

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

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

**DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY**

Defendants hereby notify the Court of additional case law that pertains to the issues set forth in Defendants' First Motion for Summary Judgment. (Doc. 54). On February 18, 2010, the Sixth Circuit Court of Appeals issued its opinion in *Foster v. Booker*, Nos. 08-1371;1372;1626 (6<sup>th</sup> Cir. 2010) (copy attached as Exhibit D).

The *Foster* decision is significant for several reasons. First, the Sixth Circuit clarifies the role of discretion in the parole context and strengthens Defendants' argument that an inmate fails to state an *ex post facto* claim where the scope of a parole board's discretion has remained the same. See *Foster v. Booker*, Nos. 08-1371;1372;1626, pp. 12-13 (6<sup>th</sup> Cir. 2010) ("Despite the fact that the scope of the Board's discretion has remained the same, plaintiffs argue that, in practice, the new Board applied a harsher standard than the old Board when deciding whether to grant parole. However, plaintiffs' contentions do not make out an *ex post facto* violation") (italics added).

Second, *Foster* nullifies the possibility of an inmate's success on a due process claim in the parole context. *Id.* at pp. 21-23. Lastly, *Foster* makes the common sense recognition that the

fundamental nature of a discretionary parole system effectively precludes the use of statistical evidence to prove an *ex post facto* claim. *Id.* at pp. 15-21.

Defendants respectfully request that the Court consider this supplemental authority when issuing its decision.

Respectfully submitted,

RICHARD CORDRAY  
Ohio Attorney General

/s/Ryan G. Dolan  
RYAN G. DOLAN (0079509)  
RICHARD T. CHOLAR, JR. (0060062)  
Assistant Attorneys General  
Criminal Justice Section  
150 East Gay Street, 16<sup>th</sup> Floor  
Columbus, Ohio 43215-6001  
Tel: (614) 644-7233  
Fax: (866) 522-9245  
[ryan.dolan@ohioattorneygeneral.gov](mailto:ryan.dolan@ohioattorneygeneral.gov)  
[richard.cholar@ohioattorneygeneral.gov](mailto:richard.cholar@ohioattorneygeneral.gov)  
Counsel for Defendants

**CERTIFICATE OF SERVICE**

I certify that on February 18, 2010, a copy of the foregoing, *Notice of Supplemental Authority*, 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 G. Dolan  
RYAN G. DOLAN  
Assistant Attorney General