MISINTERPRETATION OF ITS ENABLING STATUTE AND VIOLATION OF ITS REGULATIONS AND THE CONSTITUTION

### A. The Commission's promulgated regulation on mandatory parole conflicts with the authorizing statute and overall statutory scheme and prejudices all potential parolees with severe, permanent adjudications that are arbitrary, irrational, and capricious.

62. Under the normal course, the PCRA affords all prisoners parole hearings under the "discretionary parole" criteria of 18 U.S.C. § 4206(a), which requires the Commission to release a prisoner on parole if the prisoner: (1) has "substantially observed the rules of the institution … to which he has been confined;" (2) if "release would not depreciate the seriousness of his offense or promote disrespect for the law;" and (3) if "release would not jeopardize the

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continuing education programs, including for completing courses in human rights, financial management, parenting skills, tutoring and becoming a Microsoft Expert.



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public welfare." 18 U.S.C. § 4206(a).

63. If an inmate is not released following the initial discretionary parole hearing, subsequent proceedings ("statutory interim hearings") are held every two years under the same § 4206(a) criteria. *See* 18 U.S.C. § 4208(h)(2); 28 C.F.R. § 2.14.

64. Congress also provided that prisoners sentenced to longer terms who had not received discretionary parole after two thirds of their term or 30 years were afforded a second *more liberal path* to parole under 18 U.S.C. § 4206(d):

> Any prisoner, serving a sentence of five years or longer, who is not earlier released under [18 U.S.C. § 4206(a)] …, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term … Provided, however, That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime.

64. Congress stated that it intended the "mandatory parole" provision in § 4206(d) to provide "*a more liberal criteria for release* on parole for prisoners with long sentences after they have completed two-thirds of any sentence or thirty years, whichever occurs first." S. Rep.



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No. 94-648, at 27 (1976) (Conf. Rep.) (emphasis added). Congress explained the purpose of the sections:

> The purpose of [Section 4206(d)] is to insure at least some minimum period of parole supervision for *all except those offenders who have the greatest probability of committing violent offenses following their release* so that parole supervision is part of their transition from the institutional life of imprisonment to living in the community."

H. Rep. 94-648, 94th Cong., 2d Sess. 27, 1976 U.S.C.C.A.N. 351 (emphasis added).

65. However, as unreasonably interpreted by the Commission, § 4206(d) turns out to be a far harsher standard than § 4206(a): (1) The Commission's interpretation of §4206(d) in its corresponding regulations does not permit consideration for release under § 4206(a) once the Commission denies release under § 4206(d); (2) the Commission's finding that a prisoner "seriously" and "frequently" violated prison rules leaves prisoners ineligible for release under § 4206(d) and the Commission then refuses to consider release under § 4206(a), even though the same rule violations may not bar release under § 4206(a).

66. The Commission's rule on mandatory parole is promulgated at 28 C.F.R. § 2.53. Without support in the text of the statute, the Commission's rule states a prisoner denied mandatory parole will serve "until the expiration of his



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sentence":

> 2.53 Mandatory parole. (a) A prisoner … shall be released on parole after … completion of 30 years of each term or terms of more than 45 years (including life terms … unless … the Commission determines that there is a reasonable probability that the prisoner will commit any … crime or that the prisoner has frequently or seriously violated the rules of the institution in which he is confined. *If parole is denied pursuant to this section, such prisoner shall serve until the expiration of his sentence less good time.* [Emphasis added].

67. Consistent with the Commission's regulation, a Commission General Counsel's memo of September 22, 2011, states that after serving two thirds of their sentences, inmates are only eligible for release under § 4206(d), not § 4206(a). Memorandum of Commission General Counsel to Commission dated September 22, 2011 (September 22, 2011).

68. 18 U.S.C. § 4208(h)(2) provides that all prisoners are statutorily entitled to Interim Hearings. In order to comply with § 4208, the Commission affords prisoners denied mandatory parole with subsequent Interim Hearings, but provides that all subsequent Interim Hearings will proceed only under § 4206(d) rather than the normal §4206(a) standard:

> 2.53-06. Subsequent hearings for long-term prisoners denied mandatory parole. If the denial of mandatory parole results in a



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> continuance for the prisoner that exceeds the applicable time period for an interim hearing (either every 18 or 24 months), the prisoner must be scheduled for a subsequent interim hearing. *At the interim hearing, the prisoner shall be considered for parole under the mandatory parole criteria of §2.53(a).*

USPC Rules and Procedures Manual 2.53-06 (June 30, 2010) (emphasis added).

69. In most cases, the effect of conducting subsequent interim hearings under the mandatory parole criteria of § 4206(d) and C.F.R. § 2.53 is to deny parole in perpetuity (as rule 2.53 states, "until expiration") because no relevant fact (*i.e*. past prison rule violations) under § 2.53 could change between the initial mandatory parole hearing and subsequent hearings.

70. In 2014, a Hearing Examiner in this case recommended Plaintiff be paroled in early 2015 pursuant to § 4206(a). The recommendation was based on Plaintiff's rehabilitation and "substantial observ[ance]" of prison regulations over 28 years. Hearing Summary (August 19, 2014), at 4. This recommendation was rejected by the Commission solely because of a single telephone rule violation in 2013. Notice of Action (September 4, 2014).

71. However, two years later, in the 2016 hearing, under the Commission's interpretation of § 4206(d), Plaintiff's history of substantially observing institutional regulations as reflected, *inter alia*, in his superior 10 Salient Factor Score and 2014 Hearing Examiner's report, is irrelevant because,



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according to the Commission, a 30-year old positive drug test (of questionably validity), and a handful of relatively minor telephone rule violations, seemingly forever bar release under § 4206(d). *See* (2016 Notice of Action) Appendix 6, at 1.[16]

72. Nothing in the statutory language or Congressional record supports the Commission's interpretation of § 4206(d) as expressed in the Commission's parole decisions and C.F.R. § 2.53.[17]

**B. The Commission violated its pre-hearing disclosure obligations.**

73. Section 4208(b) requires that at least thirty days prior to any parole determination the prisoner shall be provided with reasonable access to any report or document to be used by the Commission in making its determination. 28 C.F.R. § 2.55 provides in relevant part:

> At least 60 days prior to a hearing scheduled pursuant to 28 CFR 2.12 or 2.14 each prisoner shall be given notice of his right to request disclosure of the reports and other documents to be used by the Commission in making its determination ...

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[16] In 2018 the Commission simply adopts in 2016 decision and repeats that Plaintiff was being denied parole because he had "seriously" violated the institution's rules. Appendix 3.

[17] The Commission's interpretation of § 4206 is also inconsistent with the PCRA's statutory scheme because Plaintiff and similarly situated prisoners denied release under § 4206(d) are entitled to and afforded subsequent interim hearings every two years pursuant to 18 U.S.C. § 4208(h)(2). These hearings are superfluous if an ancient rule violation forever bars release on parole.



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> (b) Scope of disclosure. *The scope of disclosure under this section is limited to reports and other documents to be used by the Commission in making its determination. At statutory interim hearings conducted pursuant to 28 CFR 2.14 the Commission only considers information concerning significant developments or changes in the prisoner's status since the initial hearing or a prior interim hearing*. 28 CFR § 2.55. Therefore, prehearing disclosure for interim hearings will be limited to such information …

28 C.F.R. § 2.55 (emphasis supplied).

74. None of these disclosure rules were complied with in Plaintiff's case despite requests by Plaintiff and his counsel for pre-hearing disclosures.[18] At the 2018 hearing, the written and oral statements of relatives and associates of the crime victims were again considered even though their statements were not used in hearings before 2016, and were not provided to Plaintiff prior to the 2018 hearing.

**C. The Commission violated its regulations by considering old evidence it knew about but did not use or rely upon in earlier hearings and decisions.**

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[18] The Parole Commission's September 23, 2016 response to a FOIA request disclosed that prior to the April 2016 hearing the Commission received letters opposing Plaintiff's release, including one from Assistant U.S. Attorney Elliot Jacobson the prosecutor in the case, none of which were disclosed to Plaintiff or his counsel prior to the April 2016 hearing. As already noted, the Commission's 2018 denial of parole incorporates its 2016 decision.



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75. In 2016 and 2018 the Commission relied on Plaintiff's old positive urine test and old telephone rule violations to deny release even though it had not relied on those rule violations in the 2014 and earlier parole hearings.

76. The Commission's rules clearly state that at subsequent hearings "the Commission only considers information concerning significant developments or changes in the prisoner's status since the initial hearing or a prior interim hearing." 28 CFR § 2.55. Pursuant to 28 C.F.R. § 2.14(a), "[t]he purpose of an interim hearing … shall be to consider any significant developments or changes in the prisoner's status that may have occurred subsequent to the initial hearing."

77. In reaching its 2016 and 2018 decisions to deny release, the Commission relied on a vast set of "facts" (e.g. 2016 statements of the DOJ prosecutor, non-serious old telephone call violations, the 28-year old urine test, etc.) that had *not* been relied upon by the Commission in the initial or subsequent hearings conducted prior to 2016.

**D. The 27-year old positive drug test does not, as the Commission claims, statutorily prevent the Commission from releasing Plaintiff on parole.**

78. Plaintiff has only had one "serious" rule violation during over 30 years of incarceration: A single positive urine test some 27 years before his parole hearing. That violation, which the BOP no longer treats as serious but the Commission does, was the basis for denying parole in 2016 and again in 2018.



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2016 Notice of Action, Appendix 6, at 3; 2018 Notice of Action Appendix 3, at 1.[19]

79. The 1990 urine test reportedly showed the presence of morphine, a drug not readily available in prisons. Upon being informed of the test, Plaintiff requested to be retested and also offered to take a DNA test. These requests were denied. To the best of Plaintiff's knowledge, in 1990 no retesting was done and there was no way for an inmate to contest a drug test.[20]

80. At a July 17, 2002, parole hearing the Hearing Examiner considered the 1990 positive drug rule violation and stated "[t]he drug offense will call for 0 to 8 months in the administrative offenses."[21] *Yet in 2016 and again in 2018, fourteen and sixteen years after stating the positive drug test would only adversely impact Plaintiff's record for "0 to 8 months," the Commission denied Plaintiff parole relying on the same 1990 drug test*. The Commission has no known rules or policies regarding what inmates must present to show past rule violations were not serious or should not now be

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[19] Plaintiffs explained in 2016 and again in 2018 why the old one-time drug offense should not be considered a disqualifying factor under 18 U.S.C. §4206(d). *See, e.g*. Appendix 1 at 9.

[20] Plaintiff has a FOIA request pending trying to determine whether retesting was ever required by BOP, and the extent to which ancient positive drug tests are ever used by the Parole Commission to find an inmate ineligible for release.

[21] This result tracks the Commission's Parole Rescission Guidelines promulgated in C.F.R. §§ 2.20 and 2.36, which characterize a single instance of drug use as an "administrative rule infraction," the *least* among offenses listed, punishable by no more than eight months extended denial of presumptive parole.



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treated as serious because of the passage of time or other factors. This has resulted and continues to result in the Commission issuing inconsistent *ad hoc* decisions when weighing the seriousness of past rule violations in Plaintiff's case and the cases of similarly situated long-term prisoners.

81. In the case of *Bowers v. Drew*, Civil Action No. 1:08-CV-2095-WCO (U.S. District Court Northern District of Georgia), the Commission addressed issues involving its application of the term "serious" rule violations as used in § 4206(d). The Commission "focused on … *[1] the gravity of the 1979 escape attempt and [2] whether the passage of time diminished the seriousness of the prison rule violation*." *Id*. Docket # 141, at 42 (emphasis added). *See also id*. at 44 ("the Commissioners … are not precluded from reaching the conclusion that they did in October 2005 [that the attempted escape was a serious rule violation], … *or they may find that the attempted escape was not so serious*." (Emphasis added)).[22] Had the Commission applied a similar reasoning in this case, it would have found that Plaintiff's 28-year old positive urine test for morphine is not a "serious" rule violation that forever precludes release on parole under § 4206(d) (or under § 4206(a) were that section considered). *See* Plaintiff's April 18, 2018 letter to the Commission, Appendix

[22] The Commission has granted parole to other escapees (including Sara Jane Moore and Zvonko Busic) and thus has refrained from characterizing all escapes as serious. *Id*., Memorandum of Commission General Counsel to Commission (September 22, 2011), Docket 138-7 at 4.



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1, at 9-10.[23]

82. In his Post Hearing Assessment on which the Commission heavily relies to reach its decision, the Hearing Examiner stated:

> I do not disagree that our General Counsel has advised the Commission may revisit the finding [of a "serious" rule violation] at subsequent hearings, primarily to consider length of time that has passed since the serious rule infraction was committed. However, 4206(d) is silent to this and, in fact, only states that if the Commission finds the subject has committed a serious violation of the rules of the institution, the Commission shall deny mandatory parole. Because of this absolute language, the Commission is not barred from continuing to deny mandatory parole on the basis of seriously violating the rules of the institution, regardless of the length of time that has passed.

Post-Hearing Assessment, Appendix 7, at 11.

83. The BOP does not treat an ancient positive urine test as a "serious" rule violation for purposes of evaluating an inmates salient score factor. *See* BOP Program Statement, Inmate Security Designation and Custody

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[23] Plaintiff cannot identify any case in the Notices of Decision obtained under FOIA where an ancient drug test was used to deny an inmate mandatory parole. Several of the approved mandatory paroles in the Notices of Decision come with the condition that parolee attend mandatory drug and alcohol programs, indicating these prisoners had at least one (if not several) drug or alcohol-related infractions while in custody that were not deemed "serious" for the purposes of release under § 4206(d).



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Classification, P5100.08, Chapter 6, p. 9 (indicates a "positive drug test" *over 5 years old* is not used to determine the inmate's Custody Classification—whereby an inmate is assigned a level of supervision according to their criminal history and institutional behavior/adjustment—or the inmate's "Anticipated Time in Confinement"). The Commission has never explained why it disregards BOP's interpretation of the seriousness of violations of its own rules. The "intent of the [BOP's] Custody Classification system is to permit staff to use professional judgment within specific guidelines." *Id*. Chapter 6, p. 2. The Commission's failure to adopt any similar system to permit its Commissioners and staff to use professional judgment within specific guidelines on critically important release criteria—including standards about how the Commission decides whether rule violations are "serious" or "frequent" so release under § 4206(d) should be denied — is what lead to arbitrary and unreasonable decision-making in this and similarly situated cases.

**E. A 5-year old brief phone call to university students urging them to support peaceful social change does not disqualify Plaintiff for release nor does it indicate Plaintiff is likely to reoffend. The BOP charge should be vacated because BOP destroyed key evidence, denied access to an appeal, and the Hearing Officer was not qualified under BOP's extant rules.**

84. In its November 2016 decision, the Commission cited what it called Plaintiff's "most serious incident" involving a February 5, 2013 telephone call to a group of university students. Notice of Action (November 25, 2016) at



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2. The Commission's 2018 decision incorporates its 2016 decision.

85. The facts are not in dispute. On February 5, 2013, Plaintiff, at the invitation of professor Karin Stanford, placed a phone call to Professor Stanford who placed the call on her speaker phone and invited Plaintiff to say a few words to a group of students and professors gathered to hear actor/producer Danny Glover speak and screen one of his films. Professor Stanford was on Plaintiff's approved phone call list and had visited him before this phone call.

86. The sworn declaration of Professor Stanford that is part of the Commission's record provides insight into Plaintiff's core beliefs and the arbitrariness of the Commission's reliance on the phone call to find Plaintiff is likely to reoffend if released on parole:

> On February 5, 2013 … CSUN's Department of Pan African Studies … co-sponsored a symposium … with … Danny Glover (actor and producer) who was screening his new Oscar-nominated documentary … *During a [previous] phone call with Mutulu Shakur ... I invited him to call-in to my cell-phone during the event to participate briefly in the discussion*. During the symposium Mutulu Shakur called … and I placed him on my phone speaker. He very briefly spoke about his ideas for the Truth and Reconciliation Commission, historical aspects of the civil rights movement, … the need to remember the sacrifices of civil rights workers who were killed in the woods of



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> America, … how the people have chosen the electoral process and elected President Obama as a means to get economic, medical and political relief, and again he returned to the peaceful process for addressing healing he has long supported as a tool to resolve conflict … *Mr. Shakur's contribution to the event was positive and he was a voice for healing and reconciliation, which I am very glad students had the opportunity to hear. At no time did Mr. Shakur say anything that was an incitement to violence or criminality. On the opposite, his message was one of working within the system to achieve healing and reconciliation* …

Declaration of Dr. Karen Stanford (April 3, 2016) (emphasis added).

87. The following day, February 6, 2013, BOP Officer G. Odell monitored the previously recorded call and submitted an incident report, charging Shakur with violation of 28 C.F.R § 541.3 (212), engaging in a "group demonstration," and 28 C.F.R § 541.3 (297), using the telephone to circumvent the ability of staff to monitor the content of the call or the number called.[24] In fact, the number called and content of the call were fully monitored.

88. On February 11, 2013 Plaintiff received a Notice of Discipline Hearing before a Disciplinary Hearing Officer ("DHO") for the alleged

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[24] The only incidents of which Plaintiff is aware involving violations of § 541.3 involve inmates using codes in their conversations to avoid monitoring.



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violations of "use of the telephone for abuses other than criminal (§ 212) and engaging in or encouraging group demo (§ 297)". Notice of Discipline Hearing Before the DHO (February 11, 2013) at 1. The allegation of engaging in a "group demonstration" was soon dropped when BOP realized the call was to a group of students at a university meeting.[25]

89. Despite Plaintiff's request that the recording of his phone call be preserved for review by his BOP staff representative and the Disciplinary Hearing Officer, his request was denied. *The recording was erased before his disciplinary hearing was conducted*.[26]

90. On March 13, 2013 a DHO Hearing was held, presided over by DHO Officer Diana Elliott. Pursuant to BOP Program Statement § 541.8(b) "A DHO may not conduct hearings without receiving specialized training and passing a certification test." On Information and belief, DHO Elliott was not

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[25] Plaintiff requested to have a staff representative, Rec Spec Weeks, and two witnesses, Sia Castillo, who could testify as a "phone monitoring expert", and Rec Spec Weeks, who could testify to Plaintiff's role "on the compound in keeping the peace."

[26] Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. In this case (1) the missing evidence existed at one time; (2) BOP had a duty to preserve the evidence; and (3) the evidence was important to Plaintiff 's being able to prove his innocence of the alleged phone rule violation.



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certified on March 13, 2013 when she presided over Plaintiff's DHO hearing.[27]

91. After being found guilty of violation a telephone rule, hearing Plaintiff was booked into administrative segregation (solitary confinement). He was not served with a copy of the DHO decision.[28] While in solitary confinement, Plaintiff wrote to Director of the Bureau of Prisons, Charles J. Samuels, to request an extension to file an appeal from the DHO's decision. Upon release from solitary confinement, Plaintiff submitted a regional administrative appeal on June 13, 2013, citing due process violations, freedom of speech, and objecting to the incident report for "failing to specify or identify any act of misconduct." He had still not been served with the DHO's decision. Even though he had not been served with the DHO's decision, tolling the period to appeal, and had been held in solitary confinement, the appeal was rejected as untimely.[29]

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[27] In *Konopka v. McGrew*, DHO Elliott declared under oath that she was not DHO certified until Oct. 2013. In it's decision, the Court stated "DHO Elliott… passed a certification test in October 2013... Indeed, the BOP prohibits DHOs from conducting hearings unless they have received the requisite certification and training". 2015 U.S. Dist. LEXIS 36230 (C.D. Cal. 2015).

[28] Pursuant to 28 C.F.R. § 542.14(d)(2), "DHO appeals shall be submitted initially to the Regional Director for the region where the inmate is currently located." 28 C.F.R. § 542.14(d)(2). The submission period for DHO Appeals is "20 calendar days of the date the Warden signed the response" and "Appeals to the Regional Director shall be … accompanied by one complete copy or duplicate original of the institution Request and response." BOP Policy § 542.15(a) and (b).

[29] Plaintiff next submitted a central office administrative appeal dated August



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92. On April 20, 2016, the phone violation was used as a key basis to deny Plaintiff mandatory parole. In 2018 the Commission denied parole incorporating its reasons for denying parole in 2016.[30]

93. In this Amended Complaint Plaintiff seeks an Order vacating the rule violation because (1) the phone call did not violate any known rule issued by the BOP, (2) the key evidence (recording of the telephone call) was destroyed prior to the disciplinary hearing despite Plaintiff requesting that the evidence be preserved, (3) the BOP circumvented Plaintiff's ability to administratively appeal the rule violation by running the clock on his time to appeal while he could not submit his appeal to anyone, and (4) the Disciplinary Hearing Officer, Diana Elliot, may not have been qualified under 28 CFR §

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19, 2013. Central Office Administrative Remedy Appeal, dated August 19, 2013, pg. 1. Plaintiff attached a signed Form A0148 (request to Staff) from his counselor, Counselor Prieto, verifying that the DHO report had not been provided to the Unit Team and/or inmate as of on July 28, 2013.[29] The outcome of that appeal is uncertain but it did not result in a decision reversing the telephone rule violation.

[30] On July 10, 2017 Plaintiff resumed his efforts to have the 2013 rule violation set aside. He submitted a new request for informal resolution of the rule violation. On August 3, 2017 Plaintiff submitted a request for administrative remedy to the Warden. On September 25, 2017, Plaintiff submitted a regional administrative appeal. On October 31, 2017 Plaintiff submitted a central office appeal. On January 11, 2018 Plaintiff submitted a regional administrative appeal. Despite these efforts, to date Defendant the BOP has not set aside Plaintiff's 2013 telephone rule violation that Defendant the Parole Commission found was his "most serious" violation warranting denial of parole in 2016, a decision the Commission incorporated into its 2018 decision where it again relies upon Plaintiff's alleged "serious" rule violations to deny parole.



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541.8(b) to preside as a Disciplinary Hearing Officer.

**F. The Commission has failed to adopt or apply any known standards on the meaning of "frequent" rule violations. A handful of old telephone rule violations over 30 years do not show Plaintiff "frequently" violated prison rules or is likely to reoffend if released on parole.**

94. Section 4206(d) provides that a prisoner shall not be granted mandatory release if he has "frequently violated institution rules." On the other hand, a prisoner may be granted discretionary release under § 4206(a) even if he has frequently violated institution rules depending on the seriousness and age of those violations.

95. The Notice of Action dated November 25, 2016 (incorporated into the Commission's 2018 denial of parole) concludes that four alleged non-serious telephone rule infractions in about twenty-eight (28) years, show that Plaintiff has "frequently" violated institution rules and therefore is statutorily ineligible for release under § 4206(d), and is a threat to reoffend if released.[31]

96. "Frequent" means "occurring often or in close succession; habitual; constant." *The Oxford Desk Dictionary* at 321. Four or five phone violations over a period of about thirty (30) years by any rational interpretation does not involve "frequently" violating prison rules. This amounts on average to a minor rule violation once every seven years in custody. *Congress would not have*

31 The two 2007 telephone infractions involved attempted "outreach to the public" without authorization because the phone call involved an *anti-violence* music CD project.



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*called § 4206(d) a "more liberal" approach to release on parole if four phone calls that would not block release under the normal standard of § 4206(a), permanently blocks release under § 4206(d).*

97. The Commission has failed to issue standards or rules consistently applied to Plaintiff and proposed class members regarding how it interprets the term "frequently." Plaintiff and proposed class members have no idea what standards the Commission follows when deciding that an inmate has "frequently" violated prison rules such that they are, in the Commission's view, forever ineligible for release on parole under § 4206(d).

98. As explained at the 2016 and 2018 hearings, in each instance the phone calls at issue involved Plaintiff encouraging non-violence, anti-gang messaging, healing and reconciliation. The few 2001 and 2007 telephone calls involved a music project that included an anti-gang/anti-violence message.

99. None of the phone calls were deemed "serious" rule violations by BOP.[32]

100. The Commission also unreasonably and without explanation concluded that these 4 non-"serious" rule violations establish that Plaintiff is

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[32] The BOP defines a "serious" telephone rule violation when an "inmate … utilizes the telephone to further criminal activities or promote illicit organizations…." BOP Program Statement, Inmate Security Designation and Custody Classification, P5100.08, Chapter 5, page 10. These include, for example, utilizing the telephone "to communicate threats of bodily injury, death, assaults, or homicides," or to arrange "narcotic/alcohol" deals. *Id*. at 11.



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likely to commit new crimes if released on parole. As the record shows, Plaintiff has for many years been a voice advocating for non-violence and peaceful social change. Detailed information regarding his well-known ideas in this regard were presented and referenced at Plaintiff's 2014, 2016 and 2018 parole hearings. Instead of focusing on his long-standing message of peaceful reconciliation, the denial of parole focuses on minor telephone rule violations to deny release on parole under a statute Congress specifically intended to provide a "more liberal" path to release. This approach dishonors what Congress sought to achieve: "[T]o assure … imprisoned inmates that parole decisions are openly reached by a fair and reasonable process after due consideration has been given [all] salient information." Conference Report, Cong Rec Feb 23, 1976, page H1222.

101. In its summary of the final rules published in 1978, the Commission stated: "the Commission will consider the facts underlying each case to determine the severity of the institutional misconduct and will base its parole decision on that independent assessment." 43 FR 38822 (October 1, 1978).

102. In its 2018 decision, the National Appeals Board (aka the Commission) erroneously stated:

> The Board notes that the Commission [one and the same three people] made no such finding previously that your infractions were 'frequent.' Instead, the Commission found that you seriously violated the rules of



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> the institution and such a finding was reasonable. As you are aware, your positive drug test is a "l00" level infraction (most serious level in the BOP). This fact and the *nature and circumstances of your other infractions*, were reviewed and formed the basis of the opinion that you have seriously violated the rules of the institution.

Notice of Action on Appeal (July 25, 2018), Appendix 5, at 3 (emphasis supplied). The only "other infractions" are the non-serious telephone rule violations the Commission relies on to deny parole.

103. In this case the Hearing Examiner and the Notice of Action fail to consider "the severity of the institutional misconduct" and instead rely upon infrequent and minor telephone rule violations to trump an otherwise exemplary history of conduct in order to reach a predetermined outcome. That is not what Congress intended when it enacted the parole laws. The Commission also again relies on old telephone rule violations not considered at earlier parole hearings in violation of the Commission's own rules.[33]

**G. The Commission unreasonably concluded Plaintiff is likely to reoffend if released on parole because he has sometimes in the past referred to himself as a "victim" of the FBI's illegal COINTELPRO program**

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[33] The Commission's rules state that it will "only considers information concerning significant developments or changes in the prisoner's status since the initial hearing or a prior interim hearing." 28 CFR § 2.55. Pursuant to 28 C.F.R. § 2.14(a), "[t]he purpose of an interim hearing … shall be to consider any significant developments or changes in the prisoner's status that may have occurred subsequent to the initial hearing."



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104. In 2016 Plaintiff was denied release on parole in part because he has referred to himself as a "victim of the government's counter-intelligence program" and this, according to the Parole Commission, indicates he is not rehabilitated and is likely to commit crimes if released. 2016 Notice of Action at 1 ("Additionally, you take no responsibility for the crimes for which you were convicted [because] [i]nformation on your website, including your writings and in a recent letter you wrote to your supporters in 2014, indicates you routinely refer to yourself as a … 'victim' of the government's counter-intelligence program."). As noted above, the Commission incorporates its 2016 findings into its 2018 decision again denying parole.

105. Despite being in the record, and being brought to the Commission's attention in 2016 and again in Plaintiff's pre-hearing submission in 2018 (Appendix 1), the Commission ignored the fact that Trial Judge Haight, Jr. stated in this case that documents obtained under the FOIA "demonstrate that for a considerable time Shakur …[has] been the subject of illegal surveillance, harassment, and disinformation by the FBI as part of that lamented, unconstitutional project known as COINTELPRO." *United States v. Shakur*, 1988 U.S. Dist. LEXIS 2762, pp. 16-17 (1988).[34] A federal judge has

[34] In no prior Notice of Action has the Commission ever argued that a reason to deny parole is because Plaintiff has stated he was a "victim" of COINTELPRO before he was convicted. Raising this now, for the first time in twenty years,



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recognized that Plaintiff *was* a victim of the COINTELPRO program, but the Commission, ignoring the record it is supposed to consider, denied parole because Plaintiff "considers" himself to be a victim of the COINTELPRO program.

106. In addition, despite its rule at 28 CFR § 2.55 stating that at subsequent hearings "the Commission only considers information concerning significant developments or changes in the prisoner's status since … a prior interim hearing," the Commission denied parole in 2016 and seemingly again in 2018 because Plaintiff in the past sometimes referred to himself as a victim of the COINTELPRO program even though the Commission had not in previous hearings addressed or relied on this reason to deny parole.

107. Plaintiffs' claim, "[s]tating that he was a victim of COINTELPRO is an accurate and truthful statement and does not show in any way that Mr. Shakur is likely to reoffend if released on parole.

**H. The Commission unreasonably concluded Plaintiff is likely to reoffend if released on parole because he has sometimes referred to himself as a "political" prisoner.**

108. The Commission also denied parole because Plaintiff has occasionally referred to himself as a "political prisoner." Notice of Action (April 2016) at 1 ("Information on your website, including your writings and in

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shows the arbitrariness of the Commission's action in this case and violates the Commission's rules at 28 CFR § 2.55 and 28 C.F.R. § 2.14(a).



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a recent letter you wrote to your supporters in 2014, indicates you routinely refer to yourself as a … political prisoner …"); *see also* Notice of Action (November 2016) at 2 ("Specifically, you refer to yourself as … a 'political prisoner' …").

109. Plaintiff's April 18, 2018 pre-hearing submission to the Commission reiterated his oft-repeated position in 2016: "… Mr. Shakur has respected every stage of the criminal justice process throughout 30 years of litigation and incarceration. *He has never argued that his conviction is "political" in nature or that his conviction was politically motivated*. He has fully accepted his conviction." Appendix 1, at 11.

110. During the trial, U.S. District Judge Charles S. Haight, Jr. repeatedly acknowledged the political nature of Plaintiff's history, circumstance, motivation and intentions related to his conviction. The District Court described Shakur's trial defense as follows:

> Shakur's defense had at its core the proposition that while his *political* goals were to further the fortunes of African-Americans, his means were peaceful and law-abiding, rather than violent and criminal. While Shakur did not testify in his defense, he called 26 witnesses, the majority of whom testified about Shakur's public, *political*, and non-violent activities, extending over a number of years, and the concerns about governmental persecution that Shakur harbored as a result.



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*Shakur v. United States*, 32 F. Supp. 2d 651, 665 (SDNY Jan. 13, 1999) (emphasis supplied).

111. Plaintiff's "political" goals and activities were understood and accepted by trial judge Haight, Jr., even if they did nothing to mitigate Plaintiff's guilt. Plaintiff, other prisoners, BOP staff, and others outside of prison have all at times referred to Plaintiff as a "political" prisoner because the activities in which he engaged leading up to his conviction were motivated by political beliefs and because inmates who serve as mediators and act to diffuse interracial inmate gang hostilities are also known as political prisoners.[35]

112. The BOP and the Commission were aware that for over twenty years Plaintiff occasionally referred to himself as a political prisoner, yet the Commission never previously relied on that information to deny him parole. This indicates the Commission's reliance on this phrase to deny parole is pretextual.

113. In its 2018 denial of parole, the National Appeals Board [aka the Commission] stated: "Though you posit that your use of the term 'political

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[35] Plaintiff explained in his pre-hearing submission that "[t]he day to day functions of mediation, conciliation, conflict resolution inside the prison structure are referred to as 'politics' and those who engage to have impact on their environment are considered 'political prisoners' (rather than 'shot callers' 'MOB Boss' etc.)." Appendix 4, at 8. "Mr. Shakur is viewed by many as a 'political prisoner' because of his character, values and moral acts employed during his 30 years of incarceration … [H]is continued efforts to encourage alternative health care, an equitable criminal justice system, anti-gang violence and a TRC [Truth and Reconciliation] process for healing …" *Id*.



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prisoner' has varying meaning, it is reasonable for the Board to adopt the one that would suggest a failure to fully accept responsibility." Notice of Action on Appeal (July 25, 2018), Appendix 5, at 3-4. In the "mandatory" release provision Congress enacted in § 4206(d), it did not include as a criteria an inmate "fully accept[ing] responsibility." The Commission adopts a criteria not included by Congress in the statute, and then despite Plaintiff having stated for many years in plain English that he accepts responsibility for the crimes, concludes that his rare use of the term "political prisoner" somehow evidences that he has not accepted full responsibility for his crimes, and that, in turn, despite overwhelming and concrete evidence to the contrary including from BOP, somehow shows that he is likely to reoffend if released on parole. Appendix 5. The Commission's conclusion is factually baseless and possesses no rational basis. As noted above, it is also a violation of the Commission's rules.[36]

**I. The Commission unreasonably concluded Plaintiff is likely to reoffend if released on parole because he has occasionally ended letters with the salutation "stiff resistance".**

114. Plaintiff was denied parole in 2016 because on two known occasions he ended letters or communications with the salutation "stiff

[36] In no prior Notice of Action has the Commission ever argued that a reason to deny parole is because Plaintiff had sometimes referred to himself as a "political prisoner." Raising this now, for the first time in twenty years, violates the Commission's rules at 28 CFR § 2.55 and 28 C.F.R. § 2.14(a).



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resistance." Notice of Action (April 2016) at 1. In its 2018 denial of parole, the Commission adopted its 2016 decision.

115. As Plaintiff explained in 2016:

> My salutation "stiff resistance" purpose has been to serve as a reminder and to fortify an individual's character and resolve in the face of their specific challenges. The objective of "stiff resistance" is now and has always been about the quality of life. I have never intended its use to encourage criminality or terrorism, to target the government.

Mutulu Shakur Statement submitted to the Commission (May 19, 2016).

116. As Plaintiff explained to the Commission in his pre-hearing submission, many groups with entirely lawful goals use the age-old term "resistance." The "Culture of Resistance Network" aims to promote and support organizations, activists, and artists who seek a more peaceful, just, and democratic world. "Critical Resistance" through its outreach works toward creating "lasting alternatives to punishment and imprisonment." The goal of "Bay Resistance" is to advance racial, economic, climate, and gender justice. In May 2017 the media reported Hillary Clinton was establishing a "Resistance" Political Action Committee." Appendix 1 at 12. See also 2018 Petition for Reconsideration, Appendix 4, at 5 (Plaintiff



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explains words stiff resistance used "to encourage personal fortitude; … and to stand firm against daily challenges and difficulties.")

117. Plaintiff advised the Commission in writing in 2016 and again in 2018 that because of its misinterpretation of the salutation "Stiff Resistance" (used twice by the Plaintiff in correspondence years ago), and to avoid anyone else misinterpreting this salutation, *Plaintiff had stopped using it*. Despite the irrationality of using this salutation as a basis to deny parole even in 2016, the Commission uses it again in 2018 *even though it knows Plaintiff stopped using that salutation over two years ago*.[37]

118. Congress could not possibly have intended that in denying parole the Commission would entirely ignore an inmate's *substantive message of peace and conciliation* for several decades and focus instead on a salutation at the close of *two letters* to keep a rehabilitated inmate in prison likely until he dies.

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[37] Despite Plaintiff having advised the Commission in 2016 in his Petition for Reconsideration, and again in 2018 in his pre-hearing submission, and again at his 2018 hearing, that he had stopped using "Stiff Resistance" as a salutation in mid-2016, the National Appeals Board (aka the Commission) denied Plaintiff's 2018 Petition for Reconsideration because: "The Board finds it reasonable for the Commission [*i.e.* we find it reasonable for us] to consider these past statements to be incompatible with the goals and conditions of supervision as well as evidence that you have not truly disavowed yourself from the set of beliefs you had when you were convicted for your role as a leader in the racketeering conspiracy." Notice of Action on Appeal (July 25, 2018), Appendix 5, at 3.



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119. Despite its rule at 28 CFR § 2.55 stating that at subsequent hearings "the Commission only considers information concerning significant developments or changes in the prisoner's status since … a prior interim hearing," the Commission denied parole in 2016 and 2018 because Plaintiff on two occasions ended letters or communications with the salutation "stiff resistance." even though the Commission had never previously relied on this reason to deny parole.

**J. The Commission unreasonable found that Petitioner has not accepted responsibility for the crimes**

120. According to the Hearing Examiner's Post Hearing Assessment, when asked if he "admitted to his offense conduct, the subject stated that he admits and accepts responsibility." Post-Hearing Assessment (May 11, 2018) attached as Appendix 7, at 1. Plaintiff also "stated he is remorseful." *Id*. at 4.[38]

121. In his statement at the hearing, Plaintiff said: "I understand that no one else is to blame for my participation in these crimes – I am responsible for

[38] "He acknowledged the pain of the victims, stating, 'they have no room to forgive,' and 'forgiveness is not in their paradigm.' He says he accepts that. He says, 'death and loss is a powerful experience and the residual effect through generations is real.' He said he understands their hate, but says it hurts him to know he is responsible." *Id*. at 4.



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my choices. I understand that I alone must accept responsibility for my crimes … I feel deep … remorse for my crimes." Appendix 2, at 1-2.[39]

122. In identical words the Hearing Examiner's post-hearing assessment, and the Commission's 2018 denial of parole, state:

> The Commission has considered your statement at this hearing in which you *now, for the first time ever, admit culpability for your offenses* of conviction and accept responsibility for your actions. The Commission has considered whether this is new information that warrants a change in its previous decision but has determined you lack credibility in making such a statement. The Commission finds the timing of your new statement suspect and further finds it to be self-serving and disingenuous.

Post-Hearing Assessment, Appendix 7, at 10; 2018 Notice of Action, Appendix 3, at 1 (emphasis added). *See also* Notice of Action on Appeal (July 25, 2018), Appendix 6, at 1 ("at your May 2018, hearing … you, for the first time, admitted your involvement in the offense conduct").

123. This was not "the first time ever" that Plaintiff accepted responsibility for the underlying crimes. Over the last three decades Mr. Shakur has increasingly demonstrated acceptance of responsibility. Plaintiff has for

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[39] See page 6 *supra* for a fuller quote of Plaintiff's statements regarding acceptance of responsibility. At the May 2016 hearing in response to questioning by the Hearing Examiner, Plaintiff stated without equivocation: "I am guilty of the crimes I have been convicted of. All of them."



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many years accepted responsibility and expressed remorse for the crimes at his parole hearings and on his web site.

124. For example, in his 2016 hearing, when asked by the Hearing Examiner whether he was part of the conspiracy in the crimes of which he was convicted, Plaintiff responded "I was involved in that conspiracy and I don't deny that."[40] The Hearing Examiner in 2016 said to the Plaintiff: "You're convicted in a conspiracy. In a conspiracy you don't have to be the shooter to be guilty, you are still responsible for the crime. You would be in a position in terms of overall responsibility for the crime. You understand that?" Plaintiff responded: "I truly understand that. I've had to live with that for 30 years and I have changed." The Commission's rejection of Plaintiff's acceptance of responsibility based on the erroneous observation that 2018 was the "the first time" he "ever" accepted responsibility was clearly erroneous and unreasonable.

125. While under § 4206(d) Congress did not authorize the Commission to consider "acceptance of responsibility" as a factor to be considered when making release decisions, the Commission may assume that acceptance of responsibility is at least partially related to the likelihood to reoffend, a factor to be considered under § 4206(d). However, in this case the record shows that (1) Plaintiff has accepted responsibility for his crimes for many years, (2) there is no

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[40] In his 2016 hearing Plaintiff also stated "I'm glad that the victims' families are here because there is a need for me to represent to [them] …[my] sympathy and remorse for their families and their loss."



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basis for the Commission to conclude that Plaintiff's acceptance of responsibility is "suspect" and "disingenuous," (2018 Notice of Action at 1), and (3) the overwhelming and uncontradicted evidence of record (including the uncontradicted statements of BOP staff and high officials) shows Plaintiff is fully rehabilitated and based on his 30 year incarceration record, it is extremely unlikely Plaintiff will ever reoffend. He also has an excellent reentry plan. But all this evidence was outweighed by the Commission's entirely unsupported conclusion that Plaintiff's acceptance of responsibility was "suspect" solely because of its alleged recency.

**K. The Commission erroneously and unreasonably concluded there was no new evidence or change in circumstances between Plaintiff's 2016 and 2018 parole hearings to warrant release on parole.**

126. Plaintiff's April 18, 2018 prehearing submission to the Commission provided significant new evidence that warrant Plaintiff's release on parole. The submission included, for example, a letter executed by Associate Warden S. Keilman recommending parole of Plaintiff:

> In review of Shakur's institutional record it is apparent that his age and lack of violence (or other disciplinary issues) indicate a desire towards his rehabilitation. I am aware of the controversy related to a previous telephone incident [a single 2014 call to university students urging constructive political engagement] used as a basis for his 2016 parole denial and it is my professional opinion conduct related to his 2013



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> Code 297 phone incident report does not reflect a lack of rehabilitation or a disrespect for institutional policies and authority.
>
> *… I offer this letter as a recommendation for the parole of Inmate Shakur based on my observations and interactions with him. My years of experience with the Bureau has made me quite astute to the judgment of men and their character. I sincerely believe if given the opportunity, Mr. Shakur will not re-offend and will abide by the law and be an asset to the overall environment and community*.

Letter from Associate Warden Keilman (April 9, 2018), Appendix 1, Exhibit 1 (emphasis added).[41]

127. Additional new evidence addressed a realistic reentry plan for Plaintiff including firm offers of employment. The Center for Human Rights and Constitutional Law wrote that "because of his interest and long-time advocacy for peaceful resolution of disputes and racial and economic justice, the Center for Human Rights and Constitutional Law would be pleased to have Mr. Shakur work with the organization half-time." Appendix 1 at 3.[42]

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41 In addition, BOP staff testified at the May 2016 hearing that over the previous two years Plaintiff presented no management problems, no disciplinary problems, had positive rapport with and was respectful of BOP staff, and that his work as an prison orderly was good.

42 The Center for Human Rights job offer letter further stated: "We have dedicated hundreds of hours researching the achievements of truth and



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128. The Asian American Drug Abuse Program wrote an offer employment letter which states in part: "[Plaintiff's] skills and experience with community organizing and his ability to connect with young African American high-risk youth would also be an important asset in the work we do. It is for this reason that we would like to employ him in our Outreach Services Program … This position will be based at our Center on Crenshaw Boulevard, which is easily accessible from the residence of his son where he would be living. He may work in this position full or half time …" Appendix 1 at 4.

129. Plaintiff's daughter, Sekyiaw Shakur, provided new evidence as follows:

> Tupac Shakur was my brother and my father's stepson. In my work for the Tupac Amaru Shakur Foundation, I focus on community engagement and speak to abused women and children on overcoming adversity. Since his incarceration, my father has expressed his remorse for his past crimes. My father has taught me (and he taught Tupac) that positive social change comes about not through crimes or violence, but by promoting peace and healing … [My father] *has become known to many throughout the country not as Mutulu Shakur*

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reconciliation efforts around the world and look forward to Mr. Shakur's positive involvement in our work. We are fully prepared to compensate Mr. Shakur with a half-time salary of $15,000 per year." *Id*.



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> *the man involved in violent bank robberies to further political causes, but as Mutulu Shakur, the man who speaks out against gang violence, against inmate-on-inmate violence, ... and in support of empathy, understanding and healing*. That's who my dad is now.

Appendix 1 at 4-5.

130. New evidence was offered in the form of a letter by Reverend Anthony Evans, President of the National Black Church Initiative, along with 70 other faith based leaders, who wrote in part:

> … [Plaintiff] has consistently promoted and supported the peaceful resolution of social conflicts. Use of the salutation "stiff resistance" [a factor considered by the Commission in 2016] in no way invokes the notion that Dr. Shakur was encouraging others to engage in lawless behavior. *To dissuade the Commission from this misunderstanding, ... Dr. Shakur has even stopped using the salutation "stiff resistance*." … There are many examples of individuals engaging in "stiff resistance" to personal failure, bad habits, selfishness or even the temptation of crime.

Appendix 1 at 5 (emphasis added).

131. Despite the submission of this array of new evidence, including a letter from a top BOP official and testimony by BOP staff all making clear that Plaintiff's positive institutional conduct made it extremely unlikely he will



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reoffend if released on parole, the Commission denied parole concluding that "the Commission finds that there have been no significant developments or changes in your case as to warrant a change in the previous decision to deny mandatory parole and continue [your incarceration] to expiration [of your 60 year sentence]." May 2018 Notice of Action, Appendix 3, at 1. *See also* July 2018 Notice of Action, Appendix 5, at 1 (same). The finding that the evidence presented disclosed "no significant developments or changes" in Plaintiff's case was arbitrary and unreasonable.

**L. The Commission's consideration of and retaliation against Plaintiff's non-violent, protected political speech violates the First Amendment.**

132. By denying Shakur parole on the basis of his use of the phrases "stiff resistance" and "political prisoner" and his criticism of the FBI's illegal COINTELPRO, the Commission not only considered evidence irrelevant to Plaintiff's release pursuant to § 4206(a) or (d), it unconstitutionally retaliated against Plaintiff's protected speech.

133. Congress intended that mandatory parole apply to all prisoners eligible under § 4206(d) "except those offenders who have *the greatest probability of committing violent offenses* following their release so that parole supervision is part of their transition from the institutional life of imprisonment to living in the community." Joint Explanatory Statement, H.R.Rep.No.5727,



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80th Cong., 1st Sess. reprinted in [1976] U.S.Code Cong. and Admin.News, pp. 335, 360 (emphasis added).

134. The Commission's conclusion that Plaintiff's non-violent protected speech is a basis for denying him parole under § 4206(d) is arbitrary, capricious and a violation of the limited First Amendment rights prisoners possess.

**M. The Commission considered and included irrelevant testimony from AUSA Jacobson and retired FBI Agent Mitchell on Plaintiff's post-conviction conduct during his over 30 years of federal custody and on Plaintiff's likelihood to commit violent offenses upon release.**

135. Permitting the lengthy and one-sided testimonies of Assistant United States Attorney Elliott Jacobson and retired FBI Agent David Mitchell, at the 2016 hearing, and AUSA Jacobson's statements in the 2018, hearing raises statutory and due process concerns inasmuch as Plaintiff had no prior knowledge that these written statements and oral testimonies would be considered by the Commission, their statements went far afield of the conduct charged in Plaintiff's case, and they were not in a position to authoritatively comment on Plaintiff's *current* level of remorse or rehabilitation, or his prison rules violations that may reflect on his likelihood to reoffend.[43] Plaintiff and his

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43 *See, e.g.* Jacobson letter to USPC dated March 14, 2016, at 4-5 ("Although Shakur has spent the last thirty years in prison, he shows no signs of being rehabilitated. To our knowledge Shakur has: never admitted his guilt; never expressed one iota of remorse for the many victims of his murderous and prolonged crime spree; and never once rejected the violent tactics and ideology that resulted in his arrest and conviction."); *Id.* at 5 ("Nor is there anything in his … post-trial conduct that indicates he is inclined to do anything other than to



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representative were not informed of the written statements submitted by Jacobson and Mitchell or their intent to provide oral testimony until the dates of the hearings on April 7, 2016, and May 3, 2018.

136. The Hearing Examiner's Post Hearing Assessment states in part: "Victim(s) provided written or telephonic communication prior to the hearing." Appendix 7 at 4. These statements were not provided to Plaintiff prior to the hearing as required by the Commission's regulations.

137. Allowing testimony and written statements from law enforcement officials about the post-conviction conduct of the Plaintiff almost *thirty years after these officials were involved in the case* indicates an inappropriate delegation of discretionary authority.[44]

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pick up where he left off when he was arrested in 1986. … There is every reason to believe that notwithstanding the many years he spent behind bars and his age, Shakur presents a serious danger to the law abiding community if he is released on parole."); Mitchell letter to USPC dated March 24, 2016, at 4 ("Mutulu Shakur … continues to profess … that he is a 'political prisoner,' wrongfully targeted by the FBI. The evidence presented at trial and statements by his co-conspirators directly and convincingly contradict this absurd position." This "absurd" position was in fact, as noted *supra* at ¶ 105, the position of the criminal trial judge).

[44] The legislative history indicates Congress intended "that parole decision making be independent of … the investigative and prosecutorial functions of the Department of Justice." S. Rep. No. 94-648, at 21 (1976) (Conf. Rep.). This independence was intended by Congress to "guard against influence in case decisions." S. Rep. No. 94-369, at 20 (1975). However, here the Parole Commission granted undue authority to the prosecutor and investigator over matters outside their purview, such as Plaintiff's post-conviction institutional conduct and Plaintiff's current state of mind.



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138. Despite its rule at 28 CFR § 2.55 stating that at subsequent hearings "the Commission only considers information concerning significant developments or changes in the prisoner's status since … a prior interim hearing," the Commission denied parole in 2016 (and incorporates its 2016 decision into its 2018 decision) based in part on the statements of Jacobson, Mitchell and other victims' relatives and associates even though prior to 2016 the Commission had never relied on these statements to deny parole. Nor did these statements remotely address "significant developments or changes in the prisoner's status since … a prior interim hearing."

**N. Data released by the Commission under the FOIA shows that the Commission has applied alleged rule violations far differently in Plaintiff's case than in any other federal inmate's case.**

139. In their FOIA Response dated September 23, 2016, the Parole Commission provided Plaintiff with Notices of Action for every Mandatory Parole Decision that the Commission issued in the past 24 months.

140. The Notices of Action issued by the Commission over the past two years show that when the Commission denied a prisoner parole based on "frequent" rule violations, the mean number of violations was 20.5 with the highest number being 53 and the lowest being 7.[45] *Plaintiff has a handful of*

45 In the case of the prisoner denied mandatory parole for 7 rule violations, nearly all of the offenses involved serious acts of violence, including killing multiple inmates, several assaults, possessing weapons, and threatening bodily harm.



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*minor rule violations in 28 years*. With regard to Plaintiff's single, 27-year old "serious" violation for a "positive" urine test, it appears that not one prisoner was denied parole based on a single rule violation involving drugs. In every case in which the Commission cited drug use as a basis of denial, it was either for frequent drug abuses or it was followed by a violent offense. Plaintiff has never incurred a single rule violation involving violent speech or conduct in over 30 years of Federal incarceration.

**O. The Commission failed to take into consideration the Comprehensive Risk Assessment Report regarding Plaintiff's rehabilitation**

141. Plaintiff's pre-hearing submission urged the Commission to consider the Comprehensive Risk Assessment Report prepared by Dr. Jonathan Mathew Fabian, Psy.D, J.D., ABPP.[46] Dr. Fabian reports in relevant part: "There was no elevation for psychopathy or severe criminal personality. There was no clinically significant elevation for intra/interpersonal problems, alcohol/drug problems, aggression or negative social influences." Forensic Psychological Evaluation, Forensic

[46] In evaluating the Plaintiff, Dr. Fabian administered and considered several well established tests/criteria including the Federal Post-Conviction Risk Assessment, Level of Service Inventory-Revised (LSI-R), the Hare Psychopathy Checklist-Revised (Hare PCLR), and the Inventory of Offender Risk, Needs, and Strengths (IORNS). These are all tests commonly used by law enforcement agencies, courts and experts to assess the risk of someone offending if released from custody on probation or parole.



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Neuropsychological Evaluation, Pre-Parole Risk Assessment at 15.[47] It is Dr. Fabian's opinion that his score on the Hare PCL-R is about 7, indicating very low and no significant anti-social and psychopathic personality traits. *Id*. at 14.

142. Dr. Fabian concludes: "[Today the Plaintiff] is more an advocate of equal human rights through peaceful means … He has not been involved with gang-related behaviors or the Black Guerilla family, for example. Rather, he has been considered as a mentor and a peacekeeper within the prison system …" *Id*.

## FIRST CLAIM FOR RELIEF

VIOLATION OF PAROLE COMMISSION AND REORGANIZATION ACT 18 U.S.C. § 4206(D) AS INTERPRETED AND APPLIED IN 28 C.F.R. § 2.53 BY EFFECTIVELY MAKING DENIAL OF MANDATORY PAROLE A FINAL AND PERMANENT DENIAL OF PAROLE

143. Plaintiff realleges and incorporates into this claim of relief the allegations made in paragraphs 1-142 of this Complaint.

144. The Commission's regulation and policy applied in this case and all similar cases precluding release on parole under § 4206(a) if the Commission finds an inmate ineligible for release under § 4206(d) conflicts with the Parole Commission and Reorganization Act.

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[47] On the LSI-R test, "he presents as a low-risk/needs group. His cumulative frequency for prison inmates was 6.6%, meaning that 93-94% of the inmates would have higher scores than him." *Id*. at 15.



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145. The Commission's failure to issue standards or rules regarding its interpretation of the terms "serious" and "frequently" used in § 4206(d) leads to ad hoc and unreasonable application of these terms in parole decisions and violates the Parole Commission and Reorganization Act and prisoners' rights to due process and equal protection under the Fifth Amendment.

146. Plaintiff and those similarly situated are therefore in custody in violation of the laws of the United States.

## SECOND CLAIM FOR RELIEF

THE BUREAU OF PRISONS VIOLATED ITS REGULATIONS, DUE PROCESS AND EQUAL PROTECTION BY CHARGING PLAINTIFF WITH AN OFFENSE NOT DEFINED IN DEFENDANT'S RULES, DESTROYING THE PRIMARY EVIDENCE ALLEGEDLY SHOWING A TELEPHONE RULE VIOLATION, ASSIGNING A HEARING DISCIPLINARY OFFICER NOT QUALIFIED UNDER BOP RULES, AND THWARTING PLAINTIFF'S ABILITY TO FILE A TIMELY APPEAL.

147. Plaintiff realleges and incorporates into this claim of relief the allegations made in paragraphs 1-142 of this Complaint.

148. The BOP violated its rules and procedures and the due process clause of the Fifth Amendment when it found Plaintiff had violated prison rules when no BOP rule states that an inmate may not be placed on a speaker phone when calling someone on the prisoner's approved telephone list and speak to other people present with the person called.



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149. The BOP violated its rules and procedures and the due process clause of the Fifth Amendment when it destroyed the tape recording of the telephone call that formed the basis for the disciplinary charge over Plaintiff's objection prior to the hearing and resolution of any appeals. BOP's Inmate Discipline Program requires that "if the inmate requests exculpatory evidence, such as video or audio surveillance, the investigator must make every effort to review and preserve the evidence." BOP Prog. Stat. 5270.09 § 541.5(b)(2) (July 8, 2011). *See also* 28 C.F.R. 541.7(e) (stating that prisoners "are entitled to make a statement and present documentary evidence to the UDC on [their] own behalf."); 28 C.F.R. § 541.8(f) (stating that prisoners "are entitled to make a statement and present documentary evidence to the DHO on [their] own behalf.").

150. The BOP also violated Plaintiff's due process and equal protection rights by charging him with a rule violation when other similarly situated prisoners are never similarly charged.

151. The BOP also violated Plaintiff's right to a fair hearing when in violation of its own rules it assigned an unqualified staff member to serve as the Disciplinary Hearing Officer in this case. See 28 C.F.R. § 541.16(a).

152. Plaintiff is therefore in custody in violation of the laws of the United States.



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## THIRD CLAIM FOR RELIEF

VIOLATION OF PAROLE COMMISSION AND REORGANIZATION ACT, AGENCY REGULATIONS, THE ADMINISTRATIVE PROCEDURES ACT, AND DUE PROCESS BY FAILING TO PROVIDE PRE-HEARING DISCLOSURES.

153. Plaintiff realleges and incorporates into this claim of relief the allegations made in paragraphs 1-142 of this Complaint.

154. 28 U.S.C. § 4208(b) and 28 C.F.R. § 2.55 require the Commission provide certain pre-hearing disclosures to inmates appearing in parole hearings. These provisions are mandatory and so they also create a liberty interest that inmates possess to receive pre-hearing disclosures. The Commission's failure to provide full pre-hearing disclosure violated the Parole Commission and Reorganization Act, the Administrative Procedures Act, the Commission's promulgated regulations, and the due process clause of the Fifth Amendment as this failure deprived Plaintiff of a fundamentally fair parole hearing leading to the denial of release on parole.

155. Plaintiff is therefore in custody in violation of the laws of the United States.

## FOURTH CLAIM FOR RELIEF

THE COMMISSION VIOLATED ITS RULES, DUE PROCESS AND EQUAL PROTECTION BY RELYING UPON ALLEGEDLY ADVERSE FACTORS NOT RELIED UPON BY THE COMMISSION IN PREVIOUS PAROLE HEARINGS.

156. Plaintiff realleges and incorporates into this claim of relief the allegations made in paragraphs 1-142 of this Complaint.



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157. Despite its rule at 28 C.F.R. § 2.55 stating that at subsequent hearings "the Commission only considers information concerning significant developments or changes in the prisoner's status since … a prior interim hearing" (emphasis added), the Commission denied parole in 2016 and 2018 based on numerous facts and allegedly adverse evidence the Commission had not relied upon in Plaintiff's 2014 and previous parole hearings, including (i) the written submissions and testimony of U.S. Attorney Jacobson and former FBI agent Mitchell, (ii) the fact that over 30 years Plaintiff had sometimes referred to himself as a "victim" of the FBI's illegal COINTELRO program, (iii) the fact that over 30 years Plaintiff had sometimes referred to himself as a "political prisoner," (iv) the fact that over 30 years Plaintiff had sometimes signed letters with the salutation "stiff resistance," (v) the fact that in 2003 Plaintiff had minor telephone use violations, and (vi) the fact that over 27 years before the hearing Plaintiff had a rule violation for a positive urine test. In 2014 the Commission denied parole (after the Hearing Examiner recommended granting parole) only because in 2013 the Plaintiff had a rule violation based on his telephone call to Professor Karen Stanford who briefly placed him on a speakerphone so his comments supporting non-violent social change could be heard by university students. None of the matters described above involved "significant developments or changes in the prisoner's status since … [the] prior interim hearing …" 28 C.F.R. § 2.55.



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158. Plaintiff is therefore in custody in violation of the laws of the United States.

## FIFTH CLAIM FOR RELIEF

THE COMMISSION MISCONSTRUED THE PLAIN MEANING OF AND VIOLATED 18 U.S.C. § 4206(D) BY PRETEXTUALLY FINDING A SINGLE 28-YEAR-OLD POSITIVE DRUG TEST A "SERIOUS" VIOLATION FOREVER PRECLUDING PAROLE.

159. Plaintiff realleges and incorporates into this claim of relief the allegations made in paragraphs 1-142 of this Complaint.

160. Before and again in 2018 the Commission failed to disclose its criteria for deciding whether an old prison rule violation was "serious" preventing release under 28 USC § 4206(d), and inconsistently and arbitrarily concluded some rule violations are serious and others not, including escapes and attempted escapes, which are obviously more serious than the ancient positive drug test used as a basis to deny parole in this case. The Commission's failure to issue guidelines or standards regarding its interpretation of the term "serious" as used in § 4206(d) and its inconsistent application of the term violates the Parole Commission and Reorganization Act and the due process clause and equal protection guarantee of the Fifth Amendment as this failure deprived Plaintiff and others similarly situated of fundamentally fair parole hearings.



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161. Plaintiff is therefore in custody in violation of the laws of the United States.

## SIXTH CLAIM FOR RELIEF

THE COMMISSION'S VIOLATION OF REGULATIONS, DUE PROCESS AND EQUAL PROTECTION BY RELYING UPON PLAINTIFF'S ALLEGED 2013 TELEPHONE RULE VIOLATION

162. Plaintiff realleges and incorporates into this claim of relief the allegations made in paragraphs 1-142 of this Complaint.

163. The Commission's denial of parole based on an alleged rule violation involving a February 5, 2013 telephone call by Plaintiff to a group of university students violates the Parole Commission and Reorganization Act and the due process clause of the Fifth Amendment inasmuch as the Commission was fully advised that (i) the telephone call violated no known BOP rule, (ii) the BOP destroyed the tape recording of the call prior to the disciplinary hearing, (iii) the BOP thwarted the Plaintiff's ability to appeal the decision of a rule violation because he was in lock down when the appeal was due, and (iv) the Disciplinary Hearing Officer was not qualified to preside over the disciplinary hearing under BOP rules.

164. Plaintiff is therefore in custody in violation of the laws of the United States.

## SEVENTH CLAIM FOR RELIEF



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THE COMMISSION MISCONSTRUED THE PLAIN MEANING OF AND VIOLATED 18 U.S.C. § 4206(D) WHEN IT HELD THAT A HANDFUL OF MINOR RULE VIOLATIONS OVER 30 YEARS WERE "FREQUENT".

165. Plaintiff realleges and incorporates into this claim of relief the allegations made in paragraphs 1-142 of this Complaint.

166. The Commission's denial of parole based on the conclusion that Plaintiff "frequently" violated institutional rules because of four minor non-violent rule violations involving use of the telephones and one positive urine test over a thirty year period is inconsistent with and an unreasonable interpretation of § 4206(d). Section 4206(d) creates a liberty interest that inmates possess to have the Commission adopt a consistent and rational standard for what constitutes "frequent[ ]" rule violations and to have the rule applied consistently to Plaintiff and all similarly situated inmates considered for release on parole. The Commission's failure to issue guidelines or standards regarding its interpretation of the term "frequently" as used in § 4206(d) and its inconsistent application of the term violates the Parole Commission and Reorganization Act and the due process clause and equal protection guarantee of the Fifth Amendment as this failure deprived Plaintiff of a fundamental fair parole hearing.

167. Plaintiff is therefore in custody in violation of the laws of the United States.



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## EIGHTH CLAIM FOR RELIEF

THE COMMISSION MISCONSTRUED AND VIOLATED 18 U.S.C. § 4206(D) WHEN IT ERRONEOUSLY CONCLUDED PLAINTIFF IS LIKELY TO REOFFEND IF RELEASED BECAUSE IN THE PAST HE HAS REFERRED TO HIMSELF AS A "VICTIM" OF THE FBI'S COINTELPRO PROGRAM.

168. Plaintiff realleges and incorporates into this claim of relief the allegations made in paragraphs 1-142 of this Complaint.

169. The Commission unreasonably and unlawfully concluded Plaintiff is likely to reoffend if released on parole because he has referred to himself as a subject of the FBI's illegal COINTELRO program. In fact, Trial Judge Haight, Jr. stated in this case that documents obtained under the FOIA "demonstrate that for a considerable time Shakur …[has] been the subject of illegal surveillance, harassment, and disinformation by the FBI as part of that lamented, unconstitutional project known as COINTELPRO." *United States v. Shakur*, 1988 U.S. Dist. LEXIS 2762, pp. 16-17 (F, 1988). The Commission also violated its regulations by relying on Plaintiff's statement that he was a victim of the COINTELPRO program, when it did not rely on this conduct in its earlier parole hearings and decisions. Section 4206(d) creates a liberty interest that inmates will have a fair hearing and will not be denied parole based on false facts relied upon by the Commission contradicted by undisputed facts set forth in the record.



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170. Plaintiff is therefore in custody in violation of the laws of the United States.

## NINTH CLAIM FOR RELIEF

THE COMMISSION MISCONSTRUED AND VIOLATED 18 U.S.C. § 4206(D) WHEN IT ERRONEOUSLY CONCLUDED PLAINTIFF IS LIKELY TO REOFFEND IF RELEASED BECAUSE IN THE PAST HE HAS REFERRED TO HIMSELF AS A "POLITICAL" PRISONER.

171. Plaintiff realleges and incorporates into this claim of relief the allegations made in paragraphs 1-142 of this Complaint.

172. The Commission unreasonably and unlawfully concluded Plaintiff is likely to reoffend if released on parole because he has in the past referred to himself as a "political" prisoner. Plaintiff has never argued that his conviction is "political" in nature. He has said that the crimes of which he was convicted were politically motivated. The indictment itself discusses the political nature of the crimes charged. During the trial, U.S. District Judge Charles S. Haight, Jr. acknowledged the political nature of Plaintiff's history, circumstance, motivation and intentions related to his conviction. These facts are in the record but were ignored by the Commission. The Commission also violated its regulations by relying on Plaintiff's use of the term "political" prisoner when it did not rely on this conduct in its earlier parole hearings and decisions. Section 4206(d) creates a liberty interest that inmates will have a fair hearing, will not be denied parole based on false facts relied upon by the Commission



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contradicted by facts set forth in the record, and will be treated in a manner similar to similarly situated inmates seeking release on parole.

173. Plaintiff is therefore in custody in violation of the laws of the United States.

## TENTH CLAIM FOR RELIEF

THE COMMISSION MISCONSTRUED AND VIOLATED 18 U.S.C. § 4206(D) WHEN IT ERRONEOUSLY CONCLUDED PLAINTIFF IS LIKELY TO REOFFEND IF RELEASED ON PAROLE BECAUSE HE HAS OCCASIONALLY ENDED LETTERS WITH THE SALUTATION "STIFF RESISTANCE".

174. Plaintiff realleges and incorporates into this claim of relief the allegations made in paragraphs 1-142 of this Complaint.

175. The Commission unreasonably and unlawfully concluded Plaintiff is likely to reoffend if released on parole because he has twice long ago ended letters with the salutation "stiff resistance." Plaintiff made clear that the salutation "stiff resistance" has been to serve to fortify an individual's character and resolve in the face of their specific challenges, and Plaintiff has "never intended its use to encourage criminality ..." He renounced using the term "stiff resistance" two years ago. Congress could not possibly have intended that in denying parole the Commission would ignore an inmate's consistent substantive message of peace and conciliation in his letters and public statements for several decades while focusing entirely on a salutation at the close of two letters to keep a rehabilitated inmate in prison likely until he dies.



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The Commission also violated its regulations by relying on Plaintiff's "stiff resistance" salutation when it did not rely on this conduct in its earlier parole hearings and decisions. Section 4206(d) creates a liberty interest that inmates will have a fair hearing, will not be denied parole based on false facts relied upon by the Commission contradicted by facts set forth in the record, and will be treated in a manner similar to similarly situated inmates seeking release on parole.

176. Plaintiff is therefore in custody in violation of the laws of the United States.

## ELEVENTH CLAIM FOR RELIEF

THE COMMISSION MISCONSTRUED AND VIOLATED 18 U.S.C. § 4206(D) WHEN IT UNREASONABLY CONCLUDED PLAINTIFF'S ACCEPTANCE OF RESPONSIBILITY WAS NOT CREDIBLE AND HE IS THEREFORE LIKELY TO REOFFEND IF RELEASED ON PAROLE.

177. Plaintiff realleges and incorporates into this claim of relief the allegations made in paragraphs 1-142 of this Complaint.

178. The Commission unreasonably and unlawfully concluded Plaintiff is likely to reoffend if released on parole because his statements accepting responsibility for the underlying crimes is recent and therefore insincere. Plaintiff has accepted responsibility for the crimes and expressed remorse for many years and there is no evidence his acceptance of responsibility is not sincere. Congress could not possibly have intended that the Commission would



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ignore an inmate's consistent substantive message of peace and conciliation in his letters and public statements for several decades while relying on a finding, unsupported in the record, that his acceptance of responsibility is not sincere and therefore he is likely to reoffend if released on parole. Section 4206(d) creates a liberty interest that inmates will have a fair hearing, will not be denied parole based on conclusions unsupported in the record and disputed by an abundance of uncontroverted facts in the record, and will be treated in a manner similar to similarly situated inmates seeking release on parole.

179. Plaintiff is therefore in custody in violation of the laws of the United States.

## TWELFTH CLAIM FOR RELIEF

THE COMMISSION MISCONSTRUED AND VIOLATED 18 U.S.C. § 4206(D) WHEN IT UNREASONABLY CONCLUDED PLAINTIFF'S CIRCUMSTANCES HAD NOT CHANGED SINCE THE COMMISSION'S PREVIOUS DENIAL OF PAROLE.

180. Plaintiff realleges and incorporates into this claim of relief the allegations made in paragraphs 1-142 of this Complaint.

181. The Commission unreasonably and unlawfully concluded Plaintiff had presented no new facts warranting reconsideration of its prior decision denying parole when Plaintiff in fact presented new evidence including an unequivocal assessment by BOP leadership that Plaintiff is rehabilitated and is unlikely to reoffend if released on parole, firm and realistic job offers, and uncontroverted evidence that for two years Plaintiff no longer used the



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salutation "Stiff Resistance." Section 4206(d) creates a liberty interest that inmates will have a fair hearing, will not be denied parole based on conclusions unsupported in the record and disputed by an abundance of uncontroverted facts in the record, and will be treated in a manner similar to similarly situated inmates seeking release on parole.

182. Plaintiff is therefore in custody in violation of the laws of the United States.

## THIRTEENTH CLAIM FOR RELIEF

### VIOLATION OF DUE PROCESS AND EQUAL PROTECTION BY COMMISSION ADOPTING RULE VIOLATIONS DIFFERENTLY IN PLAINTIFF'S CASE THAN IN OTHER FEDERAL INMATES' CASES OVER THE PAST SEVERAL YEARS

183. Plaintiff realleges and incorporates into this claim of relief the allegations made in paragraphs 1-142 of this Complaint.

184. The Commission unreasonably and without any rational basis, in violation of the equal protection guarantee of the Fifth Amendment, treated Plaintiff's eligibility for release on parole far more harshly than the manner in which it adjudicated all other parole cases. There is no lawful basis for this disparate and discriminatory treatment. In this case the Commission failed to act as a neutral, unbiased decision-maker, and made arbitrary and result-oriented decisions aimed at denying Plaintiff release on mandatory or discretionary parole.



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185. Plaintiff is therefore in custody in violation of the laws of the United States.

## FOURTEENTH CLAIM FOR RELIEF

### FIRST AMENDMENT RETALIATION

186. Plaintiff realleges and incorporates into this claim of relief the allegations made in paragraphs 1-142 of this Complaint.

187. The Commission's focus on Plaintiff's protected non-violent political speech in its Notices of Decision violated Plaintiff's rights to political speech under the First Amendment.

188. Plaintiff is therefore in custody in violation of the laws of the United States.

## FIFTEENTH CLAIM FOR RELIEF

### THE COMMISSION VIOLATED THE PAROLE COMMISSION AND REORGANIZATION ACT AND REGULATIONS PROMULGATED THEREUNDER BY CONSIDERING IRRELEVANT TESTIMONY FROM A FORMER PROSECUTOR AND FBI INVESTIGATOR AS TO PLAINTIFF'S POST-CONVICTION CONDUCT AND STATE OF MIND.

189. Plaintiff realleges and incorporates into this claim of relief the allegations made in paragraphs 1-142 of this Complaint.

190. The testimony of AUSA Jacobson and retired FBI Agent Mitchell as to Plaintiff's post-conviction conduct and current state of mind and conscience in 2016, and adoption of its 2016 decision in 2018, were irrelevant and considered in contravention of the Commission's duties under the PCRA to



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remain independent of prosecutorial influence and to exclude any repetitious or irrelevant testimony.

191. Plaintiff is therefore in custody in violation of the laws of the United States.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Order Plaintiff released on parole or alternatively order a prompt new parole hearing held in compliance with relevant statutes, the Commission's extant rules and regulations, and the Constitution;

2. Certify a class as proposed herein and issue a declaratory judgment and permanent injunction requiring that the Commission must consider Plaintiff and similarly situated prisoners for release on parole under the terms of both 18 U.S.C. § 4206 (a) and (d), and issue standards regarding and consistently apply its interpretation of the terms "serious" and "frequently" as used in § 4206(d);

3. Issue a declaratory judgment that the Commission's failure to provide Plaintiff with pre-hearing records or evidence the Commission relied upon to deny release in 2016 and 2018 violated the Parole Commission and Reorganization Act, the regulations issued thereunder, and the due process guarantee of the Fifth Amendment and issue a permanent injunction enjoining the Commission in any further parole hearing from not disclosing to Plaintiff 30



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days prior to the hearing any records or evidence the Commission intends to rely upon in making a parole decision;

4. Issue a declaratory judgment that the Commission's reliance on allegedly adverse facts or evidence predating previous parole hearings and that the Commission did not rely upon in earlier hearings in order to deny parole violates the Parole Commission and Reorganization Act, the regulations issued thereunder, and the due process and equal protection guarantees of the Fifth Amendment, and issue a permanent injunction enjoining the Commission in any further parole hearing from relying on alleged adverse facts or evidence predating previous parole hearings and that the Commission did not rely upon in earlier hearings in order to deny parole;

5. Issue a declaratory judgment that the Commission's failure to issue standards and ad hoc approach regarding how it defines "serious" rule violations and whether Plaintiff has "frequently" violated rules precluding release un §4206(d) violates the Parole Commission and Reorganization Act, the regulations issued thereunder, and the due process and equal protection guarantees of the Fifth Amendment, and issue a permanent injunction enjoining the Commission in any further parole hearing from denying release on parole based on Plaintiff's alleged past "serious" rule violations or having "frequently" violated rules without providing Plaintiff with the Commission's interpretation of these terms equally applied to all prisoners eligible for release under §



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4206(d);

6. Issue a declaratory judgment that the Commission's reliance on Plaintiff's past occasional reference to himself as a victim of COINTELPRO, a "political" prisoner, and twice using the salutation "stiff resistance" to deny parole violates the Parole Commission and Reorganization Act, the regulations issued thereunder, and the First Amendment and due process and equal protection guarantees of the Fifth Amendment, and issue a permanent injunction enjoining the Commission in any further parole hearing from denying release because Plaintiff in the past occasionally referred to himself as a victim of COINTELPRO, a "political" prisoner, and on two known occasions used the salutation "stiff resistance";

7. Issue a declaratory judgment that the Commission's failure to consider Plaintiff's exemplary prison record and repeated and long-standing stand against violence to achieve social change violates the Parole Commission and Reorganization Act, the regulations issued thereunder, and the due process and equal protection guarantees of the Fifth Amendment, and issue a permanent injunction enjoining the Commission in any further parole hearing from ignoring Plaintiff's exemplary prison record and repeated and long-standing stand against violence to achieve social change;

8. Issue a declaratory judgment that the Commission's reliance on a 27-year old positive drug test to deny parole violates the Parole Commission and



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Reorganization Act, the regulations issued thereunder, and the due process and equal protection guarantees of the Fifth Amendment, and issue a permanent injunction enjoining the Commission in any further parole hearing from relying on the twenty-seven year old drug test to deny release on parole;

9. Issue a declaratory judgment that the Commission's reliance on old minor telephone rule violations to deny parole because they allegedly show that Plaintiff "frequently" violated prison rules during almost thirty years of incarceration violates the Parole Commission and Reorganization Act, the regulations issued thereunder, and the due process and equal protection guarantees of the Fifth Amendment, and issue a permanent injunction enjoining the Commission in any further parole hearing from relying on these old telephone violations to deny release on parole because they allegedly show Plaintiff "frequently" violated prison rules or because of those old minor rule violations is now likely to reoffend if released on parole;

10. Issue a declaratory judgment that BOP's telephone rule violation of March 20, 2013, and the Commission's reliance on that alleged rule violation to deny parole, regarding Plaintiff's telephone call with a group of university students, was issued and relied upon in violation of BOP rules regarding the substance of rule violations, the qualifications of Disciplinary Hearing Officers, the destruction of evidence, and the appeal rights of prisoners, and violated Plaintiff's due process and equal rights, and issue a permanent injunction



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requiring that the BOP vacate its finding of a rule violation and enjoining the Commission from relying on the alleged rule violation to deny Plaintiff release on parole;

11. Award reasonable attorneys' fees and costs pursuant to 18 U.S.C. § 3006A, 28 U.S.C. § 2412, Federal Rule of Civil Procedure 54, and any other applicable provisions of federal law; and

12. Grant such other relief as Plaintiff may seek and law and justice require.

Dated: August 21, 2018

PETER A. SCHEY
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TERI THOMPSON
TERI THOMPSON, LLC

Signed: /s/Peter A. Schey

/ / /



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CERTIFICATE OF SERVICE

I, Peter Schey, declare and say as follows:

I am over the age of eighteen years of age and am a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 256 S. Occidental Blvd., Los Angeles, CA 90057, in said county and state.

On August 21, 2018, I electronically filed the following document(s):

- FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

with the United States District Court, Central District of California by using the CM/ECF system.

Dated: August 21, 2018

/s/*Peter Schey*

*Attorney for Plaintiffs*



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