The Supreme Court of Ohio

# CASE ANNOUNCEMENTS

## December 28, 2016

**[Cite as *12/28/2016 Case Announcements #2,* 2016-Ohio-8439.]**

## MERIT DECISIONS WITHOUT OPINIONS

### 2016-1483. State ex rel. McCall v. Gall.

In Mandamus. This cause originated in this court on the filing of a complaint for a writ of mandamus.

Upon consideration pursuant to S.Ct.Prac.R. 12.04 and upon respondents' answer and motion for judgment on the pleadings, it is ordered by the court that the cause is dismissed.

O'Neill, J., dissents, with an opinion joined by Lanzinger, J.

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**O'NEILL, J., dissenting.**

**{¶ 1}** Respectfully, I dissent from the court's dismissal of this petition for a writ of mandamus.

**{¶ 2}** Relator, Tony McCall, petitions this court for a writ of mandamus commanding Cuyahoga County officials to produce copies of letters he believes the Cuyahoga County prosecuting attorney sent to the parole board in breach of his plea agreement. I believe that a prisoner is entitled to see what has been submitted against him in support of a denial of parole under the Due Process Clauses of the United States and Ohio Constitutions. Courts often state that due process " 'calls for such procedural protections as the particular situation demands.' " *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), quoting *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). But in the context of a hearing under Ohio Adm.Code 5120:1-1-10(A) for the purpose of considering whether granting parole "would further the interests of justice and be consistent with the welfare and security of

society," R.C. 2967.03, this court has decided that the state parole laws do not "create an expectancy of parole upon which [an individual] can base [a] due process claim." *State ex rel. Blake v. Shoemaker*, 4 Ohio St.3d 42, 43, 446 N.E.2d 169 (1983).

**{¶ 3}** I disagree with that conclusion, and I believe it is time to reconsider it. The parole board commonly sets a "projected release date" for prisoners who are denied parole after a hearing. Ohio Adm.Code 5120:1-1-10(B)(1). I believe that this practice creates an "expectancy of release * * * entitled to some measure of constitutional protection." *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 12, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). But more to the point, I believe, contrary to the holding in *Greenholtz*, that every prisoner with a maximum prison term expects to be released someday. In his eyes, that day would be before the end of his imposed sentence. That future-liberty interest should be sufficient to trigger due-process protections at any hearing in which the parole board considers releasing an inmate sooner. Under either theory, McCall is entitled to an "opportunity to be heard" regarding the propriety of parole " 'at a meaningful time and in a meaningful manner.' " *Mathews* at 333, quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). And I believe that there can be no meaningful parole hearing if a prisoner cannot rebut the particular assertions of those who show up to say he should remain in prison.

**{¶ 4}** How can we as a court say that there has been a meaningful hearing when the party requesting the hearing was not permitted the opportunity to inspect and rebut that which was presented? Ignore for a moment the "expectancy of release," which apparently is being summarily dismissed by the majority. The state is making a decision whether to continue the incarceration of one of its citizens. Certainly, liberty is at stake. The current procedure is the modern day equivalent of a Star Chamber proceeding. Imagine, if you will, the following colloquy, which is not only permitted but encouraged by the current law: "Well, Mr. Prisoner, do you have anything else to present? I have heard all your arguments about being rehabilitated, read the favorable comments from your correctional officers, and even considered that glowing letter from your former employer who needs you back on the job. Unfortunately, I also have read many documents, none of which I am going to show you, indicating that you were a bad child, a bad adolescent, a bad neighbor, and generally a bad influence in your neighborhood 20 years ago. Since you have not rebutted that which you have not seen, I really have no choice but to deny your application to be released. Have a nice day. This hearing is adjourned."

**{¶ 5}** That is not due process. It is a badly flawed system that violates the United States and Ohio Constitutions. Daily.

**{¶ 6}** I therefore believe that McCall is entitled to copies of any documents sent to the parole board that were relied upon in determining the outcome of his petition. This is notwithstanding the respondents' argument that these items are not public records.

**{¶ 7}** Respectfully, I dissent.

LANZINGER, J., concurs in the foregoing opinion.

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## RECONSIDERATION OF PRIOR DECISIONS

### 2016-0880. State v. Gall.

Montgomery App. Nos. 26114 and 26115, 2016-Ohio-2748. This cause came on for further consideration upon the filing of appellant's motion for reconsideration. It is ordered by the court that the motion is denied.

O'Neill, J., dissents, with an opinion joined by Lanzinger, J.

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**O'NEILL, J., dissenting.**

**{¶ 1}** Respectfully, I must dissent from the decision to deny reconsideration.

**{¶ 2}** I originally joined the court in voting to deny jurisdiction over this matter and reject the appeal of appellant, Eugene Gall. 146 Ohio St.3d 1514, 2016-Ohio-7199, 60 N.E.3d 6. Upon reflection, I believe that Gall's appeal presents an issue of great importance. For that reason, I would accept his first proposition of law: "If an offender serves time on a nullified, expunged conviction, the sentence is invalid and any time served on that invalid sentence should be credited towards a valid sentence to avoid collateral consequences."

**{¶ 3}** The full course of Gall's history of imprisonment was explained in the opinion of the Second District Court of Appeals. 2016-Ohio-2748, 51 N.E.3d 703, ¶ 2-7 (2d Dist.). Briefly, Gall served many years on death row in Kentucky while waiting to serve consecutive sentences imposed for multiple rapes he committed in Ohio in the late 1970s. *Id.* at ¶ 3-5. In October 2000, the United States Court of Appeals for the Sixth Circuit granted relief in habeas corpus, declared Gall's Kentucky death-penalty conviction unconstitutional, and determined that he could not be retried. *Gall v. Parker*, 231 F.3d 265, 335 (6th Cir.2000). A federal district court later nullified the conviction and ordered it expunged from Gall's record. *Gall v. Scroggy*,

E.D.Ky. No. 2:87-56-DCR, 2008 WL 9463883 (Dec. 4, 2008). The issue before us now is whether the time served in Kentucky should be credited toward Gall's Ohio sentences.

**{¶ 4}** This court once declared that "time served under a conviction which is subsequently vacated and not reimposed should be credited to a prior existing sentence which was not running during the period the accused was in custody under the vacated sentence." *McNary v. Green*, 12 Ohio St.2d 10, 12, 230 N.E.2d 649 (1967). We spoke generally and made no distinction between prison sentences served in this or another state. We called this "the sound rule" to follow in our state, *id*., and based our decision on no other authority—not even a statute.

**{¶ 5}** Only a few courts have considered our ruling in *McNary* in the ensuing decades. In 1967, we did not balk at declaring a rule of law for no other reason than that we thought it was the most reasonable one whenever a prisoner "was deprived of his liberty" illegally. *Id.* at 12. Shortly thereafter, an appellate court applied the rule in *McNary* to the case of a man who had been imprisoned for some time on an invalid charge and credited the time on the invalid charge toward a prison sentence he should have been serving on a valid charge. *State v. Preston*, 20 Ohio App.2d 333, 335, 253 N.E.2d 827 (7th Dist.1969). But 47 years later, another appellate court has now found a factual distinction between the instant case and the *McNary* and *Preston* cases. The appellate court was persuaded by the fact that Gall served his time in Kentucky and not in Ohio. 2016-Ohio-2748, 51 N.E.3d 703, ¶ 23. Moreover, according to the court of appeals, the version of the jail-time-credit statute in effect when *McNary* and *Preston* were decided was not as limited as the current statute. I question this holding. In *McNary*, we did not narrow our rule factually, and we did not rely on a statute. In fact, the jail-time-credit statute does not address the circumstances in this case. R.C. 2967.191.

**{¶ 6}** Rather than allowing the lower courts to overrule our precedent, we should address the question whether an inmate gets credit for time served in another state when that foreign sentence has been vacated and when it prevented the inmate from serving a term in an Ohio prison. We adhere strongly to precedent in the modern era, only overruling our prior case law in very limited circumstances. *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, paragraph one of the syllabus. And we should do that work for ourselves rather than encouraging courts of appeals to do the heavy lifting. This is a policy question, and this is a policy court.

**{¶ 7}** Without question, Gall committed terrible crimes for which he should be punished. He should serve precisely the sentence he deserves because his crimes are so profoundly reprehensible. But he is a human being living in Ohio, and he should not serve a day more than the law requires—it is elementary that all people in Ohio are guaranteed the due process of law. The Kentucky conviction did not happen in a legal sense. That entire proceeding has been expunged. Because Gall was deprived of his ability to complete his *Ohio* prison time by virtue of prison time served in *Kentucky*, we should decide whether or not the time Gall served in Kentucky is also now a legal fiction.

**{¶ 8}** For these reasons, I dissent.

LANZINGER, J., concurs in the foregoing opinion.