

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT J. ALLEN, *et al.*, :
 :
 Plaintiffs, : Case No. 1:08CV01780
 :
 v. : Judge Oliver
 :
 TERRY COLLINS, *et al.*, : Magistrate Judge McHargh
 :
 Defendants. :

DEFENDANTS' FIRST MOTION FOR SUMMARY JUDGMENT

Defendants move the Court for summary judgment on all claims asserted by Plaintiffs.¹ The *Rooker-Feldman* Doctrine, and inherent notions of comity between State and Federal Courts, bars this Court from exercising federal subject matter jurisdiction over the claims asserted by Plaintiffs. Furthermore, Plaintiffs' claims predicated on the Eighth Amendment, the Fourteenth Amendment, the *Ex Post Facto* Clause, and Ohio's Victims' Rights Statutes, fail as a matter of law.

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¹ On November 30, 2009, Plaintiffs filed their "Motion to Amend Complaint". Doc 34. Defendants chose not to respond or otherwise object to the filing of Plaintiffs' Motion. Thus, Defendants' First Motion for Summary Judgment is directed at the allegations set forth in the Amended Complaint attached to Plaintiffs' Motion to Amend (Doc. 34-1). However, since Plaintiffs' Amended Complaint adopts the claims asserted in the original Complaint, this Motion also addresses the original Complaint.

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STATEMENT OF THE ISSUES

1. Whether the *Rooker-Feldman* Doctrine prohibits this Court from exercising federal subject matter jurisdiction because the claims at issue in the ongoing state class action cases of *Ankrom v. Hageman*, No. 04AP-984, 2005 Ohio App. Lexis 1489 (10th App. Dist., 2005) and *Hall v. Hageman*, Case No. 05-CVH-05-5459 (Franklin County, 2009) are inextricably intertwined with Plaintiffs' claims herein and because granting Plaintiffs' requested relief would render the *Ankrom* and *Hall* orders null and void.
2. Whether Plaintiffs' allegations regarding Ohio's Victims' Rights Statutes fail to state a claim upon which relief can be granted as a matter law.
3. Whether the parole practices at issue in this case violate the Eighth and Fourteenth Amendments to the United States Constitution.
4. Whether Plaintiffs' allegations regarding the "cumulative effects" of Ohio's parole laws are vague and conclusory and thus fail to state a claim upon which relief can be granted.
5. Whether the 2007 Ohio Parole Guidelines violate the *Ex Post Facto* Clause of the United States Constitution.

SUMMARY OF ARGUMENTS

1. **The *Rooker-Feldman* Doctrine Prohibits This Court From Exercising Federal Subject Matter Jurisdiction Over Plaintiffs' Claims.**

Plaintiffs' allegations of constitutional violations are unquestionably "inextricably intertwined" with the issues decided by the ongoing state class action cases of *Ankrom v. Hageman*, No. 04AP-984, 2005 Ohio App. Lexis 1489 (10th App. Dist., 2005) and *Hall v. Hageman*, Case No. 05-CVH-05-5459 (Franklin County, 2009). Plaintiffs are asking this Court to do precisely what the *Rooker* decision prohibits this Court from doing – question the validity of prior state court judgments and render the *Ankrom* and *Hall* orders null and void. Furthermore, Plaintiffs are asking this Court to disregard the court-approved settlement agreement entered into between the *Hall* plaintiffs and the Ohio Adult Parole Authority that requires the *Hall* Plaintiffs to file further parole-related claims in the Franklin County Court of Common Pleas.

2. **Ohio's Victims' Rights Statutes Do Not Violate the *Ex Post Facto* Clause.**

Ohio's Victims' Rights Statutes are procedural laws that did not have a substantive impact on Plaintiffs' sentence length or eligibility for parole. *Clumm v. Warden, Chillicothe Correction Inst.*, 2008 U.S. Dist. Lexis 70877 (S.D. Ohio, 2008). Ohio courts have explicitly held that the *Ex Post Facto* Clause does not prohibit the retroactive application of Ohio's Victims' Rights Statutes (and any recent amendment made to them). *Id.*

3. **Ohio's Parole Procedures and Laws Do Not Violate the Eighth or Fourteenth Amendments to the United States Constitution.**

Sixth Circuit and Ohio case law hold that the existence of a parole system does not give rise to a constitutionally protected liberty interest in release on parole. *Inmates of Orient Corr.*

Inst. v. Ohio State Adult Parole Auth., 929 F.2d 233, 235-238 (6th Cir. 1991). Furthermore, the denial of parole, or the application of certain parole procedures, does not implicate the Eighth Amendment. *Davis v. Howes*, 2009 U.S. Dist. Lexis 62744, *12 (E.D. Mich., 2009).

4. Plaintiffs' Vague and Conclusory Allegations Regarding "Cumulative Effects" Fail to State a Claim Upon Which Relief Can Be Granted.

Plaintiffs' claim with respect to any alleged "cumulative effects" is vague, generalized and not justiciable. Section 1983 jurisprudence requires dismissal of any claims determined to be vague and conclusory. *Ashcroft v. Iqbal*, 2009 U.S. LEXIS 3472 (2009).

5. Ohio's 2007 Parole Guidelines Do Not Violate the *Ex Post Facto* Clause Face.

The 2007 Parole Guidelines, as a matter of law, do not violate the *Ex Post Facto* Clause on their face. *Nur v. Mausser*, 2008 U.S. Dist. Lexis 30905 (N.D. Ohio, 2008); *Brown v. Collins*, No. 3:09 CV 1655, 2009 U.S. Dist. LEXIS 107341 (N.D. Ohio, 2009).

Furthermore, Plaintiffs' attack on the Ohio Adult Parole Authority's discretionary decision making process, in the form of an "as applied" challenge to the 2007 Guidelines, fails for two very significant reason. First, with respect to inmates serving a maximum term of "life" in prison and categorized as a 13 under the 2007 Guidelines (which is the majority of all Old Law inmates), the applicable guideline range is simply the parameters of the indefinite sentence set by the sentencing court. Therefore, there is no basis for inmates serving a maximum term of life to claim that the 2007 Guidelines modify or influence the Ohio Adult Parole Authority's discretionary decision making, or lead to an increase in the amount of time to be served. *Brown v. Collins*, No. 3:09 CV 1655, 2009 U.S. Dist. Lexis 107341 (N.D. Ohio, 2009); *Nur v. Mausser*, No. 1:08 CV 110, 2008 U.S. Dist. Lexis 30905 (N.D. Ohio, 2008).

Second, since the Franklin County Court of Common Pleas' decision in *Ankrom v. Hageman*, 2007 Ohio App. Lexis 4496 (10th App. Dist., 2005), the Ohio Adult Parole Authority has not used the 2007 Guidelines as a factor in *suitability* or *eligibility* determinations. Thus, whether to grant or deny an inmate parole is determined without reference to the 2007 Guidelines. Neither the United States Supreme Court, nor the Sixth Circuit, has recognized the validity of an "as applied" challenge where parole guidelines do not guide, restrict, or otherwise influence, a parole board's legislatively sanctioned discretion.

6. **The Doctrine of Separation of Powers Prohibits This Court From Infringing Upon The Executive Branch's Exclusive Jurisdiction to Determine Whether an Inmate is Suitable for Parole.**

The 2007 Guidelines do not modify, amend, or otherwise impact the Ohio Adult Parole Authority's discretionary power with respect to any Old Law inmates. As such, any federal court order that alters Ohio's parole process would both infringe upon the Executive Branch's exclusive jurisdiction to grant or deny parole within the parameters set by Ohio's Legislative Branch and violate the principle of separation of powers.

MEMORANDUM IN SUPPORT

I. INTRODUCTION.

Plaintiffs, nineteen parole eligible inmates currently in the custody of the Ohio Department of Rehabilitation and Correction (“ODRC”), initiated this *pre se* action pursuant to 42 U.S.C. § 1983 alleging that the Ohio Adult Parole Authority’s retroactive application of Ohio’s parole standards, polices, guidelines and laws violates the *Ex Post Facto* and Due Process Clauses of the United States Constitution. Complaint, Doc. 1, ¶ 35. On November 30, 2009, after appointment of counsel, Plaintiffs filed a “Motion to Amend Complaint”. See Doc. 34 and 34-1. The proposed amended Complaint incorporates the allegations set forth in the original Complaint, and includes claims predicated on the Eighth Amendment and Ohio’s Victims’ Rights Statutes. Furthermore, the proposed Amended Complaint includes five additional named Plaintiffs and requests class certification for all of Ohio’s “Old Law” inmates. Notably, the named Plaintiffs herein, and the members of Plaintiffs’ prospective class, are members of the current and ongoing state class action cases of *Ankrom v. Hageman*, No. 04AP-984, 2005 Ohio App. Lexis 1489 (10th App. Dist., 2005) and *Hall v. Hageman*, Case No. 05-CVH-05-5459 (Franklin County, 2009)) (certified copy attached as Exhibit A.).

In *Ankrom* and *Hall*, the state courts ordered parole re-hearings for any parole-eligible class member. In *Ankrom*, the court ordered re-hearings for any class member when: (1) a class member was assigned a guideline range which has a minimum term that exceeds the length of time a class member must serve before becoming eligible for parole; (2) a class member was assigned an offense category that does not correspond to the class member’s offense (or offenses) of conviction, or assigned an offense category that nominally corresponds but which is elevated based upon the OAPA’s independent determination that the class member committed a

distinct offense (such as kidnapping in connection with rape) for which he was not convicted; or (3) a class member did not receive a hearing or re-hearing that did not comply with the OAPA's post-*Layne* practices and procedures.² See *Ankrom v. Hageman*, No. 04AP-984, 2005 Ohio App. Lexis 1489, *P6 (10th App. Dist., 2005)

In *Hall*, the court ordered parole re-hearings for any class member who had not had a hearing since June 2005, when the OAPA adopted its post-*Ankrom* policy and procedures. The OAPA has captured these post-*Ankrom* policies and procedures and incorporated them into the 2007 Parole Guidelines which are at issue in this case.

Plaintiffs herein are members of the *Ankrom* and *Hall* class actions who are unhappy with the OAPA's decision to deny some of the parole for being not suitable. In essence, they are seeking to have the *Ankrom* and *Hall* decisions declared null and void by this Court. An invitation this Court should decline.

The *Rooker-Feldman* Doctrine prohibits this Court from exercising federal jurisdiction over Plaintiffs' claims. While this case presents an atypical twist on the *Rooker-Feldman* analysis (ironically, Plaintiffs here are challenging the constitutionality of the relief ordered by the courts in their successful Ohio class action cases of *Ankrom v. Hageman*, No. 04AP-984, 2005 Ohio App. Lexis 1489 (10th App. Dist., 2005) and *Hall v. Hageman*, Case No. 05-CVH-05-5459 (Franklin County, 2009)) (certified copy attached as Exhibit A), the philosophy underlying this doctrine, in conjunction with fundamental notions of comity between federal and state courts, suggest that the Court should dismiss this action.

In addition, Plaintiffs' claims predicated on the Eighth Amendment, the Fourteenth Amendment, and Ohio's Victims' Rights Statutes, fail as a matter of law. Plaintiff's allegations

² Post-*Layne* practices and procedures require that the OAPA assign an inmate the offense category score that corresponds to the offense or offenses of conviction. Exhibit A, *Ankrom v. Hageman*, No. 04AP-984, 2005 Ohio App. Lexis 1489 at * P 6 (10th App. Dist., 2005)

are founded on the faulty premise that inmates have a protected liberty interest in parole and its procedures. Furthermore, Plaintiffs' allegations are founded on the erroneous belief that inmates are entitled to the application of the parole guidelines in effect at the time of their conviction and that certain "representations" entitle them to be paroled on a date certain. However, inmates clearly have no such rights under Ohio law.

Lastly, Plaintiffs' primary allegation – that the Ohio Adult Parole Authority's ("OAPA") implementation and use of the 2007 Ohio Parole Guidelines ("2007 Guidelines") violates the prohibition on *ex post facto* laws – fails as a matter of law. The 2007 Guidelines do not modify an inmate's statutory sentence, do not alter an inmate's *eligibility* for parole, and do not alter the *suitability* criteria that the OAPA must consider at hearings. In fact, as explained in further detail below, the 2007 Guidelines are not even consulted until after the OAPA has already decided an inmate's *suitability* for release on parole. Thus, in essence, and in form, Plaintiffs' *ex post facto* allegations are nothing more than a thinly veiled attack on the Executive Branch's exclusive jurisdiction to determine, at its sole discretion (bound only by the minimum and maximum sentence range set by statute), an inmate's *suitability* for parole. However, a challenge to OAPA *suitability* determinations does not implicate *ex post facto*.

Notably, four named Plaintiffs in this case, Plaintiffs Allen, Morrison, Scott, and Murray, have already been released on parole. See Exhibit B, Affidavit of Judy Coakley, ¶ 11 (hereinafter, "Coakley Affidavit"). This fact effectively rebuts Plaintiffs' claim that the OAPA has adopted a "life means life" policy for inmates categorized as a thirteen under the 2007 Guidelines' Matrix. See Doc. 34-1, Amended Complaint, ¶ 35, attached to Motion to Amend Complaint (hereinafter, "Amended Complaint"). Thus, these Plaintiffs' claims are moot. See *Kensu v. Haigh*, 87 F.3d 172, 175 (6th Cir. 1996). Furthermore, Plaintiffs cite Ohio

Administrative Code (“O.A.C.”) 5120:1-1-10(E) for the proposition that “the 2007 standards explicitly adopted a policy that non-mandatory lifers would serve life in prison.” Doc. 34-1; Amended Complaint, ¶ 35. Plaintiffs’ allegation is misleading and a misrepresentation of the statute. O.A.C. 5120:1-1-10(E) only states that projected release dates will not be given to inmates serving a maximum of life in prison.³ That section does not deny any inmate, who is *eligible* for parole, from receiving a hearing by the OAPA to determine if he or she is *suitable* for release. Contrary to Plaintiffs’ allegation, it simply does not permit the establishment of a projected release date.

In reality, Plaintiffs’ Complaint is merely an expression of their frustration over the fact that they have not yet been released on parole. However, Plaintiffs’ parole expectations, masquerading as *ex post facto* allegations, are not justiciable in this Court. The truth remains that when Plaintiffs committed their crimes they subjected themselves to a parole system under which the likelihood of parole was uncertain and subject to the discretion of the OAPA until the expiration of their maximum sentence. Denial of discretionary parole does not offend established notions of justice.

II. OHIO’S PAROLE SYSTEM – APPLICATION OF THE 2007 GUIDELINES

A. INMATES HAVE NO CONSTITUTIONALLY PROTECTED INTEREST IN PAROLE PROCEDURES OR GUIDELINES.

As an initial matter, Ohio’s Supreme Court has consistently held that Ohio’s parole laws make parole totally discretionary, recognizing that they “do[] not create any presumption that parole will be issued and do[] not create an expectancy of parole.” *State ex rel. Blake v.*

³ O.A.C. 5120:1-1-10(E) states: “[a] projected release date shall not be established for any prisoner serving a life sentence, sentence of fifteen years to life, or a sentence imposed for any offense pursuant to Chapter 2907. of the Revised Code.” Furthermore, O.A.C. 5120:1-1-01 defines projected release date and states: “[a]n action taken by the parole board to establish a future date of release from six months to one year from the date of the hearing based upon the inmate complying with program and institution conduct requirements.”

Shoemaker, 446 N.E.2d 169, 170 (Ohio, 1983). The United States Supreme Court and the Sixth Circuit have reached the same conclusion. *Jago v. Van Curen*, 454 U.S. 14, 20 (1981); *Inmates of Orient Correctional Inst. v. Ohio State Adult Parole Authority*, 929 F.2d 233, 23607 (6th Cir. 1991). Thus, under Ohio law, inmates have no right to parole and no liberty interest in parole or parole procedures. *Id.* Further, the Ohio Supreme Court has specifically held that Ohio inmates have no right to rely on a particular set of guidelines, or have parole guidelines in effect at the time of their conviction applied at subsequent parole hearings. *State ex rel. Bealler v. Ohio Adult Parole Authority*, 91 Ohio St.3d 36 (2001).

B. SUITABILITY VS. ELIGIBILITY.

It is important to understand the distinction between an inmate's *eligibility* for parole, and an inmate's *suitability* for parole. An inmate's *eligibility* for parole is determined by statute. See O.R.C. § 2967.13. For example, an inmate serving a maximum term of life in prison becomes *eligible* for parole after expiration of the minimum sentence length as announced by the sentencing court. O.R.C. § 2967.13. Pursuant to statute, all parole eligible inmates are given a parole hearing when they first become eligible. *Id.*

On the other hand, an inmate's *suitability* for release on parole is determined at the OAPA's sole discretion after application of the criteria listed in O.A.C. § 5120-1-1-07. Essentially, each OAPA *suitability* determination weighs the interest of the inmate against the interest of the public. The OAPA may only authorize parole "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." O.R.C. § 2967.03.

Each *suitability* determination involves potential risks to the public. Offenders committing crimes serious enough to warrant incarceration, "are more likely to commit future

criminal offenses” than others. *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 365 (1998). Further, *suitability* determinations literally concern matters of life and death. *See, e.g., Swart v. Ohio Department of Rehabilitation and Correction*, 728 N.E.2d 428, 429 (Ohio App. 1999) (murder committed by parolee). It is particularly true of these Plaintiffs; offenders still in prison for pre-1996 crimes either “have troublesome institutional records” or “would have left prison by now if they were not convicted of serious crimes.” D. Diroll, *Thoughts on Applying S.B. 2 “Old Law” Inmates* (Ohio Criminal Sentencing Commission 2004).⁴ Clearly then, the OAPA cannot, and does not, take *suitability* determinations lightly.

C. THE 2007 GUIDELINES “MATRIX” IS NO LONGER USED AS A DECISION MAKING TOOL IN THE SUITABILITY PROCESS.

The 2007 Guidelines consist of two distinct parts. First, the 2007 Guidelines set forth and describe current sentencing law and the factors that the OAPA must consider at parole hearings. This portion essentially follows and re-states Ohio’s parole law as set forth in statute and code.

The second part of the 2007 Guidelines consists of a parole guideline chart (the “Matrix”), that sets forth the applicable guideline range for the typical case based on the seriousness of an inmate’s offense of conviction and the inmate’s criminal history/risk score. *Brown v. Collins*, No. 3:09 CV 1655, 2009 U.S. Dist. Lexis 107341, *3-5 (N.D. Ohio, 2009). The Matrix’s guideline ranges are a suggestion of time to be served in months for the typical or average case. Application of the Matrix is not mandatory and the OAPA has discretion to depart upward or downward from the guideline range. *Brown*, 2009 U.S. Dist. Lexis 107341 at *4.

⁴ Available at: <http://www.supremecourt.ohio.gov/Boards/Sentencing/resources/Publications/SB2.pdf> last visited January 7, 2010.

The crux of this lawsuit involves the OAPA's application of the Matrix at Plaintiffs' parole hearings.

The Matrix was initially developed (for inclusion in the 1998 Guidelines) at a time when there was a large population of parole eligible inmates. The matrix was "intended to promote a more consistent exercise of discretion, and enable fairer and more equitable decision making without removing the opportunity for consideration of the parole eligibility on an individual case basis." *Layne v. Ohio Adult Parole Authority*, 97 Ohio St. 3d 456, 457 (2002). Logic dictates, however, that Ohio's change to a determinate sentencing system in 1996 has drastically transformed Ohio's parole eligible population – only those Old Law inmates convicted of the most egregious offenses under the most horrific of factual circumstances remain incarcerated.

Ohio court decisions have been the driving force behind the changes made to Ohio's parole guidelines since implementation in 1998. *See Layne v. Ohio Adult Parole Authority*, 97 Ohio St. 3d 456 (2002); *Ankrom v. Hageman*, 2007 Ohio App. Lexis 4496 (10th App. Dist., 2005); *Hall v. Hageman*, Case No. 05-CVH-05-5459, p. 4 (Franklin County, 2009) (certified copy attached as Exhibit A.). Prior to June, 2005, the OAPA utilized the Matrix as a decision making tool in the suitability determination process. *Ankrom*, 2007 Ohio App. Lexis 4496 at *P15 (describing how the OAPA would use the guideline range to effectively postpone an inmate's eligibility for parole).

However, since *Ankrom*, an inmate's *suitability* for parole (i.e., whether an inmate will actually be granted release) has been determined prior to the OAPA's use of, or reference to, the Matrix. *See Hall*, Case No. 05-CVH-05-5459 at pp. 4, 9-12 (recognizing that since *Ankrom*, the OAPA's decision to deny parole is based upon the lack of *suitability* for parole, not parole *eligibility* or use of a matrix and holding that those inmates that had not yet received parole

hearings under post-*Ankrom* policies are entitled to them). Inmates, counsel, and sometimes courts, have difficulty recognizing this vital change in OAPA procedure and continue to believe that the Matrix is used as a decision making tool during the *suitability* determination process.

In *Ankrom*, a group of Ohio inmates initiated a class action lawsuit in the Franklin County Court of Common Pleas against the OAPA. This group of inmates was certified as a class defined as “all parole-eligible inmates who pleaded guilty or no contest to lesser or fewer offenses than for which they were indicted.” *Ankrom*, 2005 Ohio App. Lexis 1489 at *P2. The *Ankrom* Plaintiffs alleged that Ohio’s parole laws and guidelines violated their right to “meaningful consideration” under state law. The *Ankrom* class members also alleged, pursuant to 42 U.S.C. § 1983, that Ohio’s parole laws and guidelines violated the *Ex Post Facto* Clause, Double Jeopardy Clause, Equal Protection Clause, and Due Process Clause of the United States Constitution. The *Ankrom* class requested re-hearings under revised procedures that provided meaningful consideration as defined by the Court.

The *Ankrom* Court found that application of the 1998 Ohio Parole Guidelines (the “1998 Guidelines”) could result in the denial of “meaningful consideration” for parole under Ohio law. The Court found that the OAPA was, at times, using the 1998 Guidelines’ Matrix as a decision making tool as part of an inmate’s suitability determination. Because the minimum guideline range under the 1998 Guidelines was sometimes beyond an inmates’ statutory minimum sentence length, the OAPA was denying inmates “meaningful consideration” for parole by effectively delaying inmates’ eligibility for parole. This occurred when an inmate had his first hearing when he or she became statutorily eligible, but was denied parole merely because the guideline range stated in the Matrix had not been met. The *Ankrom* Court found that placement on a Matrix did not invoke the OAPA’s discretionary decision making process. If, however, a

reason was given to demonstrate that the inmate was not suitable for release, then there was “meaningful consideration” and use of the Matrix did not result in a violation of inmates' rights. *Hall*, Case No. 05-CVH-05-5459 at p. 10.

Ohio’s parole guidelines were revised in four significant respects in response to *Ankrom*. First, under the previous guidelines, the low end of the guideline range reflected the minimum amount of time that an inmate was thought to be required to serve before being considered potentially suitable for release. *Nur v. Mausser*, No. 1:08 CV 110, 2008 U.S. Dist. Lexis 30905, *3 (N.D. Ohio, 2008). Under the 2007 Guidelines’ Matrix, the statutory minimum sentence for each offense is the low end of the guideline range. Second, under the 2007 Guidelines’ Matrix, the offense category assigned to an inmate is determined by the offense of conviction, and only for those convictions for which an indefinite sentence was imposed. *Id.* Third, the 2007 Guidelines’ Matrix classifies all “maximum life” convictions in offense category 13, which was designed to correct the misconception under the previous guidelines that an inmate convicted of murder will be released after serving a definitive amount of time. *Id.* Finally, the OAPA’s use of the matrix also changed and it was no longer used as a decision making tool when determining suitability for release. *Hall*, Case no. 05-CVH-05-5459, pp. 4, 9-10 (Franklin County, 2009).

The reclassification of inmates serving a maximum term of life in prison is the crux of Plaintiffs’ Complaint. *See, e.g.*, Doc. 34-1, Amended Complaint, ¶¶ 36-41. Notably, however, this reclassification has already been held to not violate the *Ex Post Facto* Clause. *See Nur*, 2008 U.S. Dist. Lexis 30905 at *3; *Brown v. Collins*, No. 3:09 CV 1655, 2009 U.S. Dist. Lexis 107341 (N.D. Ohio, 2009). Furthermore, after the *Ankrom* decision, the OAPA began making all *suitability* determinations, for all inmates, prior to consulting the Matrix. *Hall v. Hageman*, Case No. 05-CVH-05-5459, pp. 4, 9-12 (Franklin County, 2009). This change, and the on-going

application of it to the *Hall* re-hearings, demonstrates that the OAPA does not use the 2007 Guidelines as a decision making tool when determining an inmate's suitability for release.

In the wake of the Ohio Tenth Appellate District's decision in *Ankrom*, a second group of Ohio inmates initiated an additional class action lawsuit in the Franklin County Court of Common Pleas against the OAPA. *Id.* This group of inmates was certified as a class defined as "all parole-eligible Ohio prison inmates whose convictions were obtained by trial." *Id.* at 3. The *Hall* plaintiffs alleged that Ohio's parole laws and guidelines violated their right to "meaningful consideration" under state law. The *Hall* class members also alleged, pursuant to 42 U.S.C. § 1983, that Ohio's parole laws and guidelines violated the *Ex Post Facto* Clause, Double Jeopardy Clause, Equal Protection Clause, and Due Process Clause of the United States Constitution. As relief, the *Hall* plaintiffs requested new parole hearings under the 2007 Guidelines.

Ultimately, Judge Connor of the Franklin County Court of Common Pleas held in favor of the plaintiff class and ordered that all parole-eligible Ohio inmates whose convictions were obtained by trial and who had not had a hearing since June, 2005 (under post-*Ankrom* practices) receive new parole hearings under post-*Ankrom* practices. *Hall*, Case No. 05-CVH-05-5459 at 11.

III. SUMMARY JUDGMENT STANDARD OF REVIEW – FRCP 56(c)

Summary judgment should be granted when it is shown that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Although summary judgment should be cautiously invoked, it is an integral part of the civil rules which are designed to "secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

Once the moving party has satisfied its burden of proof, the burden then shifts to the nonmover. A motion for summary judgment forces the nonmoving party to produce evidence on any issue for which that party bears the burden of production at trial. *Id.* at 322. The nonmoving party may not rest upon mere allegations and denials in the pleadings but instead must point to or submit some evidentiary material that shows a genuine dispute over the material fact exists. *Id.* Further, “there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Hansard v. Barrett*, 980 F.2d 1059, 1061 (6th Cir. 1992).

The Court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). However, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party’s case and on which that party will bear the burden of proof at trial. *Celotex Corp.* 477 U.S at 322.

IV. Law and Argument

A. Plaintiffs’ Complaint requires the Federal District Court to review the lawfulness of a final state court judgment. Jurisdiction over claims that require the District Court to examine the lawfulness of a final state court judgment is barred by the *Rooker-Feldman* Doctrine. The District Court, therefore, lacks jurisdiction over the claims asserted against these Defendants and they must be dismissed.

The *Rooker-Feldman* Doctrine is based on the Supreme Court’s decisions in *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Ct. of App. v. Feldman*, 460 U.S. 462 (1983). The doctrine “holds that lower federal courts lack subject matter jurisdiction to engage in appellate review of state court proceedings or to adjudicate claims ‘inextricably intertwined’ with issues decided in state court proceedings.” *Peterson Novelties, Inc. v. City of*

Berkley, 305 F.3d 386, 390 (6th Cir. 2002). The doctrine also prohibits a federal court from issuing a decision that would render a state court judgment null and void. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923).

Plaintiffs' allegations of constitutional violations are unquestionably "inextricably intertwined" with the issues decided by the state courts in *Ankrom* and *Hall*. As stated above, Ohio state courts have been the driving force behind the evolution of Ohio's parole guidelines. Further, the changes made in the 2007 Guidelines are the direct result of the *Ankrom* Court's decision.

The Sixth Circuit defines "inextricably intertwined" as:

The federal claim is inextricably intertwined with the state-court judgment if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it. Where federal relief can only be predicated upon a conviction that the state court was wrong, it is difficult to conceive the federal proceeding as, in substance, anything other than a prohibited appeal of the state-court judgment.

Peterson Novelties, Inc. et al. v. City of Berkley, et al., 305 F.3d 386, 392 (6th Cir. 2002). Applying this analysis here warrants the conclusion that Plaintiffs' constitutional claims are inextricably intertwined with the state court judgments in *Ankrom* and *Hall*. In order to proceed with Plaintiffs' constitutional claims, this Court would have to implicitly decide that the relief ordered by the *Ankrom* and *Hall* Courts was unconstitutional.

The *Rooker-Feldman* Doctrine dictates that a challenge in Federal Court to the constitutionality of relief ordered by an Ohio state court should not be tolerated. Plaintiffs are asking this Court to do precisely what the *Rooker* decision prevents this Court from doing – render the *Ankrom* and *Hall* orders null and void (*See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923) (determining that a federal district court may not declare a state court judgment "null and void")) and question the validity of prior state court judgments. This is the precise

circumstance that the *Rooker-Feldman* Doctrine is intended to prevent. Plaintiffs' efforts here to thwart those reform efforts surely must fail under *Rooker-Feldman*.

In addition, it is critically important to note that Plaintiffs' unrefined prospective class definition in the instant action necessarily encompasses all of the *Ankrom* and *Hall* class members. Exhibit B, Coakley Affidavit, ¶ 12. It is also critically important to recognize that the relief ordered by Judge Connor in *Hall* – new parole hearings for parole eligible inmates whose convictions were obtained by trial - is an ongoing effort and has yet to be fully accomplished. *Id* at ¶ 9.

Furthermore, the *Hall* class members and the OAPA entered into a Court-approved settlement agreement that: (1) “resolves all pending issues [to include claims per § 1983] between the parties in regard to this litigation, and shall act as a bar to further litigation on the issues raised”; and (2) gives the Franklin County Court of Common Pleas continuing exclusive jurisdiction over the issues addressed in the settlement agreement. *See, Journal Entry and Agreement*, pp. 2-4 (certified copy attached as Exhibit C) (hereinafter, “*Hall Agreement*”). The *Hall Agreement* explicitly requires that any disputes involving the issues settled by the *Hall Agreement* be filed in the Franklin County Court of Common Pleas. Exhibit C, *Hall Agreement*, p. 4.

The *Hall Agreement* also requires many of the named Plaintiffs herein to file claims, through counsel, that are intertwined with the *Hall Agreement* in the Franklin County Court of Common Pleas. Plaintiffs are essentially asking this Court to disregard the express terms of a court-approved contract. General contract law prohibits this. *See, e.g., Horn v. Nationwide Prop. & Cas. Ins. Co.*, 2009 U.S. Dist. LEXIS 37599, 18-20 (N.D. Ohio, 2009).

The *Hall* Agreement is unambiguous: “[t]his Agreement resolves all issues between the Plaintiff class and Defendants arising out of the claims for declaratory and injunctive relief set forth in Plaintiffs’ amended complaint”. Exhibit C, *Hall* Agreement, pg. 2. It also states that the “parties agree that this Agreement resolves all pending issues between the parties in regard to this litigation, and shall act as a bar to further litigation on the issues raised.” *Id.* The *Hall* class members’ amended complaint included a 42 U.S.C. § 1983 action for alleged violations of the United States Constitution, including the (1) *Ex Post Facto* Clause, (2) double jeopardy clause, (3) equal protection clause, and (4) due process clause. *Hall*, Case No. 05-CVH-05-5459 at 2.

Furthermore, because *Ankrom* was decided on contract principles, and because the Court issued a preliminary injunction prohibiting *Ankrom* class members from asserting individual claims in collateral courts, any claims arising out of the implementation of the *Ankrom* Court’s remedy are also required to be brought in that same Court. *Ankrom*, 2005 Ohio App. Lexis 1489 at *P6. To vindicate their rights here, Plaintiffs would have this Court eliminate their relief obtained in *Hall*. This Court must reject that request. Based on the *Rooker-Feldman* Doctrine alone, this Court must end this suit.

B. PLAINTIFFS’ ALLEGATION REGARDING OHIO’S VICTIMS’ RIGHTS STATUTES FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Plaintiffs appear to attempt to state a claim stemming from the OAPA’s compliance with Ohio’s victims’ rights and notice statutes ((R.C. §§ 2967.03, 2967.12, 5149.101 and R.C. Chapter 2930) (collectively referred to hereafter as the “Victims’ Rights Statutes”)) (*See* Doc. 34-1, Amended Complaint, pp. 8-9.). Although the Amended Complaint does not specify a specific constitutional provision that the Victims’ Rights Statutes allegedly violate, or even allege that the Victims’ Rights Statutes are unconstitutional, to the extent the Amended

Complaint is construed as alleging a cause of action based on the OAPA's compliance with the Victims' Rights Statutes, the allegation fails as a matter of law.

Ohio's courts have unambiguously held that neither Ohio's Victims' Rights Statutes, nor any additional procedural steps that these laws may require prior to releasing an inmate on parole, violate the prohibition on *ex post facto* laws. See *Clumm v. Warden, Chillicothe Correctional Inst.*, 2008 U.S. Dist. Lexis 70877 (S.D. Ohio, 2008); *Green v. OAPA*, 2008 Ohio 5972, App. Lexis 5007 (Ohio 10th App. Dist., 2008). The *Ex Post Facto* Clause does not prohibit the retroactive application of procedural laws. *Id.* The *Ex Post Facto* Clause does not "forbid[] any legislative change that has any conceivable risk of affecting a prisoner's punishment." *Cal. Dept't of Corr. v. Morales*, 514 U.S. 499, 508 (1995). Rather, the challenged law must create a "sufficient risk of increased punishment" above and beyond "some ambiguous disadvantage to an inmate." *Id.* at 506.

Ohio's Victims' Rights Statutes are procedural laws that do not have a substantive impact on inmates' sentence length or eligibility for parole. See *Clumm* at 7. Plaintiffs' allegations are in clear conflict with established case law – Ohio courts have explicitly held that the *Ex Post Facto* Clause does not prohibit the retroactive application of Ohio's Victims' Rights Statutes (and any recent amendment made to them), as established below.

For example, in *Clumm v. Warden, Chillicothe Correction Inst.*, 2008 U.S. Dist. Lexis 70877 (S.D. Ohio, 2008), one of the primary issues before the Court was whether the OAPA violated the *Ex Post Facto* Clause by observing the requirements set forth in Ohio's Victims' Rights Statutes. Noting that in order to violate the *Ex Post Facto* Clause, a post-sentencing change to parole procedures requires more than "some ambiguous sort of disadvantage to the inmate," *Morales*, 514 U.S. at 506 (FN 3), the Court held that Ohio's Victims' Rights Statutes

did not violate the prohibition on *ex post facto* laws. The Honorable District Court Judge Marbley stated:

Notwithstanding the notice and hearing requirement created by the statute, the Ohio Parole Board retains its full discretion regarding its parole decisions. See O.R.C. §2967.03. "[A] law that is merely procedural and does not increase a prisoner's punishment cannot violate the Ex Post Facto Clause even when applied retrospectively. (citations omitted).

Clumm., 2008 U.S. Dist. LEXIS at * 6-7 (S.D. Ohio 2008).

Accordingly, the District Court affirmed the magistrate's recommendation that the plaintiff's *ex post facto* claims be dismissed.⁵

In the instant case, Plaintiffs' vague allegations mirror the allegations unequivocally rejected by the *Clumm* and *Green* Courts. Application of the Victims' Rights Statutes do not create a sufficient risk of increasing any of the Plaintiffs' sentences. In fact, these statutes have "no substantive impact on [Plaintiffs'] sentences or their eligibility for parole" whatsoever. *Id.* Accordingly, these claims should be dismissed at this time.

C. OHIO'S PAROLE PROCEDURES AND THE 2007 GUIDELINES DO NOT VIOLATE THE DUE PROCESS CLAUSE OR EIGHTH AMENDMENT.

To the extent Plaintiffs attempt to assert claims predicated on the Fourteenth Amendment or the Eighth Amendment, Plaintiffs fail to state a claim upon which relief can be granted. Ohio courts, and the Sixth Circuit, have explicitly held that the existence of a parole system does not give rise to a constitutionally protected liberty interest in release on parole. *Inmates of Orient Corr. Inst. v. Ohio State Adult Parole Auth.*, 929 F.2d 233, 235-238 (6th Cir. 1991); *Jago v. Van*

⁵ See also, *Green v. OAPA*, 2008 Ohio 5972 (Ohio 10th App. Dist., 2008) ("While many of [the Victims' Rights Statutes] became effective after appellant's conviction, they had no substantive impact on appellant's sentence or his eligibility for parole. And, while these amendments may cause the parole board to hold more hearings, the parole board retains full discretion to determine appellant's eligibility for parole. The ex post facto clause does not prohibit the retroactive application of procedural laws that do not impact an individual's punishment, and all of these provisions meet that definition. Therefore, like the court in *Clumm*, we conclude that the ex post facto clause does not prohibit the retroactive application of R.C. 5149.101 and related notice provisions. Therefore, the trial court properly dismissed these claims").

Curen, 454 U.S. 14 (1981); *Michael v. Ghee*, 498 F.3d 372, 378 (6th Cir. 2007) (cert. denied).⁶ Plaintiffs' conclusory allegations and their belief that prior guidelines or prior OAPA behavior gives rise to "expectations" or "presumptions" regarding parole are mistaken and in direct conflict with controlling law. (See, e.g., Doc. 34-1, Amended Complaint, ¶ 79(a) ("Under the standards in place at the time of his sentencing in 1991 Mr. David reasonably expected to serve a minimum of 120 months (10 years)")).

Furthermore, although there are no specific allegations of cruel and unusual punishment asserted in the Amended Complaint, Plaintiffs' "First Claim for Relief" asserts the "right to be free of Cruel and Unusual Punishment as guaranteed by the Eighth Amendment." (Doc. 34-1, Amended Complaint, ¶ 182). To the extent the Amended Complaint is construed as alleging a claim predicated on the Eighth Amendment, the claim fails as a matter of law. The denial of parole simply does not implicate the Eighth Amendment. *Davis v. Howes*, 2009 U.S. Dist. Lexis 62744, *12 (E.D. Mich., 2009) (citing *Carnes v. Engler*, 76 F. Appx. 79, 81 (6th Cir., 2003)).

D. PLAINTIFFS' VAGUE AND CONCLUSORY ALLEGATIONS REGARDING THE "CUMULATIVE EFFECT" OF PAROLE GUIDELINES AND INFORMAL PRACTICES FAIL TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

Plaintiffs appear to attempt to assert a claim based on the cumulative effect of the 2007 Guidelines along with the effect of practices informally adopted by the OAPA. However, their claim, if any, is vague, generalized and not justiciable. The allegation fails to include basic information such as: who, what, when or where. A pleading requires more than an "unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 2009 U.S. LEXIS 3472, 28

⁶ Assuming, *arguendo*, that Plaintiffs have alleged a Fourteenth Amendment Equal Protection claim, inmates are not a suspect class for purposes of the Equal Protection Clause. *Wilson v. Yacklich*, 148 F.3d 596, 604 (6th Cir. 1998) (cert denied, 525 U.S. 1139) (1999).

(2009). Simple “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice” when a court is considering a motion to dismiss. *Id.* at 29.

Section 1983 jurisprudence requires dismissal of any claims determined to be vague and conclusory. The necessity of notifying Defendants of some factual underpinning in support of a claim is construed stringently in cases brought under 42 U.S.C. §1983. *Place v. Shepherd*, 446 F.2d 1239, 1244 (6th Cir. 1971); *Agnew v. Moody*, 330 F.2d 868, 870 (9th Cir. 1964); *Valley v. Maule*, 297 F. Supp. 958, 960 (D. Conn. 1968); *Shakespeare v. Wilson*, 40 F.R.D. 500, 504 (S.D. Cal. 1966). A simple threadbare allegation regarding “informal policies” does not meet the threshold standard articulated by the Supreme Court in *Iqbal*.

It must be noted that Plaintiffs’ request for relief from the “practices at issue in this case” is manifestly vague and deficient. Defendants submit that the only “parole practice” against which they *may* have stated a claim is under the *Ex Post Facto* Clause for the application of the 2007 Guidelines. As stated above, to the extent the Amended Complaint is construed as alleging causes of action based on the Due Process Clause, the Eighth Amendment, and Ohio’s Victims’ Rights Statutes, these causes of action have been soundly rejected by all courts. Further, Plaintiffs’ ill-reasoned allegations predicated on an “expectation” of parole, or on a right to be paroled at a certain time, clearly does not suffice to state a claim.

Ohio inmates simply do not have the right to be paroled before the expiration of their maximum sentence and do not have the right to have a certain set of parole guidelines applied to them. *State ex rel. Bealler v. Ohio Adult Parole Auth.*, 91 Ohio St.3d 36 (2001). Furthermore, alleged informal conversations between inmates and OAPA members regarding expected release dates do not give rise to a protected liberty interest. Thus, Plaintiffs’ only cause of action would be predicated on the OAPA’s application of the 2007 Parole Guidelines.

E. PLAINTIFFS' *EX POST FACTO* ALLEGATIONS FAIL AS A MATTER OF LAW.

1. The 2007 Parole Guidelines do not violate the *Ex Post Facto* Clause on their face.

It is unquestionable that the 2007 Guidelines do not violate the *Ex Post Facto* Clause on their face. *See, e.g., Brown v. Collins*, No. 3:09 CV 1655, 2009 U.S. Dist. Lexis 107341, (N.D. Ohio, 2009); *Nur v. Mausser*, No. 1:08 CV 110, 2008 U.S. Dist. Lexis 30905 (N.D. Ohio, 2008); *Ridenour v. Collins*, 2009 U.S. Dist. Lexis 112034 (S.D. Ohio, 2009). In fact, Chief Justice Judge Carr of the Northern District recently dismissed an inmate's *ex post facto* claim lodged against the 2007 Guidelines at the screening stage for failure to state a claim upon which relief may be granted. *Brown*, 2009 U.S. Dist. Lexis 107341.

In *Nur*, the plaintiff was serving a life sentence for murder (category 13 on the guidelines), just like the majority of the Plaintiffs herein. Plaintiff Nur filed a § 1983 action alleging that the OAPA's use of the 2007 Guidelines to determine his eligibility for parole violated the *Ex Post Facto* Clause. After a thorough examination of the 2007 Guidelines, the District Court concisely described why application of the Guidelines and the Matrix, on their face, do not violate the *Ex Post Facto* Clause for inmates such as Nur and Plaintiffs:

Mr. Nur does not set forth a valid *ex post facto* claim at this time. The guidelines on their face do not create a significant risk of increasing the amount of time Mr. Nur actually will serve. Under the 2007 guidelines, the low end of the guideline range for all offenses is the minimum sentence imposed by the sentencing court. The maximum end of the guideline range in category 13 would be Life, which was also imposed upon Mr. Nur by the sentencing court. Therefore, on paper, the applicable guideline range under the 2007 guidelines for an inmate convicted of murder, like Mr. Nur, is the indefinite sentence imposed on him by the sentencing court. This leaves the decision to grant or deny parole within the parameters of indefinite sentence to the complete discretion of the parole board. Because there is no longer a suggested range of time that Mr. Nur should serve before parole should be granted, there is no objective criteria upon which he can base his claim that he will almost certainly be required to serve a longer term of incarceration than he

anticipated after his last parole hearing. There is no *ex post facto* violation on the face of the guidelines.

Nur, 2008 U.S. Dist. Lexis 30905 at *7-8 (N.D. Ohio, 2008). This reasoning applies here. Thus, Plaintiffs' facial challenge to the 2007 Guidelines should be dismissed.

2. The 2007 Parole Guidelines and Matrix do not modify, amend or otherwise have an effect on suitability determinations made by the OAPA. Thus, the *Ex Post Facto* Clause cannot be violated as a matter of law.

Plaintiffs' attack on the OAPA's discretionary decision making process, in the form of an "as applied" challenge to the 2007 Guidelines, fails for two significant reasons. First, neither the United States Supreme Court, nor the Sixth Circuit, has recognized the validity of an "as applied" challenge where parole guidelines do not guide, restrict, or otherwise influence, a parole board's legislatively sanctioned discretion. The truth of the matter is that the guideline range for inmates serving a maximum term of life in prison, which is the majority of Old Law offenders (and five of the seven "representative" Plaintiffs described in the Amended Complaint⁷), is the indefinite sentence imposed by the sentencing court. *Id.* This leaves the decision to grant or deny parole within the parameters of the indefinite sentence to the complete discretion of the OAPA. O.R.C. § 2967.03; *Brown*, 2009 U.S. Dist. Lexis 107341. Without an applicable guideline range, there is no basis for inmates serving a maximum term of life to claim that the 2007 Guidelines modify or influence the OAPA's discretionary decision making, or lead to an increase in the amount of time to be served. *Brown v. Collins*, 2009 U.S. Dist. Lexis 107341 at 5.

Second, with respect to the two "representative" Plaintiffs subject to non-life sentences (who represent a minority of all Old Law offenders), Plaintiffs' allegations continue to rely on

⁷ "Representative" Plaintiffs are those Plaintiffs described in the Amended Complaint, to wit: John McDermott, Jerry David, Chrystal Pfeifer, Gary Meek, Donald Martin, Luther D. Johnson, and Claude Spencer. *See* Doc. 34-1, Amended Complaint.

the erroneous assumption that the Matrix is utilized as a decision making tool⁸. However, as described above, since the Franklin County Court of Common Pleas decision in *Ankrom*, the OAPA has not used the Matrix as a factor in suitability determinations. *Hall*, Case No. 05-CVH-05-5459 at 4, 9-12. Post-*Ankrom* denials of parole for non-lifers are simply the result of applying the substantive *suitability* criteria found at O.A.C. § 5120-1-1-7 – criteria which has remained unchanged since 1975.

The 2007 Guidelines do not modify, amend, or otherwise have any effect on the OAPA's discretionary power with respect to any Old Law inmates. As such, infringing upon the Executive Branch's exclusive jurisdiction to grant or deny parole within the parameters set by Ohio's Legislative Branch violates the principle of separation of powers.

3. Plaintiffs' allegations are nothing more than an attack on the OAPA's discretionary decision making process and must be dismissed due to the separation of Powers Doctrine.

Plaintiffs' allegations depend exclusively upon an "as applied" challenge as formulated in the seminal cases of *Garner v. Jones*, 529 U.S. 244 (2000), *Fletcher v. Reilly*, 433 F.3d 867 (D.C. Cir. 2006) and *Michael v. Ghee*, 498 F.3d 372 (6th Cir. 2007) (cert. denied). However, it is critically important to understand that these Courts recognize an "as applied" challenge to discretionary decision making in the parole context only where the parole guidelines or regulation at issue restrict, alter, or otherwise have an affect on a parole board's discretion. In stark contrast, the 2007 Guidelines have no effect on the OAPA's discretion. Consequently,

⁸ The two "representative" Plaintiffs depicted in the Amended Complaint that are not serving a maximum term of life in prison are Gary Meek, who was sentenced to a term of 6 ½ to 26 ½ after pleading guilty to 11 counts of rape, 12 counts of gross sexual imposition and 11 counts of corruption of a minor (*See State v. Meek*, 1997 Ohio App. LEXIS 193, *1-2 (Ohio 9th App. Dist. 1997)), and Donald Martin, who was sentenced to a term of 9 to 35 years after pleading guilty to one count of voluntary manslaughter and one count of theft with specifications. *See* Doc. 34-1, Amended Complaint, ¶ 128.

Plaintiffs' allegations are necessarily directed solely at the OAPA's discretionary *suitability* determinations and decision making ability.

Challenges to *suitability* determinations simply do not have *ex post facto* implications. *McMahan v. Owens*, 2009 U.S. App. Lexis 101770 (W.D. Texas, 2009). Where parole guidelines do not: (i) alter the sentence length set by statute; (ii) modify an inmate's *eligibility* for parole; (iii) narrow a parole board's discretion by forcing it to deny parole in more circumstances; (iv) alter substantive *suitability* factors set by administrative code provision; or (v) mandate an increase in the length of time between suitability hearings for certain inmates, Courts should be reluctant to infringe upon the Executive Branch's exclusive jurisdiction to grant or deny parole within the parameters set by the Legislative Branch. *Toolasprashad v. Grondolsky*, 570 F. Supp. 2d 610, 631 (D.C. N.J. 2008). The challenged guidelines offend none of the listed factors.

4. Neither the Sixth Circuit nor the United States Supreme Court has recognized a challenge to discretionary decision making where the challenged law or guideline does not influence a parole board's discretion.

In *Michael v. Ghee*, a panel of Sixth Circuit judges overruled a previous Sixth Circuit panel (*Ruip v. United States*, 555 F.2d 1331 (6th Cir. 1997)). The *Michael* Court determined that the 1998 Ohio Parole Guidelines should be considered "laws" for *ex post facto* purposes. Relying on the Supreme Court case of *Garner v. Jones*, and the D.C. Circuit's decision in *Fletcher v. Reilly*, 433 F.3d 867 (2006), the Sixth Circuit held that parole guidelines that affect a parole board's discretion by guiding decision making implicates *ex post facto*. *Michael*, 498 F.3d at 383 ("The 1998 Ohio guidelines are similar to the guidelines at issue in *Fletcher* as they

both *guide the discretion* of the parole board in making parole determinations”) (emphasis added).⁹

Inmates across the country have latched on to the Supreme Court’s declaration, as recognized by *Michael*, that “the presence of discretion does not displace the protection of the *Ex Post Facto* clause.” *Garner*, 529 U.S. at 253. However, *Garner*’s holding was limited to a regulation that actually affected discretion. Therein lies the critical distinction between the 2007 Guidelines at issue in this case and the amended regulation and guidelines at issue in *Garner*, *Fletcher*, and *Michael* – the 2007 Guidelines have absolutely no affect on the OAPA’s discretion when making *suitability* determinations. Rather, once a decision has been made that an inmate is not suitable for release, the Matrix *may* be reviewed to assist in determining an appropriate length of time to be served prior to the next hearing. See *Hall*, Case No. 05-CVH-05-5459.

At issue in *Garner* was whether an amendment to a Georgia parole regulation that mandated an increase in the interval of time between suitability hearings violated the *Ex Post Facto* clause. *Garner*, 529 U.S. at 246. However, the amended Georgia regulation gave the Georgia Parole Board discretion to circumvent the regulation’s mandate by granting earlier suitability hearings in special cases. The respondent argued that the parole board would never use its discretion to grant an earlier suitability hearing, thus creating a risk of increased sentence length simply by reducing the frequency of opportunities to be seen by the parole board. Significantly, the Supreme Court did not condemn the parole board’s use of discretion in the context of *suitability* determinations. In fact, the Supreme Court explicitly recognized the importance of the use of discretion and its role in the parole process. *Garner*, 529 U.S. at 253-54. The Supreme Court did view as problematic the possibility that the parole board would not

⁹ Notably, there is a split of authority amongst the Circuits on this issue. See, e.g., *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006) (holding that parole guidelines are not laws for *ex post facto* purposes).

use its discretion to overcome the mandatory increase in time between suitability hearings. *Id.* at 254 (“The essence of respondent’s case, as we see it, is not that discretion has been changed in its exercise but that, in the period between parole reviews, it will not be exercised at all”).

Accordingly, the principle underlying the *Garner* decision is that, although *suitability* determinations remain entirely discretionary and not subject to *ex post facto* inquiry, failure to exercise discretion to nullify a mandatory increase in the interval of time between hearings (which effectively minimizes *eligibility* for parole), may implicate the *Ex Post Facto* Clause. In contrast, the 2007 Guidelines and the Matrix do not mandate any particular outcome; thus, the OAPA is not forced to use their discretion to nullify mandatory, and potentially unconstitutional, effects. *Hall*, Case No. 05-CVH-05-5459, *passim*; *Brown*, 2009 U.S. Dist. Lexis 107341; *Nur v. Mausser*, 2008 U.S. Dist. Lexis 30905 (N.D. Ohio, 2008). The 2007 Guidelines simply do not implicate the concerns addressed by the *Garner* Court.

In *Fletcher*, the D.C. Circuit extended the logic underpinning the *Garner* decision to parole guidelines. At issue in *Fletcher* was the promulgation of new re-parole guidelines that significantly changed the *suitability* criteria the United States Parole Commission would apply at re-parole hearings. *Fletcher v. Reilly*, 433 F.3d 867, 869 (2006). The *Fletcher* Court recognized that the plaintiff in that case was subject to a new set of re-parole guidelines that, unlike the previous set of re-parole guidelines, did not take post-incarceration behavior into account when making *suitability* determinations. *Id.* Thus, the amended re-parole guidelines in *Fletcher* greatly affected discretion by narrowing the criteria that the Parole Commission could consider at a re-parole hearing.

In contrast, the 2007 Guidelines do not affect or modify any parole *suitability* criteria. In fact, the *suitability* criteria for parole in Ohio have remained constant since 1975.

Lastly, at issue in *Michael v. Ghee*, was the promulgation and application of Ohio's 1998 Parole Guidelines. Relying on *Garner* and *Fletcher*, the Sixth Circuit held that parole guidelines that affect discretion are subject to *ex post facto* scrutiny. *Michael*, 498 F. 3d at 382. The Sixth Circuit stated: "[t]he 1998 Ohio guidelines are similar to the guidelines at issue in *Fletcher* as they both guide the discretion of the parole board in making parole determinations, and we find the approach taken by the D.C. Circuit to be consistent with *Garner*." *Id.* at 383 (emphasis added). However, as stated above, the 2007 Guidelines provide no guidance for inmates serving a life term. Moreover, for non-life inmates, the 2007 Guidelines are not consulted until after an inmate's *suitability* is determined. See *Hall*, Case No. 05-CVH-05-5459 at 4, 9-12.

Further, the Sixth Circuit's analysis of the 1998 Guidelines must be viewed in the context of evolving state law. See *Ankrom v. Hageman*, No. 04AP-984, 2005 Ohio App. Lexis 1489 (10th App. Dist., 2005). A careful reading of *Michael* reveals that the Court's ultimate concern with the 1998 Guidelines was the possibility that inmates' actual *eligibility* for parole was delayed until the minimum guideline range had been met by an inmate; this was the same concern at issue in *Ankrom*. Promulgation of the 2007 Guidelines, which actually took effect in June, 2005, was a specific response by the OAPA to remedy the Ohio state courts' concerns expressed in *Ankrom*. Exhibit B, Coakley Affidavit, ¶ 5. Significantly, postponement of inmates' *eligibility* for parole by using the Matrix as a decision-making tool is not an issue under the 2007 Guidelines. *Hall*, Case No. 05-CVH-05-5459 at 4, 9-12. Not only is the Matrix not considered until after an inmate's *suitability* is determined, but the minimum guideline range is the minimum statutory sentence length for all inmates. *Id.*; *Brown*, 2009 U.S. Dist. Lexis 107341.

The 2007 Guidelines do not implicate the same concerns as the guidelines or regulations at issue in the seminal *ex post facto*/parole cases described above. The 2007 Guidelines do not effectively postpone an inmate's eligibility for parole by mandating an increase in time between hearings like the regulation at issue in *Garner*. Further, the 2007 Guidelines do not restrict, decrease, or otherwise affect the *suitability* criteria that the OAPA must consider like in *Fletcher*. Lastly, the 2007 Guidelines do not affect or postpone an inmate's *eligibility* for parole like the 1998 Guidelines at issue in *Michael* and *Ankrom*, or have any tendency to affect the OAPA's discretion with respect to all inmates.

5. Courts should not infringe upon the Executive Branch's exclusive jurisdiction to determine an inmate's suitability for parole.

It is clear that Plaintiffs are simply attacking the OAPA's discretionary decision making. "[W]hile changes to parole eligibility could retroactively increase punishment, determinations of suitability for parole are discretionary and do not have *ex post facto* implications." *McMahan v. Owens*, 2009 U.S. App. Lexis 101770, *10 (W.D. Texas, 2009) (citation omitted). In this context:

"The Supreme Court has guided that, the question is a matter of degree, and, if the amended law neither modifies the statutory punishment imposed for any particular offenses nor alters the initial date for parole eligibility or the suitability standard, the amendment does not violate the Ex Post Facto Clause, since such amendment would (1) not change the basic structure of state parole law, but (2) merely vest the parole board with a discretionary function."

Toolasprashad v. Grondolsky, 570 F. Supp. 2d 610, 638, n. 41 (D.C. N.J., 2008) (citing *Garner*, 529 U.S. at 250).

Challenges to purely discretionary *suitability* determinations are not properly heard in the federal courts. "The OAPA's decision to grant or deny parole is an executive function involving a high degree of official judgment or discretion [and] [t]he discretionary authority in relation to

parole eligibility and release given the OAPA, pursuant to R.C. 2967.01 et seq., has been properly delegated by the legislature.” *Spencer v. Ohio State Adult Parole Authority*, Case No. 09AP-143 (Ohio 10th App. Dist. 2009) (citation omitted). A challenge to purely discretionary decision making “unduly usurps[s] the mandate of the Parole Board and violate[s] core separation of power postulates.” *Toolasprashad*, 570 F. Supp at 631.

It is not this Court’s function “to review the discretion of the Board in the denial of applications for parole” *Id.* (citation omitted) Thus, because the 2007 Guidelines do not modify eligibility or suitability standards, do not modify the statutory punishment, and do not affect the OAPA’s use of discretion, this Court should be reluctant to infringe upon the Executive Branch’s exclusive jurisdiction to grant or deny parole within the parameters set by the Legislative Branch.

F. PLAINTIFFS’ CLAIM FOR RELIEF, IF GRANTED, WOULD NOT MAKE IT MORE LIKELY THAT THEY WOULD BE GRANTED PAROLE.

Plaintiffs’ entire Amended Complaint is premised on the erroneous assumption that Plaintiffs would likely be paroled under a previous set of guidelines (or no set of guidelines). However, curiously absent from Plaintiffs’ request for relief is a request that Plaintiffs be granted new parole hearings under a new set of guidelines, or a set of previous guidelines. It appears that Plaintiffs simply want to be released, a form of relief to which they are not legally entitled. It is certainly unclear what other form of relief they might be seeking. The failure to specify a form of relief is indicative of the amorphous nature of their claim.

Presumably, Plaintiffs’ desire new parole hearings under a hypothetical set of guidelines, or re-hearings under no guidelines at all. However, this form of relief, even if granted, would not improve Plaintiffs’ situation.

Assuming, *arguendo*, that new parole hearings were granted for Plaintiffs under a hypothetical set of guidelines, or no guidelines at all, the OAPA would nonetheless first apply the substantive criteria found at O.A.C. § 5120-1-1-07 to determine the inmate's *suitability* for parole, without reference to guidelines or a matrix. This has been the OAPA's practice and procedure since June, 2005. *Hall*, Case No. 05-CVH-05-5459, *passim*. However, because Ohio's substantive *suitability* criteria has remained unchanged since 1975, the new hearings would garner the exact same result as each Plaintiffs' last parole hearing – denial, unless the OAPA changes its collective mind on *suitability*.

V. CONCLUSION.

At this point in time – nearly fifteen years after termination of Ohio's indefinite sentencing system – logic dictates that only the most egregious of Old Law offenders remain behind bars. The truth remains that each and every suitability determination is highly individualized and dependent upon a multitude of ever-changing variables. The OAPA denies inmates parole for case specific, compelling and legitimate reasons, not by reference to a Matrix that provides no guidance whatsoever.

Ohio's legislature has vested the OAPA with the enormous responsibility of using its collective best judgment to keep our society safe. Ohio inmates will continually and persistently initiate lawsuits against the OAPA when frustrated by the OAPA's parole decisions. However, Defendants urge this Court to remember that the "*Ex Post Facto* Clause should not be employed for the micromanagement of an endless array of legislative adjustment to parole and sentencing procedures . . . The states must have due flexibility in formulating parole procedures and addressing problems associated with confinement and release." *Garner*, 529 U.S. at 252 (citing *Morales*, 514 U.S. at 508).

The fact is, the 2007 Guidelines represent the OAPA's good-faith effort to meet the irreconcilable demands of inmates who feel that they are wrongfully denied parole and from members of the public who feel that too many convicts are released too soon. This Court must put an end to inmate attacks on guidelines that do not implicate *ex post facto* concerns. Accordingly, Defendants request the Court to grant Defendants' First Motion for Summary Judgment.

Respectfully submitted,

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DEFENDANTS' L.R. 7.1(f) CERTIFICATION

The undersigned certifies that this case is on the standard track. Pursuant to this Court's Order (non-document, related to Doc. 53), Defendants have been granted leave to exceed the twenty page limit set for the length of memoranda by L.R. 7.1(f). The foregoing memoranda in support of their motion for summary judgment is 29 pages in length.

s/ Ryan G. Dolan
RYAN G. DOLAN (0079509)

CERTIFICATE OF SERVICE

I certify that on February 1, 2010, a copy of the foregoing, *First Motion for Summary Judgment*, was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Ryan Dolan
RYAN DOLAN
Assistant Attorney General

ADDENDUM