

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

SHERRYL ANN SNODGRASS and)	
JULIANN LAWRENCE,)	NO. 4:05-cv-00520-RAW
)	
Plaintiffs,)	
)	RULING ON DEFENDANTS'
vs.)	MOTION TO DISMISS
)	
ELIZABETH ROBINSON, Chair of)	
the Iowa Board of Parole, in)	
her individual and official)	
capacity; KAREN MUELHAUPT,)	
Vice Chair of the Iowa Board)	
of Parole, in her individual)	
and official capacity;)	
RICHARD S. BORDWELL, Member,)	
Iowa Board of Parole, in his)	
individual and official)	
capacity; CURTIS S. JENKINS,)	
Member, Iowa Board of Parole,)	
in his individual and)	
official capacity; BARBARA)	
BINNIE, Member, Iowa Board of)	
Parole, in her individual and)	
official capacity; IOWA BOARD)	
OF PAROLE; and CHESTER J.)	
CULVER, Governor of Iowa,)	
)	
Defendants.)	

Before the Court following hearing is defendants' resisted Motion to Dismiss [9] for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). On a motion to dismiss the Court accepts as true all of the allegations of the Complaint and draws all reasonable inferences in favor of the non-movant plaintiffs. United States ex rel. Joshi v. St. Luke's Hosp., Inc., 441 F.3d 552, 555 (8th Cir. 2006). A Rule 12(b)(6) motion

should not be granted unless it appears beyond a reasonable doubt the plaintiff can prove no set of facts entitling him or her to relief. Young v. City of St. Charles, MO, 244 F.3d 623, 627 (8th Cir. 2001). While the Court takes as true the factual allegations of the Complaint, "the complaint must contain facts which state a claim as a matter of law and must not be conclusory." Briehl v. General Motors Corp., 172 F.3d 623, 627 (8th Cir. 1999); see Quinn v. Ocwen Federal Bank FSB, 470 F.3d 1240, 1244 (8th Cir. 2006) ("complaint must contain sufficient facts, as opposed to mere conclusions, to satisfy the legal requirements of the claim," quoting DuBois v. Ford Motor Credit Co., 276 F.3d 1019, 1022 (8th Cir. 2002)). In addition to the Complaint the Court may consider matters of public record, of which judicial notice may be taken, and "materials necessarily embraced by the pleadings" without converting the motion to one for summary judgment. Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir. 1999)(quoting Piper Jaffray Cos. v. National Union Fire Ins. Co., 967 F. Supp. 1148, 1152 (D. Minn. 1997)); see Manion v. Nagin, 394 F.3d 1062, 1065 n.3 (8th Cir.), cert. denied, 545 U.S. 1128 (2005); Stahl v. U.S. Dept. of Agriculture, 327 F.3d 697, 700 (8th Cir. 2003); Mattes v. ABC Plastics, Inc., 323 F.3d 695, 697 n.4 (8th Cir. 2003); Faibisch v. University of Minnesota, 304 F.3d 797, 802 (8th Cir. 2002); Hatch v. TIG Ins. Co., 301 F.3d 915, 916 n. 2 (8th Cir. 2002).

I. Factual, Procedural and Legal Background

The Complaint together with public record and other material integral to it show the following. Plaintiff Sherryl Snodgrass is serving a life sentence following a 1982 conviction for first-degree murder, a class "A" felony under Iowa law. Iowa Code § 707.2 (1981 & 2005).¹ Plaintiff Juliann Lawrence is Ms. Snodgrass' daughter. Defendants are members of the Iowa Board of Parole (the Board), the Board itself and Governor Culver.²

Ms. Snodgrass is not eligible for release on parole unless her sentence is commuted to a term of years by the Governor. Iowa Code § 902.1 (1981 & 2005). At the time of the offense, the Iowa Code provided as follows with respect to the Board's review of class "A" felons for possible commutation:

. . . The board shall interview a class "A" felon within five years of his or her confinement and regularly thereafter. If in the opinion of the board, the person should be considered for release on parole, the board shall recommend to the governor that the person's sentence be commuted to a term of years. If the person's sentence is so commuted, the person shall be eligible for parole as provided in chapter 906.

¹ The circumstances of the offense are described in State v. Snodgrass, 346 N.W.2d 472, 473-74 (Iowa 1984).

² The Governor is sued only in his official capacity. The Complaint names former Governor Thomas J. Vilsack who has recently been succeeded by Governor Culver. By rule the latter should be substituted. Fed. R. Civ. P. 25(d)(1).

Iowa Code § 902.2 (1981). The Complaint alleges: "Prior to 1995 the [Board's] policy was in fact to review applications for commutation by class 'A' felons every year, after they had been incarcerated for fifteen years." (Complaint ¶ 14).³ Ms. Snodgrass was called before the Board in 1995 at which time she was told the Board could not review her case because a "new law" was in effect.⁴

The "new law" was a 1995 revision to § 902.2 which substituted the following for the former version:

. . . A person who has been sentenced to life imprisonment under section 902.1 may, no more frequently than once every ten years, make an application to the governor requesting that the person's sentence be commuted to a term of years. The director of the Iowa department of corrections may make a request to the governor that a person's sentence be commuted to a term of years at any time. Upon receipt of a request for commutation, the governor shall send a copy of the request to the Iowa board of parole for investigation and recommendations as to whether the person should be considered for commutation. The board shall conduct an interview of the class "A" felon and shall make a report of its findings and recommendations to the governor.

1995 Iowa Acts, ch. 128, § 1 codified at Iowa Code § 902.2 (2005).⁵

³ See Iowa Admin. Code § 205-14.2(1)(902)(1989) which provided for class "A" felon interviews at intervals of five, ten, thirteen and fifteen years from commitment and annually thereafter.

⁴ The Board's administrative rules now permit Board reviews of the records of class "A" felons at its discretion. Iowa Admin. Code § 205-14.2 (902)(2006).

⁵ The caption of § 902.2 was also changed from "[r]ecord of class 'A' felon reviewed" in the pre-1995 version to "[c]ommutation (continued...)

On February 5, 2004 Ms. Snodgrass submitted a clemency petition seeking commutation of her sentence. (Pl. Resistance at 5). On May 13, 2004 Board Chair Elizabeth Robinson wrote to one of Ms. Snodgrass' attorneys advising:

. . . [T]he Parole Board has received 80 commutation applications from the Governor's Office to date. Each of these cases will be investigated and a recommendation made to the Governor in as timely a manner as possible. All applications need to be reviewed within ten years. The applications date back to 1994 and are being processed in order as received. Sherryl Snodgrass is number 80 on the list. It may be several years before her case is considered.

(Complaint ¶ 17). By post-hearing status reports the Court has been advised the Board has since considered Ms. Snodgrass' petition, did not recommend commutation, and on November 30, 2006 Governor Vilsack denied the petition.⁶

Ms. Snodgrass alleges the new version of § 902.2 "has created a significant risk of prolonging her incarceration" and

⁵(...continued)
procedure for class 'A' felons" in the current version, a change which reflects the purpose of the revision.

⁶ As the Complaint refers to the pendency of the clemency petition filed by Ms. Snodgrass and sought an immediate interview with the Board to address it, the petition's outcome is integral to the Complaint and a matter of public record which the Court may consider in connection with the motion.

The Court had held ruling on the present motion in abeyance pending review of the petition by the Board and Governor. While the Governor's action moots the prayer for immediate consideration of the then-pending clemency petition, the prayers for damages and prospective equitable relief remain.

that it is likely she "would have been freed from prison by now if the Board . . . had 'interview[ed]' her 'regularly' over the past ten years as required by the pre-1995 version of the statute." (Complaint ¶¶ 18, 19)(bracket original to Complaint).⁷

This lawsuit was commenced on September 14, 2005. Plaintiffs sue under 42 U.S.C. § 1983 to redress alleged violations of their federal constitutional rights.⁸ The "First Claim for Relief" in the Complaint is in two counts and brought only by Ms. Snodgrass. In Count One she contends retroactive application to her of the revision to § 902.2 violates the *Ex Post Facto* Clause of Article I, § 10 of the United States Constitution. In Count Two Ms. Snodgrass asserts the retroactive application deprives her of a liberty interest without due process of law in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution. Both plaintiffs are parties to the "Second Claim for Relief" by which they allege the retroactive application of the § 902.2 revision

⁷ There is no indication if Ms. Snodgrass submitted a clemency petition or application at any time prior to 2004. If she did, her continued incarceration means it was rejected, a fact which would not be helpful to her contention she would have been released by now had the former version of § 902.2 remained in effect. If, on the other hand, Ms. Snodgrass did not previously apply for commutation, then her claim she would have been released by now is dependent on showing the probability the Board would have acted on its own initiative through the interview process to recommend commutation. See *infra* at 13.

⁸ The Court has federal question jurisdiction. 28 U.S.C. § 1331. The matter is before the undersigned pursuant to 28 U.S.C. § 636(c).

constitutes an unwarranted interference with a right to familial association emanating from the First and Fourteenth Amendments to the Constitution.

II. Discussion

A. Ex Post Facto

The *Ex Post Facto* Clause states simply: "No State shall . . . pass any . . . ex post facto Law" U.S. Const. art. I, § 10. Among other things, the clause has been held to prohibit retroactive application of enactments which would increase the punishment for a crime after the crime has been committed. Garner v. Jones, 529 U.S. 244, 250 (2000)(citing Collins v. Youngblood, 497 U.S. 37, 42 (1990) and Beazell v. Ohio, 269 U.S. 167, 169-70 (1925)); see Johnson v. United States, 529 U.S. 694, 699 (2000). In the case of parole the Supreme Court has held "[r]etroactive changes in laws governing parole of prisoners, in some instances" may be seen as increasing the punishment for a crime in violation of the *Ex Post Facto* Clause. Garner, 529 U.S. at 251; see California Dep't of Corrections v. Morales, 514 U.S. 499, 508-09 (1995). The "controlling inquiry" in this context is whether the retroactive change in the law creates "a sufficient risk of increasing the measure of punishment attached to the covered crimes," a "matter of degree." Garner, 529 U.S. at 250 (quoting Morales, 514 U.S. at 509). The requisite degree is present if it is shown a change in parole law "creates a significant risk of

prolonging [the prisoner's] incarceration." Id. at 251. This may be apparent from the terms of the challenged law (or rule) or may be demonstrated "by evidence drawn from . . . practical implementation by the agency charged with exercising discretion that [the law's] retroactive application will result in a longer period of incarceration than under the earlier [law]." Id. at 255.

The Supreme Court's opinions in Morales and Garner are the starting point. Morales involved a prisoner who had been convicted of two murders. The prisoner was nonetheless eligible for parole. A subsequent change in California law allowed the parole board to defer parole suitability hearings for up to three years in the case of a prisoner convicted of more than one homicide. 514 U.S. at 503. The Supreme Court rejected an *ex post facto* challenge on habeas corpus review because the statutory change "create[d] only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes, and such conjectural effects are insufficient under any threshold [the Supreme Court] might establish under the *Ex Post Facto* Clause." 514 U.S. at 509.

Garner too involved a double murderer sentenced to life in prison. 529 U.S. at 247. Georgia law required the parole board to initially consider inmates serving life sentences for parole after seven years. At the time of the prisoner's second homicide parole board rules required reconsideration of life-serving inmates

for parole every three years. Subsequently the rules were changed to provide for reconsideration "at least every eight years." Id. While dubious about the merits in view of the prisoner's serious criminal history, id. at 255, the Supreme Court reversed summary judgment on the *ex post facto* claim because the court of appeals' analysis had not indicated whether the amended rule created the requisite significant risk of increased punishment, nor had the prisoner's request to conduct discovery been addressed. Id. at 257.

Unlike the prisoners in Morales and Garner, Ms. Snodgrass is not eligible for parole. The mandatory sentence for the crime she committed is life in prison without possibility of parole. In Iowa, life means life unless the Governor exercises the authority vested in him by the Iowa constitution and statute to commute a life sentence to a term of years. Iowa Const. of 1857 (codified), art. IV, § 16; Iowa Code § 902.1, 914.1. The exercise of that authority is discretionary. See Lyon v. State, 404 N.W.2d 580, 583 (Iowa App. 1987). Then as now the Board's involvement in the commutation process is limited to making a recommendation to the Governor.

Parole and commutation are conceptually distinct and serve different purposes. Parole is an early release from incarceration prior to the end of the prison term to which the person has been sentenced. Iowa Code § 906.1. Commutation, on the other hand, is the substitution of a less severe sentence (in Ms.

Snodgrass' case, a term of years) for the sentence imposed by the court (life without parole). See 59 Am. Jur. 2d Pardon and Parole §5 at 13. "[T]he possibility of commutation is not equivalent to a possibility of parole, because commutation is an *ad hoc* exercise of executive clemency while '[p]arole is a regular part of the rehabilitative process.'" Hatter v. Warden, Iowa Men's Reformatory, 734 F. Supp. 1505, 1522 (N.D. Iowa 1990)(involving Iowa law and citing and quoting in part Solem v. Helm, 463 U.S. 277, 300-03 (1983)). There is no allegation in the Complaint that it is otherwise in Iowa. See infra at 14-15. "The possibility of commutation is nothing more than a hope" for clemency. Helm, 463 U.S. at 303. In substance Ms. Snodgrass is arguing that a retroactive limitation on the frequency with which she may be considered for commutation to a sentence with a lesser punishment risks increasing her punishment under the sentence she did receive. The Court has great difficulty with this logic. The revision to § 902.2 does not have any effect on the length of the mandatory life sentence Ms. Snodgrass is serving. Life imprisonment -- the maximum punishment provided by Iowa criminal law -- is what anyone convicted in Iowa of first degree murder expects to receive. As there is no risk the measure of Ms. Snodgrass' punishment for the crime she committed has been increased by the revision to § 902.2, its application to her does not violate the *Ex Post Facto* Clause.

Beyond the critical distinction between commutation and parole, that the revision to § 902.2 creates a significant risk of prolonging Ms. Snodgrass' incarceration is not capable of proof beyond speculation under Iowa's statutory framework. Ms. Snodgrass is a long step removed from parole. She must first obtain commutation of her sentence. Neither by its terms nor in practical effect does the revision portend a longer stay in prison for Ms. Snodgrass.

Textually the revision to § 902.2 did not alter the likelihood of commutation from what might have occurred under the version in effect at the time Ms. Snodgrass was convicted. The 1995 revision changed the statute entirely. Prior to revision the statute only required the Board to "interview" a class "A" felon within five years and "regularly thereafter." The statute did not require a hearing, any particular consideration to commutation, or mandate any recommendation to the Governor one way or the other. It simply provided an opportunity for the Board to initiate a commutation recommendation for those prisoners it thought should be considered for parole. The statute was silent concerning commutation applications by the prisoner. Other provisions in effect at the time of Ms. Snodgrass' conviction implicitly recognized such applications could be made, but said very little about procedure other than requiring the Governor to obtain the advice of the Board before granting a commutation. See Iowa Code §§

248.6, .9, .10 (1981). In 1986 the legislature enacted legislation concerning reprieves, pardons and commutations which among other things expressly recognized the right of prisoners to apply for commutations and required the Governor to respond to a Board recommendation within ninety days, giving reasons for his action. 1986 Iowa Acts ch. 1112, §§ 5, 7, now codified at Iowa Code §§ 914.2-.4.⁹ The evolution of Iowa law in this area with respect to class "A" felons was completed with the 1995 revision to § 902.2. The revision substituted prisoner-initiated applications to the Governor (and Department of Corrections requests) for the former interview process as the means to bring the subject of commutation to the attention of the executive, and imposed procedural requirements that the Board conduct an investigation, report its findings, and make a recommendation whether the person should be considered for commutation.

The revision limited applications to the Governor to no more than once every ten years, but in company with the 1986 legislation gave Ms. Snodgrass significant procedural rights with respect to the determination of such an application. The less frequent, but more formal and comprehensive opportunity for

⁹ Subsequent to the 1986 enactment the Board adopted administrative rules to implement Iowa Code chs. 902 and 914.

When § 902.2 was revised in 1995 the legislature amended the relevant provisions in ch. 914 to make them subject to § 902.2. 1995 Iowa Acts ch. 128, § 2, 3.

commutation consideration afforded by the revision does not by its terms risk prolonging Ms. Snodgrass' incarceration.

Even in the absence of the ten-year limitation incorporated in the 1995 revision, there are as a practical matter only so many opportunities to assemble the necessary information and have full consideration be given to commuting a class "A" felon's life sentence to a lesser punishment. The likelihood that without the 1995 revision and prior to her 2004 clemency petition regular interviews with the Board would have gelled into a commutation recommendation, or would do so in the future sooner than the formalized ten-year application process now provided in § 902.2, seems very speculative. That this would occur is, if possible, rendered even more unknowable by the fact that since at least 1989 Board rules have required that members of the Board unanimously agree to any favorable clemency recommendation for a class "A" felon. See Iowa Admin. Code § 205-14.5(1)(902)(1989 & 2006); see id. § 14.6(3)(2006)("Any decision to recommend commutation shall be by unanimous vote."). The unanimity requirement reflects a policy that such commutation recommendations are both of particular importance and for the clear case.

Of course, regardless of the frequency with which the Board could have considered recommending commutation for class "A" felons under the former version of § 902.2, it has always been the Governor who makes the decision. The law does not set any standards

or criteria by which the Governor is to exercise the power of commutation. Commutation is a matter of grace which may be granted or denied for any reason not in violation of law. A conceivably wide variety of policy, political, legal, moral and personal factors, some purely subjective, may inform a particular Governor in a particular case. How a Governor would react to a clemency recommendation if the Board were to make one in Ms. Snodgrass' case overlays a second tier of speculation.

Finally, the two core allegations of the Complaint -- that the revision to § 902.2 created a significant risk of prolonging Ms. Snodgrass' incarceration and absent revision it is likely she would have been freed by now -- are purely conclusory. The recent denial of Ms. Snodgrass' 2004 clemency petition together with the fact Ms. Snodgrass' pre-1995 interviews with the Board did not lead to commutation appear to preclude the latter proposition and make both incapable of proof to the extent based on the subjective appeal of her cause. Only if plaintiff alleged that at the time she committed the crime Iowa had a policy, history or practice of, with some degree of consistency, granting commutations to similarly situated life-term inmates could a significant risk of longer incarceration by reason of the revision to § 902.2 conceivably be established. See Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 465 (1981)(in which the Connecticut Board of Pardons had a "consistent practice of granting commutations to

most life inmates."). There is no such allegation here, and the Court doubts very much that one could be made.

In view of the foregoing, the Court has concluded that beyond doubt Ms. Snodgrass is not entitled to any relief on her *Ex Post Facto* claim.

B. Due Process

Ms. Snodgrass argues that the former version of § 902.2 gave her a protected liberty interest in regular interviews with the Board. She does not argue she has a liberty interest in commutation itself, nor could she. The former version of § 902.2 on which she relies did not impose any standards on the Board by which to determine whether to recommend commutation, much less on the Governor. Absent explicit standards, there is no "right or entitlement sufficient to invoke the Due Process Clause." Whitmore v. Gaines, 24 F.3d 1032, 1034 (8th Cir. 1994)(citing Dumschat, 452 U.S. at 466-67); see Joubert v. Nebraska Board of Pardons, 87 F.3d 966, 968 (8th Cir.), cert. denied, 518 U.S. 1035 (1996); Otey v. Stenberg, 34 F.3d 635, 637 (8th Cir.), cert. denied, 512 U.S. 1279 (1994). Rather, Ms. Snodgrass' due process claim is dependent on the merits of her *ex post facto* claim. She argues: "Because defendants cannot apply the provisions of present § 902.2 . . . without violating the *Ex Post Facto* Clause . . . she is entitled to the regular interviews guaranteed to her in the pre-1995 version of that statute." (Pl. Resistance at 9). As the Iowa legislature was

free to revise § 902.2 to eliminate the regular interview requirement, any liberty interest in the interviews did not survive.

C. Interference with Familial Association

In her Complaint Ms. Snodgrass alleges:

Defendants' retroactive application of the present version of § 902.2 to Ms. Snodgrass' case violates the First and Fourteenth Amendments to the United States Constitution, because it constitutes an "unwarranted interference" with the rights of both Ms. Snodgrass and her daughter, plaintiff Juliann Lawrence, to familial association under . . . the First and Fourteenth Amendments.

(Complaint ¶ 33). The constitutional foundation for plaintiffs' familial association claim lies in the First Amendment's protection of the right of freedom of association and a due process liberty interest in the sanctity of family relationships. Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984); see Overton v. Bazzetta, 539 U.S. 126, 131 (2003); Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 545 (1987); Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977). Ms. Snodgrass cites Ninth Circuit case law recognizing interference with familial association claims in the context of an action by mother and son against a city and its police officers for false arrest and subsequent incarceration, Lee v. City of Los Angeles, 250 F.3d 668, 685-86 (9th Cir. 2001), and an action by children for the excessive force shooting death of their father. Smith v. City of Fontana, 818

F.2d 1411, 1419-20 (9th Cir. 1987). For the purposes of the present motion the Court will assume that a constitutional interference with familial association claim may result where the complained of actions by state officials are not specifically directed at the familial relationship. But see Russ v. Watts, 414 F.3d 783, 788-90 (7th Cir. 2005)), cert. denied, 126 S. Ct. 1065 (2006)(no constitutional violation where violations not directed at parent-child relationship; Harpole v. Ark. Dept. of Human Services, 820 F.2d 923, 928 (8th Cir. 1987)(citing case law noting the difference between government action which directly and that which indirectly affects parent-child relationship).

There are two related, fundamental difficulties with the familial association claim here. First, it too is dependent on the merits of Ms. Snodgrass' *ex post facto* claim. If the elimination of the regular interview requirement in § 902.2 can constitutionally be applied to Ms. Snodgrass, there can be no "unwarranted interference" with the familial relationship. Second, even if Ms. Snodgrass remains entitled to the regular interviews provided for in the former version of the statute, there has still been no unwarranted interference. Ms. Snodgrass remains lawfully incarcerated following conviction for the crime of murder. "An inmate does not retain rights inconsistent with proper incarceration," the least compatible of which is freedom of association. Overton, 539 U.S. at 131 (citing Jones v. North

Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1977); Shaw v. Murphy, 532 U.S. 223, 229 (2001); and Hewitt v. Helms, 459 U.S. 460 (1983)). "The concept of incarceration itself entails a restriction on the freedom of inmates to associate with those outside of the penal institution." Jones, 433 U.S. at 126. Though Ms. Snodgrass and her daughter understandably hope that Ms. Snodgrass' sentence will someday be commuted allowing her to be paroled, they have no legitimate expectancy in clemency which would arguably support a § 1983 action for interference with the relationship between them.

III. Ruling and Order

For the foregoing reasons, defendants' motion to dismiss is **granted**. The Clerk of Court shall enter judgment dismissing the complaint.

IT IS SO ORDERED.

Dated this 25th day of January, 2007.



ROSS A. WALTERS
UNITED STATES MAGISTRATE JUDGE