[Cite as *State ex rel. Richard v. Mohr*, 2012-Ohio-4413.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Donald Richard et al.,	:	
Relators,	:	
v.	:	No. 11AP-780
Gary C. Mohr, Director, Ohio Department of Rehabilitation and Correction et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

D E C I S I O N

Rendered on September 27, 2012

Donald Richard, Dennis Calo, and *Ronald Jolly*, pro se.

Michael DeWine, Attorney General, and *David Picken*, for respondents.

IN MANDAMUS
ON OBJECTIONS TO THE MAGISTRATE'S DECISION

BROWN, P.J.

{¶ 1} Relators, Donald Richard, Dennis Calo, and Ronald Jolly, have filed an original action requesting that this court issue a writ of mandamus ordering respondents, Gary C. Mohr, Director, Ohio Department of Rehabilitation and Correction, Harry Hageman, Chief, Ohio Adult Parole Authority, and Cynthia Barbara Mausser, Chair, Ohio Parole Board, to consider their applications for parole under the statutorily delegated administrative regulation, Ohio Adm.Code 5120:1-1-10(B), as effective January 2, 1979. Respondents have filed a motion to dismiss relators' complaint.

{¶ 2} This matter was referred to a magistrate of this court pursuant to Civ.R. 53(C) and Loc.R. 13(M) of the Tenth District Court of Appeals. The magistrate issued the appended decision, including findings of fact and conclusions of law, recommending that this court grant respondents' motion to dismiss.

{¶ 3} Relators have filed objections to the magistrate's decision, arguing that the magistrate erred in failing to find they are entitled to annual parole hearings. Relators have also filed a motion, pursuant to Evid.R. 201, requesting this court to take "judicial notice" of a federal court decision, *Michael v. Ghee*, 498 F.3d 372 (6th Cir.2007).

{¶ 4} Relators' primary contention before the magistrate was that they were all incarcerated prior to the 1998 version of Ohio Adm.Code 5120:1-1-10, effective March 16, 1998, and therefore should be subject to the earlier version of that regulation, as effective January 2, 1979. Relators argued that, pursuant to the 1979 version of Ohio Adm.Code 5120:1-1-10, they were entitled to a second parole hearing within five years of their first hearing, and were also entitled to annual parole hearings thereafter. In support of their claimed right to have respondents apply the 1979 version of the administrative regulations, relators cited R.C. 5120.021(A), which states in part: "The provisions of Chapter 5120. of the Revised Code, as they existed prior to July 1, 1996, and that address the duration or potential duration of incarceration or parole or other forms of supervised release, apply to all persons upon whom a court imposed a term of imprisonment prior to July 1, 1996."

{¶ 5} In their objections, relators do not dispute the magistrate's determination that respondents cannot go back in time to correct any failure to provide relators with second hearings within five years of their first hearings. Relators maintain, however, that the magistrate erred in rejecting the claim they are entitled to annual parole hearings based upon application of the 1979 version of Ohio Adm.Code 5120:1-1-10(B)(2).

{¶ 6} Upon review, we find no error with the magistrate's recommendation that this court should grant respondents' motion to dismiss. Under Ohio law, relators have no "inherent or constitutional right to release on parole before the expiration of [a] valid sentence." *Festi v. Ohio Adult Parole Auth.*, 10th Dist. No. 04AP-1372, 2005-Ohio-3622, ¶ 14. Further, because the decision to grant or deny parole is discretionary with the Ohio Adult Parole Authority, "denial of parole does not deprive an inmate or any protected

liberty interest upon which he can base a due process claim." *Id.* Nor can relators establish that application of the amended 1998 version of Ohio Adm.Code 5120:1-1-10(B)(2), which does not require annual parole hearings, constitutes ex post facto imposition of punishment. Rather, "Ohio courts have consistently rejected arguments that changes in Ohio's parole procedures constitute an ex post facto violation." *Smith v. Ohio Adult Parole Auth.*, 2d Dist. No. 2009 CA 22, 2010-Ohio-1131, ¶ 67. *See also Harris v. Ohio Adult Parole Auth.*, 10th Dist. No. 05AP-451, 2005-Ohio-5166, ¶ 11 ("it is well settled in Ohio that since an inmate has no constitutional right to parole, a change in parole eligibility does not amount to an ex post facto imposition of punishment").

{¶ 7} Relators argue that the magistrate failed to address the provisions of R.C. 5120.021. The magistrate, however, relied in part upon the decision in *Robinson v. Tambi*, 4th Dist. No. 03CA17, 2004-Ohio-2823, in which the defendant in that case raised the same argument as relators in the instant action. Specifically, the defendant in *Tambi*, who was convicted in 1973, relied upon the 1979 version of Ohio Adm.Code 5120:1-1-10(B) to argue he was entitled to annual parole hearings. The court in *Tambi* noted that "[u]nder the current version of the Administrative Code, a prisoner is entitled to a parole hearing every ten years," and "[n]othing in the current version requires annual parole hearings." *Id.* at ¶ 20. The court in *Tambi* found that "the change in the parole guidelines designating when an offender is entitled to parole hearings does not amount to an Ex Post Facto law." *Id.* at ¶ 16.

{¶ 8} The court in *Tambi* further held:

> [W]hile a prisoner has a reasonable expectation that he will "receive meaningful consideration for parole," * * * the mere presence of a parole system does not give rise to a constitutionally protected liberty interest in release on parole. * * * Because a prisoner does not have a substantive liberty interest in parole, he cannot challenge the procedures used to deny him parole and demand an annual hearing.
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> * * *
>
> In the case at bar, appellant has not alleged that he has been deprived of a meaningful parole consideration, but instead believes that he is entitled to *annual* meaningful parole hearings. As we have previously stated, however, neither the

> parole statutes nor regulations require annual parole hearings. Additionally, because appellant has no constitutional right to parole, "he has no similar right to earlier consideration of parole.

(Citations omitted.) (Emphasis sic.) *Id*. at ¶ 21, 23.

{¶ 9} Similarly, in the instant case, the magistrate found that relators "have not alleged that they were deprived of meaningful parole hearings." We find no error with that determination. Further, "state prisoners challenging the conditions of their confinement have an adequate legal remedy by way of an action under Section 1983, Title 42, U.S. Code." *Douglas v. Money*, 85 Ohio St.3d 348, 349 (1999). Finally, to the extent that relators claim they should be released from prison, "habeas corpus is the appropriate action." *State ex rel. Bealler v. Ohio Adult Parole Auth.*, 91 Ohio St.3d 36, 37 (2001).

{¶ 10} As noted above, relators have filed a motion, pursuant to Evid.R. 201, requesting this court to take "judicial notice" of a federal decision from the Sixth District Court of Appeals. Relators request for judicial notice under Evid.R. 201 is denied, as that rule pertains to judicial notice of "adjudicative facts." This court may, however, take notice of decisions from other courts, including federal case law, and we will therefore address relators' supplemental arguments with respect to *Ghee,* a case in which the plaintiffs, prisoners in Ohio correctional facilities who were sentenced prior to the enactment of Am.Sub.S.B. No. 10 in 1996, challenged the Ohio Adult Parole Authority's practices, procedures, and proceedings. Relators do not address the actual holding in *Ghee,* but rather cite a paragraph in which the court outlined the history of Ohio's former sentencing law, including the court's recognition that indeterminate sentences had been abandoned, and that the new system does not apply retroactively to Ohio inmates sentenced under the former sentencing scheme.

{¶ 11} Relator's citation to this passage, as support for their argument that retroactive application of administrative regulations or guidelines to inmates sentenced prior to 1998 is prohibited, is not persuasive. In the *Ghee* decision itself, the court determined that the plaintiffs had "not shown that a genuine issue of material fact exists regarding whether the retroactive application of the 1998 guidelines, either on their terms or as applied to plaintiffs, creates a 'sufficient risk of increasing the measure of

punishment attached to the covered crimes.' " *Ghee* at 384. We note that other federal courts, addressing the application of Ohio Adm.Code 5120:1-1-10, have made similar determinations. *See, e.g., Kilbane v. Kinkela,* 24 Fed.Appx. 241 (6th Cir.2001) (rejecting appellants' claim that application of 1998 guidelines, under Ohio Adm.Code 5120:1-1-10 and 5120:1-1-20, violated the Ex Post Facto Clause by increasing the punishment attached to their crimes; "[t]he Ohio regulations by their own terms do not show a significant risk of increased punishment for prisoners"); *Willis v. Capots*, 902 F.2d 1570 (6th Cir.1990) ("Ohio Admin. Code § 5120:1-1-10 is not itself a liberty interest entitled to constitutional due process protection but rather is a procedural device to guide parole release determinations pursuant to Ohio Rev.Code Ann. § 2967.03").

{¶ 12} Based upon this court's independent review of the matter, we find that the magistrate has properly determined the facts and applied the pertinent law to them. Accordingly, we adopt the magistrate's decision as our own, including the findings of fact and conclusions of law contained therein, and relators' objections to the magistrate's decision are overruled. Finally, relators' motion to supplement the evidence, filed on March 16, 2012, is rendered moot. In accordance with the magistrate's recommendation, we hereby dismiss relators' complaint.

Objections overruled; relators' motion for judicial release denied; relators' motion to supplement the evidence rendered moot; respondents' motion to dismiss granted; action dismissed.

KLATT and SADLER, JJ., concur.

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[Cite as *State ex rel. Richard v. Mohr*, 2012-Ohio-4413.]

APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. Donald Richard et al.,	:	
Relators,	:	
v.	:	No. 11AP-780
Gary C. Mohr, Director, Ohio Department of Rehabilitation and Correction et al.,	:	(REGULAR CALENDAR)
Respondents.	:	

M A G I S T R A T E ' S D E C I S I O N

Rendered on December 5, 2011

Donald Richard, Dennis Calo, and Ronald Jolly, pro se.

Michael DeWine, Attorney General, and *David Picken*, for respondents.

IN MANDAMUS
ON RESPONDENTS' MOTION TO DISMISS

{¶ 13} Relators, Donald Richard, Dennis Calo, and Ronald Jolly, have filed this original action requesting that this court order respondents Gary C. Mohr, Director, Ohio Department of Rehabilitation and Correction, Harry Hageman, Chief, Ohio Adult Parole Authority, and Cynthia Barbara Mausser, Chair, Ohio Adult Parole Board to consider their applications for parole under the statutorily delegated administrative regulation Ohio Adm.Code 5120:1-1-10(B) as effective January 2, 1979.

Findings of Fact:

{¶ 14} 1. Relators are inmates currently incarcerated at Grafton Correctional Institution.

{¶ 15} 2. Pursuant to their complaint, all three relators were incarcerated prior to the adoption of Ohio administrative regulations, as effective March 16, 1998, and assert they should be subject to the earlier regulations in effect when they were first imprisoned, specifically bills adopted effective January 2, 1979.

{¶ 16} 3. According to the complaint, Richard was incarcerated on June 8, 1987, received his first parole hearing in August 2002, and his second parole hearing on July 15, 2009. Richard's next parole hearing is scheduled for February 2012.

{¶ 17} 4. Relator Calo was incarcerated on June 4, 1984, received his first parole hearing in January 1999, and apparently his next hearing was rescheduled for ten years later. This ten-year continuance was "interrupted on 7/30/03" and continued to February 2009. Calo's next parole hearing was held in February 2009, and his next parole hearing is scheduled for February 2012.

{¶ 18} 5. Relator Jolly was incarcerated on December 1, 1994, received his first parole hearing in 2002, and was informed that his next hearing was scheduled for 2012. However, Jolly received a special hearing on January 8, 2007, and his next parole hearing is scheduled for sometime in 2012.

{¶ 19} 6. Relators contend that pursuant to the 1979 version of Ohio Adm.Code 5120:1-1-10(B), they were entitled to have their second parole hearings within five years of their first hearings. Because their second parole hearings occurred beyond five years, relators argue that they have been deprived a number of parole hearings. Relators also assert that respondents were/are required to conduct additional hearings every year.

{¶ 20} 7. On October 7, 2011, respondents filed a motion to dismiss relators' complaint because relators have no constitutional or statutory right to parole or to be considered for parole at an earlier date. Respondents also contend that relators have a plain and adequate remedy in the ordinary course of the law because "relators can test the conditions of the confinement by Habeas Corpus and any Constitutional Rights violations by way of 42 U.S.C. of 1983."

{¶ 21} 8. Relators have filed a memorandum in opposition to respondents' motion to dismiss, arguing that they have clearly demonstrated that respondents failed to properly apply the law concerning the length of time between their first and second parole hearings and have failed to provide them annual parole hearings required by law. Because of these failures, relators contend that they have been deprived of several hearings.

{¶ 22} 9. Respondents' motion to dismiss is currently before the magistrate for determination.

Conclusions of Law:

{¶ 23} For the reasons that follow, it is this magistrate's decision that this court should grant respondents' motion to dismiss.

{¶ 24} A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 1992-Ohio-73. In reviewing the complaint, the court must take all the material allegations as admitted and construe all reasonable inferences in favor of the nonmoving party. Id.

{¶ 25} In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint that relator can prove no set of facts entitling him to recovery. *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242. As such, a complaint for a writ of mandamus is not subject to dismissal under Civ.R. 12(B)(6) if the complaint alleges the existence of a legal duty by the respondent and the lack of an adequate remedy at law for relator with sufficient particularity to put the respondent on notice of the substance of the claim being asserted against it, and it appears that relator might prove some set of facts entitling him to relief. *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.*, 72 Ohio St.3d 94, 1995-Ohio-202.

{¶ 26} Relators cite the following portion of Ohio Adm.Code 5120:1-1-10 effective January 2, 1979:

Time of initial parole board hearing

> (A) The initial hearing for all inmates serving indeterminate sentences shall be held on or about the date when they first become eligible for release under the Administrative Code.
>
> (B) In any case in which release is denied at the inmate's initial hearing, a second hearing shall be held as determined by the parole board, unless waived by the parole board, pursuant to rule 5120:1-1-11 of the Administrative Code. * * * In no event shall the second hearing be scheduled later than five years beyond the minimum eligibility date for release consideration * * *. If release is denied at such second hearing, the inmate shall be eligible for annual hearings thereafter.

{¶ 27} Relators all contend that they did not receive their second parole hearings within five years as required by law. Further, relators all contend that, following the second hearings, they were all entitled to receive annual parole hearings.

{¶ 28} To the extent that relators are challenging respondents' failure to provide their second hearings within five years of their first hearing, respondents cannot go back in time and hold those hearings. Richard's second hearing (2009) was held seven years after his first hearing (2002). Calos' second hearing (2009) was held ten years after his first hearing (1999). Apparently, Calos must be arguing that when the ten-year continuance was "interrupted on 7/30/03," this event was not a hearing. If it was a hearing, his second hearing was actually held four years after his first hearing. Although Jolly seems to contend that his second hearing is scheduled for 2012, ten years after his first hearing in 2002, the complaint provides that he received a special hearing in 2007 (within five years of 2002). Nowhere in the complaint does Jolly contend that this "special hearing" was not actually his second parole hearing. As such, it appears that Jolly cannot demonstrate any error. Because respondents cannot go back in time and perform second hearings, relators cannot be granted relief in mandamus. Inasmuch as relators are not entitled to release from prison due to any alleged failure on the part of respondents to hold their second hearings within five years from their first parole hearings, all respondents can do, and are required to do, is follow the requirements of the law hereafter.

{¶ 29} The only argument remaining concerns whether relators are entitled to annual parole hearings. For the reasons that follow, the magistrate finds that they are not.

{¶ 30} Ohio courts have consistently rejected arguments that changes in Ohio's parole procedures constitute an ex post facto violation. In *State ex rel. Henderson v. Ohio Dept. of Rehab. & Corr.*, 81 Ohio St.3d 267, 1998-Ohio-631, the Supreme Court of Ohio held that the application of new administrative rules that changed an inmate's parole eligibility date did not constitute an ex post facto imposition of punishment. The court reasoned that, because the inmate had no constitutional right to parole, the inmate has no similar right to earlier consideration for parole.

{¶ 31} In *Harris v. Wilkinson*, 10th Dist. No. 01AP-598, 2001-Ohio-4052, this court stated:

> * * * [U]nder R.C. 2967.03, a parole decision is discretionary. *State ex rel. Blake v. Shoemaker* (1983), 4 Ohio St.3d 42; *State ex rel. Ferguson v. Ohio Adult Parole Auth.* (1989), 45 Ohio St.3d 355. The OAPA's use of internal guidelines does not alter the decision's discretionary nature. *State ex rel. Hattie v. Goldhardt* (1994), 69 Ohio St.3d 123, 125. Because neither statute nor regulation created the guidelines, and the board need not follow them, they place no "substantive limits on official discretion," and appellant cannot claim any right to have any particular set of guidelines apply. *Olim v. Wakinekona* (1983), 461 U.S. 238, 249, 103 S.Ct. 1741, 1747; see, also, *State ex rel. Cannon v. Ohio Dept. of Rehab. & Corr.* (Oct. 31, 2000), Franklin App. No. 00AP-327, unreported. The Ohio Supreme Court has specifically held that a prisoner has no right to rely on the parole guidelines in effect prior to his parole hearing date, and, thus, any application of amended parole guidelines are not retroactively applied ex post facto. *State ex rel. Bealler v. Ohio Adult Parole Auth.* (2001), 91 Ohio St.3d 36; *Cannon, supra,* citing *State v. Caslin* (Sept. 29, 1998), Franklin App. No. 98AP-463, unreported. Therefore, appellant was deprived of no protected liberty interest when the OAPA used different guidelines than were effective at the time of his conviction, and he can claim no due process rights with respect to the parole determination. See *Jago v. Van Curen* (1981), 454 U.S. 14, 20-21, 102 S.Ct. 31, 35.
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> * * *

> * * * Simply put, an inmate has no vested interest in any particular set of parole guidelines, regulations, or matrices which assist the Parole Board in exercising its discretion, and changes in those matters do not impair any rights enjoyed by state prisoners pursuant to the United States Constitution. *Akbar El v. Wilkinson* (Apr. 28, 1998), S.D. Ohio No. C2-95-472, unreported.

{¶ 32} This same issue present here was addressed by the Fourth District Court of Appeals in *Robinson v. Tambi*, 4th Dist. No. 03CA17, 2004-Ohio-2823. In that case, appellant, Lawrence Dean Robinson, made the same argument that relators make here: the version of Ohio Adm.Code 5120:1-1-10, effective January 2, 1979, entitled him to annual parole hearings. After quoting former Ohio Adm.Code 5120:1-1-10, the court determined that Robinson was not entitled to annual hearings. The court concluded by stating:

> In the case at bar, appellant has not alleged that he has been deprived of a meaningful parole consideration, but instead believes that he is entitled to *annual* meaningful parole hearings. As we previously stated, however, neither the parole statutes nor regulations require annual parole hearings. Additionally, because appellant has no constitutional right to parole, "he has no similar right to earlier consideration of parole." *State ex rel. Henderson v. Ohio Dept. of Rehab. & Corr.* (1998), 81 Ohio St.3d 267, 268 * * *.

{¶ 33} As in *Robinson*, relators here have not alleged that they were deprived of meaningful parole hearings, and neither statutes nor regulations require annual parole hearings. And, because relators have no constitutional right to parole, they have " 'no similar right to earlier consideration of parole.' " Id., citing *Henderson*.

{¶ 34} Finding that relators cannot demonstrate that they are entitled to annual parole hearings, relators cannot demonstrate that they are entitled to a writ of mandamus. Therefore, it is this magistrate's decision that this court should grant respondents' motion to dismiss, and relators' complaint is dismissed.

____/s/ Stephanie Bisca Brooks____
STEPHANIE BISCA BROOKS
MAGISTRATE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).