

In the
Supreme Court of Ohio

STATE OF OHIO <i>EX REL.</i> , HAROLD E. STITH, JR, A316-025,	:	CASE No.: 2023-0583
	:	
Relator,	:	
	:	
v.	:	
	:	
OHIO DEPARTMENT OF REHABILITATION AND CORRECTION; DIRECTOR; OHIO ADULT PAROLE AUTHORITY,	:	
	:	On Original Action for Mandamus
Respondents.		

RESPONDENTS' MOTION TO DISMISS

HAROLD E. STITH, JR., #A316-025
Warren Correctional Institution
P.O. Box 120
Lebanon, Ohio 45036

Pro se Relator

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MOTION TO DISMISS

Undersigned counsel now appears and files the instant Motion to Dismiss for named Respondents herein: Ohio Department of Rehabilitation and Correction (ODRC), ODRC Director, and Ohio Parole Authority (OAPA, Board). Respondents respectfully move the Honorable Court to dismiss Relator Harold Stith's (Stith) mandamus action for failure to state a claim upon which relief can be granted.

Stith argues in his Complaint that the Board superseded the discretionary authority vested in the Board – a separation of powers argument, when it denied his most recent parole. In support he points to the Board using the term 'aggravated' in its board decision minutes. He believes this word – aggravated, modified the terms of conviction and extended his prison conviction. Further, Stith argues he was denied meaningful consideration at the recent parole eligibility hearing due to the use of the term aggravated and that he had favorable reports that should have outweighed the decision to deny parole. Stith also claims that the Board violated its own and or ODRC internal parole policies when the Board denied his most recent parole. Compl. *en passim*.

Stith further proposes such a term equates to a substantive error in his inmate records and that he has a right and that the Board owes him a new hearing before a parole board. In addition, he believes he should be released based on what he cites to as favorable matters that the Board should have weighed in his favor for the grant of parole.

However, the Board did not extend Stith's prison term due to usage of terms aggravated when referring to the serious nature of the underlying crime leading to conviction. The Board exercised its discretion when it determined that Stith was not eligible for parole. The Board duly noted among other things the serious nature of the underlying crime and that there was

community opposition to his release. The Board relied on no error, let alone any substantive error, when it arrived at its decision to deny parole to Stith.

Accordingly, mandamus is not warranted and this matter should be dismissed.

Respectfully submitted,

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MEMORANDUM

I. INTRODUCTION AND BACKGROUND

A. Conviction.

At present, Inmate Stith, Jr. (Stith) is a prisoner held by ODRC at Warren Correctional Institution, Lebanon, Ohio 45036. Compl., pg. 5, ¶ 1. In September 1995, Stith began serving a prison sentence of 22 years to life.

On November 2, 2010, the parole board held his first parole-eligibility hearing, which resulted in a 29-month continuance of his hearing. The parole board's decision noted Stith's positive participation in the OASIS program (an in-house, residential structured therapeutic community program) but continued the hearing partly based on an alleged violation of the prison rules of conduct. Stith served the additional 29 months and on March 21, 2013, the parole board held a second parole hearing. This time, the hearing was continued for 59 months.

Notably, Stith had at least one prior case where he believed he was denied meaningful consideration by the Board. When Stith filed his prior actions, he was housed by ODRC at Pickaway Correctional Institution. E.g., see Affidavit, Prior Actions: Compl., pg. 27, as to R.C. 2969.25. On November 30, 2015, Stith filed a petition for a writ of mandamus in the Tenth District Court of Appeals. He alleged that he was denied fair and meaningful consideration of his parole application because the parole board's second decision failed to acknowledge his participation in the prison programs and set a longer continuance than he had received after the first parole hearing.

In the Complaint at bar, Stith stated that he is confined pursuant to the affirmed opinion of the Court of Appeals, Tenth Appellate District, Franklin County, Judgment Entry 95APA 07-934, from the conviction and sentence of the Common Pleas Court, Franklin County, Case No:

95-CR-01124. Compl. pg. 5, ¶ 2. *State v. Stith*, 10th Dist. Franklin No. 95APA 07-934, 1996 Ohio App. LEXIS 2443, June 11, 1996, rendered; appeal denied by *State v. Stith*, 91 Ohio St. 3d 1447, 742 N.E.2d 145, 2001 Ohio LEXIS 413 (2001); *see also State ex rel. Stith v. Ohio Dep't of Rehab. & Corr.*, 2016-Ohio-7867, 2016 Ohio App. LEXIS 4733 (Ohio Ct. App., Franklin County, Nov. 22, 2016); *State ex rel. Stith v. Dept. of Rehab. & Correction*, 151 Ohio St.3d 125, 2017-Ohio-7824, 86 N.E.3d 323.

Stith had sought review of the judgment from the Franklin County Court of Common Pleas (Ohio) convicting him of murder in violation of Ohio Rev. Code Ann. 2903.02, carrying a concealed weapon in violation of Ohio Rev. Code Ann. 2923.12, and having a weapon while under disability in violation of Ohio Rev. Code Ann. 2923.13. The Court detailed a verbal altercation in a street that escalated into a physical fight and the eventual death of the victim. According to witnesses, Stith shot the victim after the victim had stopped fighting and was withdrawing, but Stith claimed he was defending himself. Stith's convictions for murder, carrying a concealed weapon, and having a weapon while under disability were affirmed. The Appellate Court affirmed the defendant's convictions for murder, carrying a concealed weapon, and carrying a weapon while under disability. *Id.* *See also* Compl., pg. 10, ¶¶ 17-19.

B. Prior Action as to Mandamus and Complaint at Bar.

As here, in his previous action, Stith provided that in July of 1995, he was sentenced to 22 years to life in prison. Also, in his prior Complaint, Stith noted that on November 2, 2010, he had his first parole eligibility hearing, however, the Board recommended that Stith not receive parole. In addition to judicial notice, Stith made his prior case relevant and subject to the Court's review.

In his prior action, originally addressed by the Tenth Appellate District, with a detailed review of fact and application of law, the Magistrate in March 2016, noted that Stith attached to his Complaint therein, two parole decisions dated November 12, 2010, and March 21, 2013. Therein, Stith also argued he was denied meaningful consideration when the Board denied his parole. His arguments were couched on his belief that the relevant institutional programming and some positive offender change should have tipped the scales in his favor. Mag. FOF/COL, ¶ 5. *See State ex rel. Stith v. Dep't of Rehab. & Corr.*, 151 Ohio St. 3d 125.

Importantly, the Board's decision cited to by Stith therein provided:

Inmate Stith is currently serving his 2nd prison number which occurred while on parole. Inmate Stith is noted as moderate risk to re-offend. He has taken some relevant programs and showed some positive offender change and motivation. However, he has an extensive history of criminal offenses, including violence, and not being successful on supervision. Inmate Stith's case is **aggravated by the case-specific factors of violence**. The **aggravating factors** in this case lead the Central Office Board Review to conclude that release would demean the seriousness of the offenses and not further the interest of justice.

After weighing relevant factors, the Board does not consider the inmate suitable for release at this time and assesses a five year continuance.

See Compl., pg. 38/52, Exbt. A-2 Ohio Parole Board Decision, dated 03/21/2013. Emphasis added by undersigned. Interestingly, the Magistrate found that there was no significant difference between the rationale the Board provided relator in 2010, and the rationale the Board provided relator in 2013. E.g., the findings of fact, in 2010 the Board noted that Stith has had a lot of programming and is in the OASIS program and that in 2013, the Board noted relator has taken some relevant programs and showed some positive offender change and motivation. *See* Compl., pg. 27/52, Affidavit per R.C. 2969.25, citing to *State ex rel. Stith v. Dep't of Rehab. & Corr.*, 151 Ohio St. 3d 125.

Here, Stith discussed and pointed to his prior parole decision of denial. Compl. pg. 10-11, ¶¶ 20. In the prior action noted *supra*, Stith provided, as he does here, the Parole Board decision sheets. (ODRC Form DRC 3039). Stith points out that in November 2022, he received his fourth parole hearing. Compl., pg. 11, ¶ 21. It appears that Stith believes he should now be released following nineteen (19) years of confinement. Compl. pg., 11, ¶ 21. In support, Stith attached to his Complaint exhibits relating his prior parole board determination decision sheets. Compl., Decision and or Minutes at Exb. A, hearing date 11/18/2022, at pg. 36/52; Exb. A-2: hearing date 11/18/2017, at pg. 37/52; hearing date 3/21/2013, at pg. 38/52; hearing date 11/02/2010, at pg. 38/52; *See also*, Exb. C, Ohio Parole Board Information Sheet, detailing offense and facts thereof, conviction and adult record at pg. 42-44/52. Stith pointed out that in December 2017, Respondents continued Stith's parole eligibility hearing date another 60 months. Compl., Exbt. A(2), dated, 12/27/2017. That continuance brings us to the most recent parole determination made in November 2022.

Please note that among the decision sheets created by the Board as to the decision to deny parole, the word 'aggravated' is used. The Board in 2010, provided the following:

Ohio Parole Board Decision

Inmate Last Name: Stith	Inmate First Name: Harold	# Prefix: A	Inmate Number: 316025
First Statutory Eligibility Date (mmmm yyyy) November, 2010 Actual	Type of Hearing: FIRST	Date of Hearing: 11/02/2010	

1. Offense(s) Of Conviction:
2903.02 Murder; 2923.12 Carrying concealed weapons; 2925.11 Possession of drugs

AMENDED

Aggregate sentence per Journal Entry: **3 gun+ 1.5 Def+ 19-Life**

DATE 11/21/10

3A. ☒ The mandatory factors indicated in AR 5120:1-1-07 were considered.

3B. Rationale: Cite specific factors relevant to the offense and offender:

I/M confronted the V who was with 5 of his friends, in the parking lot of the V's apartment. Victim and I/M did not know each other. An argument ensued, then a physical fight and I/M went for a gun in his vehicle. The V was shot 2 times. The witnesses (V's friends) then beat the I/M who was there when police arrived. I/M also had a drug abuse charge for possession of cocaine. I/M admits he was running the streets at the time and selling drugs. I/M has had a lot of programming and is in the OASIS program. Took responsibility for the crime. Release at this time would not be in the interest of justice.

4. The above-indicated factors support one or all of the following reasons cited in AR 5120:1-1-07 for continued incarceration.

- A. ☒ There is substantial reason to believe that the inmate will engage in further criminal conduct, or that the inmate will not conform to such conditions of release as may be established under AR 5120:1-1-12.
- B. ☒ There is substantial reason to believe that due to the serious nature of the crime, the release of the inmate into society would create undue risk to public safety, or that due to the serious nature of the crime, the release of the inmate would not further the interest of justice or be consistent with the welfare and security of society.
- C. ☐ There is substantial reason to believe that due to serious infractions of division level 5120:9-06 of the Administrative Code, the release of the inmate would not act as a deterrent to the inmate or to other institutionalized inmates from violating institutional rules.
- D. ☐ Not applicable.

Compl., Exbt. A-2, pg. 39/52. Above, the Board duly noted the nature of the crime and another offense. The Board also pointed programming accomplished by Stith and that Stith had been in the OASIS program. The Board also noted that Stith had a drug possession charge and that he admitted running drugs near or during the time described above.

The Board in 2013, provided the following:

Ohio Parole Board Decision

Inmate Last Name: Stith	Inmate First Name: Harold	# Prefix: A	Inmate Number: 316025
First Statutory Eligibility Date (mmn yyyy) November 2010 Actual	Type of Hearing: COBR CONTINUED HEARING	Date of Hearing: 03/21/2013	

1. Offense(s) Of Conviction:

2903.02 Murder; 2923.12 Carrying concealed weapons; 2925.11 Possession of drugs

3A. ☒ The mandatory factors indicated in AR 5120:1-1-07 were considered.

3B. Rationale: Cite specific factors relevant to the offense and offender:

Inmate Stith is currently serving his 2nd prison number which occurred while on parole. Inmate Stith is noted as moderate risk to re-offend. He has taken some relevant programs and showed some positive offender change and motivation. However, he has an extensive history of criminal offenses, including violence, and not being successful on supervision. Inmate Stith's case is aggravated by the case-specific factors of violence. The aggravating factors in this case lead the Central Office Board Review to conclude that release would demean the seriousness of the offenses and not further the interest of justice. After weighing relevant factors, the Board does not consider the Inmate suitable for release at this time and assesses a five year continuance.

4. The above-indicated factors support one or all of the following reasons cited in AR 5120:1-1-07 for continued incarceration.

- A. ☒ There is substantial reason to believe that the inmate will engage in further criminal conduct, or that the inmate will not conform to such conditions of release as may be established under AR 5120:1-1-12.
- B. ☒ There is substantial reason to believe that due to the serious nature of the crime, the release of the inmate into society would create undue risk to public safety, or that due to the serious nature of the crime, the release of the inmate would not further the interest of justice or be consistent with the welfare and security of society.
- C. ☐ There is substantial reason to believe that due to serious infractions of division level 5120:9-06 of the Administrative Code, the release of the inmate would not act as a deterrent to the inmate or to other institutionalized inmates from violating institutional rules.

Compl., Exbt. A-2, pg. 38/52. It is worth noting, that above, Stith was serving his second inmate number, indicating he had a history of convictions, including a history of violence, and that he was previously convicted and returned to prison after a parole violation. Moreover, the Board in 2013 had used the term '*aggravating factor*' in the case. *See above*, Para 3B, line 4. Emphasis added.

The Board in 2017, provided the following:

Ohio Parole Board Decision and Minutes

Inmate Last Name: Stith	Inmate First Name: Harold	# Prefix: A	Inmate Number: 316025
First Statutory Eligibility Date (mmm yyyy) November 2010 Actual	Type of Hearing: COBR CONTINUED HEARING	Date of Hearing: 12/27/2017	

1. Offense(s) Of Conviction:

2903.02 Murder 1 counts; 2923.12 Carrying concealed weapons 1 counts; 2925.11 Possession of drugs 1 counts; ;

3A. ☒ The mandatory factors indicated in AR 5120:1-1-07 were considered.

3B. Rationale: Cite specific factors relevant to the offense and offender:

The offender has had serious institutional infractions following his last hearing. While he is remorseful and takes responsibility for his offending behavior, his insight remains faulty. There is strong family support for his release, but there is equally strong opposition.

4. The above-indicated factors support one or all of the following reasons cited in AR 5120:1-1-07 for continued incarceration.

- A. ☐ There is substantial reason to believe that the inmate will engage in further criminal conduct, or that the inmate will not conform to such conditions of release as may be established under AR 5120:1-1-12.
- B. ☒ There is substantial reason to believe that due to the serious nature of the crime, the release of the inmate into society would create undue risk to public safety, or that due to the serious nature of the crime, the release of the inmate would not further the interest of justice or be consistent with the welfare and security of society.
- C. ☒ There is substantial reason to believe that due to serious infractions of division level 5120:9-06 of the Administrative Code, the release of the inmate would not act as a deterrent to the inmate or to other institutionalized inmates from violating institutional rules.

Compl., Exbt. A-2, pg. 37/52. Here, *supra*, it is worth noting the Board pointed to Stith's serious institutional (prison behavior rule) infractions, that his insight is faulty and though some family support in favor of release equally strong community opposition to the release exists.

At the most recent eligibility hearing in 2022, the Board provided the following:

Ohio Parole Board Decision and Minutes

Inmate Last Name: Stith	Inmate First Name: Harold	# Prefix: A	Inmate Number: 316025
First Statutory Eligibility Date (mmm yyyy) November 2010 Actual	Type of Hearing: COBR CONTINUED HEARING	Date of Hearing: 11/18/2022	

1. Offense(s) Of Conviction:

2903.02 Murder 1 counts; 2923.12 Carrying concealed weapons 1 counts; 2925.11 Drug Abuse 1 counts;

Aggregate sentence per Journal Entry: 3.00 GUN + 1.50 DEF+ 19.00- LIFE

2. Parole Violators (if applicable)

Exhibit 11

3A. ☒ The mandatory factors indicated in AR 5120:1-1-07 were considered.

3B. Rationale: Cite specific factors relevant to the offense and offender:

Inmate Stith case is aggravated by the fact that while he was on probation when he shot and murdered his male victim. Inmate Stith has serious rule infractions since his last hearing and an increase in his security level. The inmate has programmed but still exhibits thinking errors. He has a supportive release plan. There is significant community opposition communicated to the Board. He has support from staff. After weighing all relevant factors the Board finds that the unique elements of the offense outweigh the inmate's rehabilitative efforts; release would not further the interest of justice nor be consistent with the welfare and security of society thereby rendering him unsuitable for release at this time.

4. The above-indicated factors support one or all of the following reasons cited in AR 5120:1-1-07 for continued incarceration.

- A. ☐ There is substantial reason to believe that the inmate will engage in further criminal conduct, or that the inmate will not conform to such conditions of release as may be established under AR 5120:1-1-12.
- B. ☒ There is substantial reason to believe that as the unique factors of the offense of conviction significantly outweigh the inmates rehabilitative efforts, the release of the inmate into society would create undue risk to public safety and/or would not further the interest of justice nor be consistent with the welfare and security of society.
- C. ☒ There is substantial reason to believe that due to serious infractions of division level 5120:9-06 of the Administrative Code, the release of the inmate would not act as a deterrent to the inmate or to other institutionalized inmates from violating institutional rules.

In the case at bar, Stith now argues that the Board should not employ the term 'aggravated' because it is substantively incorrect and or that the Board exceeded its discretionary role. He believes that the use of such term now extends his prison time, e.g., offense category or makes a *mens rea* determination. Compl., pg. 6, ¶¶ 6, 7; pg. 8, ¶ 11, and *en passim*; see also Compl., Affidavit of Declaration, pp. 24-26; Parole Eligibility/Essay ... Reconsideration, pp 45-52.

Stith's arguments fail for the following reasons.

II. LAW AND ARGUMENT

A. Mandamus and Civ.R. 12(B)(6)

A writ of mandamus is an extraordinary writ and should only be issued in rare circumstances. This Honorable Court has set forth three requirements which must be met in establishing a right to a writ of mandamus: (1) that relator has a clear legal right to the relief prayed for; (2) that respondent is under a clear legal duty to perform the act requested; and (3) that relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28 (1983). A writ cannot issue to control the respondents'

exercise of discretion, but it can be issued to compel a public officer to engage in the exercise of discretion when there is a clear legal duty to do so. *State ex rel. Martin v. Corrigan*, 25 Ohio St.3d 29 (1986). See *State ex rel. Berger v. McMonagle*, 6 Ohio St.3d 28, 29, 451 N.E.2d 225 (1983), quoting *State ex rel. Harris v. Rhodes*, 54 Ohio St.2d 41, 42, 374 N.E.2d 641 (1978). A relator seeking such extraordinary relief bears the burden of proving the entitlement the appropriate standard of proof in mandamus cases is proof by clear and convincing evidence. See also *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, ¶¶ 55–57, citing *State ex rel. Pressley v. Indus. Comm.*, 11 Ohio St.2d 141, 161, 228 N.E.2d 631 (1967), and *State ex rel. Henslee v. Newman*, 30 Ohio St.2d 324, 325, 285 N.E.2d 54 (1972).

Here, Stith has no clear right to the relief prayed for, the Respondents owe no clear legal duty to perform the requested acts (new parole hearing, e.g.), and Stith had a plain and adequate remedy at law. (e.g., 42 U.S.C. § 1983 action). Stith has other plain and adequate remedies of law available, regardless of the success he may not have therewith, which prevent the ordering of a writ of mandamus.

Stith premised this action on the assertion, *inter alia*, that the Respondents exceeded their discretionary powers, claiming they violated constitutional mandates such as the separation of powers doctrine. Compl. p. 2, top paragraph. Relator could have raised the same contention by filing a federal civil rights action pursuant to 42 U.S.C. 1983. See *Orick v. Banziger*, 945 F.Supp. 1084, 1092 (S.D. Ohio 1996). This Court has recognized that Section 1983 provides an adequate remedy in the ordinary course of law. *State ex rel. Leach v. Schotten*, 73 Ohio St.3d 538, 541, 653 N.E.2d 356 (1995), citing *State ex rel. Carter v. Schotten*, 70 Ohio St.3d 89, 91, 637 N.E.2d 306 (1994); see also *State ex rel. Peebles v. Anderson*, 73 Ohio St.3d 559, 560, 653 N.E.2d 371 (1995) (Section 1983 constitutes an adequate remedy, since it can provide

declaratory, injunctive (both mandatory and prohibitive), and/or monetary relief.”). In *Dotson v. Wilkinson*, 300 F.3d 661 (2002), an inmate had appealed the trial court's dismissal of his action under 42 U.S. 1983, and the sole issue on appeal was whether the trial court erred in holding that the inmate's challenge to the application of the parole eligibility guidelines was cognizable under 42 U.S. 1983. The court did not reach the question of whether the guidelines had been lawfully or unlawfully applied. The trial court held only that the inmate's suit was cognizable under 42 U.S. 1983, and it reversed and remanded the action for further proceedings. Moreover, Stith could also pursue a Declaratory Judgment action to affect the relief he has requested. Stith does have a plain and adequate remedy in the ordinary course of law. Because Stith has other plain and adequate legal remedies available, a writ of mandamus cannot be issued.

Moreover, even if Stith had no other plain and adequate remedy of law available, he did not show that he has a clear legal right to relief and that Respondents have a clear legal duty to perform the requested acts. Stith’s main request is that Respondents provide him with another parole hearing at which he is given meaningful consideration of his positive rehabilitative conduct and programming, something he believes outweighs numerous unfavorable factors cited by the Board when it denied his parole.

Because Stith’s Complaint fails to demonstrate the three elements necessary to prevail in an action for a writ of mandamus, the Court should grant Respondent’s Motion to dismiss Stith’s action.

B. Stith’s Complaint should be dismissed because it fails to state a claim upon which relief may be granted and he is not entitled to the requested relief.

Dismissal of a mandamus petition is required when it appears beyond doubt, after presuming the truth of all material factual allegations and making all reasonable inferences in

favor of the relators, that they are not entitled to the requested extraordinary relief in mandamus.” *State ex rel. Crobaugh v. White*, 91 Ohio St.3d 470, 471, 746 N.E.2d 1120 (2001).

A motion to dismiss for failure to state a claim upon which the court can grant relief challenges the sufficiency of the complaint itself, not evidence outside of the complaint. *Volbers-Klarich v. Middletown Mgmt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11. A court will dismiss a complaint in mandamus where the complaint fails to allege facts necessary to support the claim. *See State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, 856 N.E.2d 966, ¶ 10. Civ.R. 12(B)(6) requires that where a motion to dismiss presents matters outside of the complaint, the court must treat the motion as a motion for summary judgment under Civil Rule 56. Nonetheless, the court may consider documents attached to or incorporated in the complaint in a motion to dismiss. *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249, 637 N.E.2d 1281 (1997), fn. 1; *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). Helpful to a conclusion in the present case is the fact that Relator attached to and referenced in his Petition two Ohio Parole Board Decision Sheets.

Relator alleges that the Parole Board denied him meaningful consideration” for parole. Compl., *en passim*. This claim is meritless. The term meaningful consideration for parole comes from the Honorable Court’s decision in *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St.3d 456, 2002-Ohio-6719, 780 N.E.2d 548, ¶ 27. In *Layne*, the Court rejected the Parole Board’s use of a grid-classification system that could lead to unjust results by artificially inflating an inmate’s sentence or violating a plea bargain agreement. *Layne* ¶ 27. The *Layne* Court held that there was no meaningful consideration when an inmate was assigned an offense category that did not correspond to the offense of conviction because of other alleged criminal activity, effectively

disregarding the inmate's offense of conviction. *Id.*

Following *Layne*, this Court found that meaningful consideration can be denied in two additional scenarios: 1) when an inmate is assigned an offense category under the guidelines' matrix that nominally corresponds to the inmate's offense of conviction but which is elevated based upon the parole board's independent determination that the inmate committed a distinct offense for which he was not convicted; and 2) when an inmate is placed within the proper guidelines' matrix category pursuant to the offense of conviction, but the lowest possible range on the guidelines' matrix for the category is beyond the inmate's earliest statutory parole eligibility date. *Ankrom v. Hageman*, 10th Dist. Franklin, 2005-Ohio-1546, ¶¶ 15, 19. These are the only two scenarios other than the one in *Layne* that have been found to deny meaningful consideration for parole. Stith does not allege that any of these three scenarios occurred in his case. Rather, he only alleges that he was must have been denied meaningful consideration because his decision sheet did not adequately reflect his "positive rehabilitative conduct and programming." Compl. p. 7.

Thus, Stith has failed to show he has a clear legal right to the relief of an additional parole hearing because he has not shown he was denied meaningful consideration when the Board noted that the nature of the crime was serious and or aggravated. The underlying conviction was never changed nor was Stith's sentence extended in any manner. He does not have a right to release from prison prior to the completion of his sentence.

The decision sheet Stith attached to his Complaint undermines his claim and demonstrates that he was given meaningful consideration for his programming and or recognition of a release plan. *See, e.g., Weatherspoon v. Mack*, 10th Dist. Franklin No. 07AP-1083, 2008 Ohio App. LEXIS 1896, ¶ 22 (May 6, 2008) (affirming the trial court's finding that

the Parole Board's decision sheet provides sufficient rationale for the decision to continue consideration of parole suitability.

The Board is duty bound to consider multiple factors when reviewing an inmate's fitness for parole, not just the factors the Relator would prefer. The Board exercised its discretion and noted that Stith had numerous hurdles to meet to afford suitability for release, including significant community opposition to his release. The decision sheet undermines Stith's allegation that he was not given meaningful consideration. The fact that the Board did not affix a weight of Stith's favorable issues to the degree that he hoped does mean that he was deprived of meaningful consideration.

C. ODRC policies do not create an action for the Relator.

Prison regulations and policies, including those promulgated via statutory authority, serve the purpose of navigating officials tasked with administering prisons, they do not endow prisoners with actionable, substantive rights. *Banks v. Corr. Corp. of Am.*, 7th District Mahoning Nos. 12 MA 48, 14 MA 98, 2015-Ohio-2002, ¶ 18; *Oko v. Lake Erie Corr. Inst.*, 11th Dist. Ashtabula No. 2010-A-0002, 2010-Ohio-2821, ¶ 29; *Peters v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 14AP-1048, 2015-Ohio-2668, ¶ 10.

D. Board decisions did not enlarge Stith's prison sentence.

Notably, in none of the Board's decisions does the Board extend Stith's sentence; his parole hearing was extended out within legal limits. *See* Ohio Adm. Code 5120:1-1-10, applicable to initial and continued Parole Board hearing dates, provides, in relevant part, as follows: (A) The initial hearing for each inmate serving an indeterminate sentence shall be held on or about the date when the prisoner first becomes eligible for parole pursuant to rule 5120:1-1-03 of the Administrative Code. (B) In any case in which parole is denied at an inmate's regularly constituted parole hearing, the parole board shall: *** (2) Set the time for a subsequent

hearing, which shall not be more than ten years after the date of the hearing.

E. Parole Board discretion in denying parole.

Stith throughout his Complaint acknowledges that the Board has discretion in its parole determinations as well as recognizing there are a host of factors the Board shall and may utilize in its decision making. He also acknowledges the bases cited for his most recent parole denial. He does however, ignore that there exist community opposition to his release.

The decision whether to grant or deny parole is entirely within the discretion of the OAPA. *Inmates of Orient Correctional Inst.*, 929 F.2d at 236. Ohio Adm. Code 5120:1-1-07(A), (B), provides a myriad of considerations when determining the suitability of parole for an inmate. The determination of suitability for parole rests with the Board and not the inmate.

As set out in the Board's Decision sheets, Stith was not found to be suitable for release because, as they wrote:

Inmate Stith case is aggravated by the fact that while he was on probation when he shot and murdered his male victim. Inmate Stith has serious rule infractions since his last hearing and an increase in his security level. The inmate has programmed but still exhibits thinking errors. He has a supportive release plan. There is significant community opposition communicated to the Board. He has support from staff. After weighing all relevant factors the Board finds that the unique elements of the offense outweigh the inmate's rehabilitative efforts; release would not further the interest of justice nor be consistent with the welfare and security of society thereby rendering him unsuitable for release at this time.

*** There is substantial reason to believe that as the unique factors of the offense of conviction significantly outweigh the inmate's rehabilitative efforts, the release of the inmate into society would create undue risk to public safety and/or would not further the interest of justice nor be consistent with the welfare and security of society.

Compl., pg. 36/52 Exbt. A, Board Decision and Minutes, 11/18/2022.

Stith is serving a maximum life sentence for murder and has no right to parole before the expiration of that sentence. Stith now has had several parole hearings but has no right to the

additional hearing he has requests herein. Prisoners have no statutory right to parole or regular scheduled parole hearings. *State ex rel. Richard v. Mohr*, 135 Ohio St.3d 373, 374, 987 N.E.2d 650, 652 (2013).

Perhaps Stith confuses parole eligibility with parole suitability.

Stith has no constitutional or inherent right to be released before the expiration of his valid sentence. *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1 (1979); *Inmates of Orient Corr. Inst. v. Ohio Adult Parole Auth.*, 929 F.2d 233 (6th Cir. 1991); *see also State ex rel. Miller v. Leonard*, 88 Ohio St.3d 46, 723 (2000); *State ex rel. Hogan v. Ghee*, 85 Ohio St.3d 150 (1999); *State ex rel. Miller v. Leonard*, 88 Ohio St.3d 46 (2000). In addition, the state of Ohio has not created a liberty interest in parole eligibility, as it has a completely discretionary parole system. *Michael v. Ghee*, 498 F.3d 372 (6th Cir. 2007).

As conceded by Stith, the Parole Board, in its discretion, may decide against releasing him on parole. Ohio Administrative Code Section 5120:1-1-07 provides a guideline and non-exhaustive list of factors that may be considered at a parole release hearing.

The Parole Board may not grant release to an inmate if they make either of the following findings: (1) There is substantial reason to believe that the inmate will engage in further criminal conduct, or that the inmate will not conform to such conditions of release as may be established under Rule 5120:1-1-12 of the Administrative Code; (2) There is substantial reason to believe that due to the serious nature of the crime, the release of the inmate into society would create undue risk to public safety, or that due to the serious nature of the crime, the release of the inmate would not further the interest of justice nor be consistent with the welfare and security of society. The Board was obligated to consider the serious nature of Stith's murder conviction when considering his fitness for early release.

R.C. 2967.03 vests discretion in OAPA to grant a parole to any prisoner for whom parole is authorized, if in its judgment there is reasonable ground to believe that * * * paroling the prisoner would further the interests of justice and be consistent with the welfare and security of society. Indeed, the Board may also consider reports of an inmate's adjustment to institutional programs and assignments as well as any other factors which the Board determines to be relevant. Ohio Adm. Code 5120:1-1-07 (B)(1) & (18). However, the consideration of any single factor, or any group of factors, shall not create a presumption of release on parole, or the presumption of continued incarceration. The parole decision need not expressly address any of the foregoing factors. Ohio Adm. Code 5120:1-1-07 (C). The Board has no obligation to expressly address any factor in their decision sheet. Thus, Stith's claims that his decision sheet should show a greater acknowledgement of what he believes to be dispositive factors demonstrating parole suitability is meritless.

Once more, the OAPA's discretion in parole matters is wide-ranging. *Layne*, 97 Ohio St.3d at 456, 780 N.E.2d at 548, ¶ 28. In addition to the *Layne* discussion set out herein, this honorable Court recognized that the OAPA has wide-ranging discretion in parole matters and emphasized that the OAPA, when considering an inmate for parole, still retains its discretion to consider any circumstances relating to the offense or offenses of conviction, including crimes that did not result in conviction, as well as any other factors the OAPA deems relevant. *Layne v. Ohio Adult Parole Authority*, 97 Ohio St. 3d 456, 464 2002-Ohio-6719, citing *Hemphill v. Ohio Adult Parole Auth.*, 61 Ohio St.3d 385, 386 (1991); *State ex rel. Lipschutz v. Shoemaker*, 49 Ohio St. 3d 88 (1990); and Ohio Adm. Code 5120:1-1-07). Further, Ohio Revised Code 2967.03 creates no expectancy of parole or a constitutional liberty interest enough to establish a right of procedural due process. *Smith v. Money*, 2002-Ohio-3387, ¶1;

69 Ohio St. 3d 123, 125 (1994); *State ex rel. Ferguson v. Ohio Adult Parole Auth.*, 45 Ohio St.3d 355 (1989); *State ex rel. Blake v. Shoemaker*, 4 Ohio St.3d 42 (1983).

Stith also argues that he was denied meaningful consideration at his most recent parole suitability hearing. He contends that the *Keith* and *Layne* cases are dispositive. Compl., *en passim*. No doubt the Honorable Court is quite familiar with these cases and should duly note that the error claimed by Stith herein are far divergent than those in *Keith*, e.g. Here, Stith takes issue with the term ‘aggravated’ as used by the Board in its decision minutes. Compl. *en passim*. By comparison, the types of errors argued in the *Keith* cases and *Layne* do not come close here. *Keith* cited to a host of matters that amounted to substantive errors in his inmate file and yet, the Court did not order another parole hearing, rather the order was to investigate and address the errors so noted. *Keith* does not stand for the proposition that an error equates to another parole hearing.

Finally, Stith has not established by clear and convincing evidence that he has a clear legal right to the requested parole hearing; as a corollary, he cannot establish that Respondents have a corresponding legal duty to perform the requested acts. Because Stith has failed to establish a clear legal right, a corresponding legal duty on the part of the Respondents, and the lack of an adequate remedy in the ordinary course of the law, this Court should deny issuance of the writ of mandamus and dismiss the Complaint herein.

F. *Res Judicata* and matters that were known and should have been raised in an earlier action.

Res judicata encompasses two related concepts: (1) claim preclusion, also known as *res judicata proper*, and (2) issue preclusion, also known as *collateral estoppel*. *O’Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 2007-Ohio-1102, ¶6, 862 N.E.2d 803. Claim preclusion [res judicata] prevents subsequent actions, by the same parties * * *, based upon any

claim arising out of a transaction that was the subject matter of a previous action. * * * where a claim could have been litigated in the previous suit, [res judicata] bars subsequent actions on that matter. Emphasis added. See *Robinson v. LaRose*, 11th Dist. Trumbull No. 2013-T-0073, 2013-Ohio-4316, ¶ 15.

On the other hand, collateral estoppel applies when the issue now raised by the defendant (1) was actually litigated in a prior action, (2) by a court of competent jurisdiction, (3) when the party against whom collateral estoppel is asserted was a party in the prior action. *Thompson v. Wing*, 70 Ohio St.3d 176, 183, 1994 Ohio 358, 637 N.E.2d 917 (1994). Collateral estoppel applies even if the causes of action differ. *O'Nesti, supra*, at ¶7. Further, collateral estoppel applies in criminal cases. See *State v. Lovejoy*, 79 Ohio St.3d 440, 443, 1997 Ohio 371, 683 N.E.2d 1112 (1997). In addition, the Supreme Court of Ohio in *Billiter*, *supra*, recently held that res judicata bars an inmate's habeas petition where he previously filed a habeas petition relating to the same conviction that was denied on the merits by a court of competent jurisdiction. *Id.* at ¶11. *Robinson v. LaRose*, 11th Dist. Trumbull No. 2013-T-0073, 2013-Ohio-4316, ¶ 16.

Finally, as to the Complaint, in Ohio, *pro se* civil litigants are bound by the same rules and procedures as those litigants who retain counsel. They are not to be accorded greater rights and must accept the results of their own mistakes and errors. See *Newton v. Cleveland Law Dept.*, 8th Dist. Cuyahoga No. 102042, 2015-Ohio-1460, ¶ 12; *Raccuia v. Kent State Univ.*, 10th Dist. No. 10AP-71, 2010-Ohio-3014; *see also Sabouri v. Ohio Dept. of Job & Family Servs.*, 145 Ohio App.3d 651, 654, 763 N.E.2d 1238 (10th Dist. 2001) (It is well-established that *pro se* litigants are presumed to have knowledge of the law and legal procedures and that they are held to the same standard as litigants who are represented by counsel.”).

As demonstrated herein, and by Stith's own exhibits, the terminology 'aggravated' was

used by the Board previously. As the Honorable Court is now aware, Stith had an action prior to this where he claimed he was denied meaningful consideration and the very decision sheets he uses here as exhibits he used in that prior action. Now, at this juncture, Stith believes his latest thought as to a separation of powers argument will provide him a favorable mandamus decision. Stith could have raised this argument previously. He did not. *See, Ibid, State ex rel. Stith v. Dep't of Rehab. & Corr.*, 151 Ohio St. 3d 125. He should not now be allowed to raise such claims.

For all the reasons presented herein, this case warrants dismissal.

IV. CONCLUSION

For all of these reasons set out herein, Respondents respectfully request the Court dismiss Stith's Complaint against them him prejudice, assess costs to Stith, and award any other relief deemed necessary and just by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the preceding *Respondents' Motion to Dismiss* was electronically filed with this Court, on the 30th day of May, 2023, and that on the same date,¹ a true copy of said document was served by regular U.S. Mail on

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/s/ *George Horvath*

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¹ Counsel makes every effort to mail court filings to incarcerated pro se individuals on the same day as the filing. However, present remote working and coordinating with in-office staff for the physical printing and preparing of paper mail means there may be times that the mail has already been collected from the Attorney General's Office for that business day before it is physically placed in the outgoing mail for collection.