

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

<b>ROBERT J. ALLEN, et al.,</b>	:	<b>Civil Action No. 1:08cv1780</b>
	:	
<b>Plaintiffs,</b>	:	
	:	<b>Judge Oliver</b>
<b>v.</b>	:	
	:	
<b>TERRY COLLINS, et al.</b>	:	<b>Magistrate Judge McHargh</b>
	:	
<b>Defendants.</b>	:	
	:	

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**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION  
FOR SUMMARY JUDGMENT (Doc. 54)**

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## MEMORANDUM

### I. INTRODUCTION

The question presented in this case is whether the retroactive application of Ohio regulations governing parole suitability is a violation of the Ex Post Facto Clause of the United States Constitution. At stake are the criminal sentences of approximately 3,200 prisoners who are serving indeterminate sentences for offenses that were committed before the Ohio legislature prospectively abolished parole in 1996. These prisoners have been subjected to a dizzying array of ad hoc parole regulations over the intervening years, all applied retroactively, and all designed to significantly increase the amount of time they are incarcerated.

The prohibition of ex post facto laws was one of the principal concerns of the Framers of the U.S. Constitution.<sup>1</sup> The driving principles of the Ex Post Facto Clause were (1) to provide citizens with fair notice of the law so they can rely on it<sup>2</sup> and (2) to restrain federal and state legislatures from enacting vindictive legislation. In the parole context, fair notice of the law is of particular concern, because a "prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *Lynce v. Mathis*, 519 U.S. at 445-446 (quoting *Weaver v. Graham*, 450 U.S. 24 at 32 (1981)); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974); *Warden v. Marrero*, 417 U.S. 653, 658 (1974). An equally important purpose behind the Clause was the fear of "arbitrary and potentially

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<sup>1</sup> They considered retroactive laws to be "contrary to the first principles of the social compact, and to every principle of sound legislation." *The Federalist* No. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961); see *The Federalist* No. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (ex post facto prohibition is among the three "greate[st] securities to liberty and republicanism [the Constitution] contains.")

<sup>2</sup> *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798).

vindictive legislation" and the questionable motives and political forces that can give rise to it. *Weaver v. Graham*, 450 U.S. at 29. Retroactive parole laws have many of the hallmarks of politically motivated legislation feared by the Framers because such laws, by definition, target America's most despised and least politically powerful element.

The Ohio Adult Parole Authority contends that it has complete discretion over parole determinations and that its discretion is beyond the purview of any court. This is patently false. The Supreme Court's consistent application of the Ex Post Facto Clause forbids laws that retroactively increase punishment, even if the laws give considerable discretion to the agency enforcing them. *Garner v. Jones*, 529 U.S. 244, 253 (2000). The constant changes to Ohio parole regulations are exactly the kind of retroactive laws that the Ex Post Facto Clause was intended to prohibit.

This entire case turns on *how the APA exercises its discretion*. In 2007, the APA made a major revision to its parole guidelines chart and handbook. Plaintiffs contend that the revised regulations subjected them to longer sentences. In its Motion for Summary Judgment, Defendants assert that the 2007 guidelines chart is only used *after* a prisoner is denied parole, and that it no longer plays any role in the determination of whether prisoners are *eligible* for parole.<sup>3</sup> Defendants contend that "inmates, counsel, and sometimes the courts, have difficulty recognizing this vital change in OAPA procedure and continue to believe the Matrix is used as a decision-making tool during the *suitability* determination process."<sup>4</sup> If there is confusion about how the suitability determinations are made, it is solely because of the APA's contradictory claims about its parole process, which reveal that there are disputed facts about its parole laws. Defendants have evaded

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<sup>3</sup> Doc. 54, p. 9.

<sup>4</sup> Doc. 54 at p.8.

discovery of the current regulations it uses to determine suitability for parole.<sup>5</sup> Plaintiffs have not been permitted any discovery into what happens when the APA board members convene to decide whether a prisoner will be released<sup>6</sup>, how much weight the parole board gives certain factors and whether they use risk assessments to determine if the prisoner is likely to re-offend.<sup>7</sup>

Due to the actions of Defendants, Plaintiffs face a significant risk of prolonged incarceration. This violates their rights to be free of ex post facto laws. Defendants have filed a Motion for Summary Judgment without answering the Amended Complaint. Nor have the parties done the discovery necessary to decide this motion. Defendants have raised the *Rooker-Feldman* Doctrine, which would bar federal subject matter jurisdiction and immediately be appealed to the Sixth Circuit. Therefore, the Court should not rule on the Motion for Summary Judgment until the record is fully developed. The Court should hold the Motion for Summary Judgment in abeyance. As explained herein, even if the record were fully developed, contested facts preclude summary judgment on Defendants' claims.

## II. FACTS<sup>8</sup>

### A. The APA Administers the Sentences of Old Law Prisoners.

The Ohio Adult Parole Authority (APA) is a seven-member board that administers pardons, community control sanctions, post-release control and parole.<sup>9</sup> The APA is required to make parole decisions for all inmates who were convicted and

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<sup>5</sup> See Doc. 61, *Plaintiffs' Rule 56(f) Motion to Reopen Discovery* (discussing the discovery disputes and identifying records that Plaintiffs need to respond to the summary judgment motion)

<sup>6</sup> See Doc. 61.

<sup>7</sup> See Doc. 61.

<sup>8</sup> The facts set out here are based on Plaintiffs' investigation done to date. These will be supplemented after discovery.

<sup>9</sup> R.C. 2967.02

sentenced to indeterminate sentences before January 1, 1996.<sup>10</sup> On July 1, 1996 Senate Bill 2 (SB2) and Amended SB 269 (SB 269) became effective. These “truth in sentencing” laws allowed judges to give fixed sentences, so that the offenders, victims, judges and the public were on notice of exactly how much time they would serve. Indeterminate sentencing (i.e. “6-25 years”) was abolished. Control over the actual length of prison terms was given to the sentencing judge rather than the parole board.<sup>11</sup> The laws also prospectively abolished parole.

However, the truth-in-sentencing laws are not retroactive to persons such as Plaintiffs who were sentenced prior to July 1, 1996. Those prisoners are serving indeterminate sentences and remain subject to the jurisdiction of the APA. They are commonly referred to as “old law” inmates. All of the original and representative plaintiffs in this lawsuit are “old law” inmates.<sup>12</sup> The APA determines how many years old law inmates will serve. The parole board members meet in private and report their decisions on whether a prisoner is suitable for parole on a decision sheet.<sup>13</sup>

**B. The Criteria for Determining Suitability for Parole have Changed Repeatedly Since 1975**

The list of factors the APA must weigh when making suitability decisions are listed in O.A.C. 5120-1-1-7. However, over the years, the APA has developed policies to guide APA’s application of the factors. In making suitability determinations, the APA is guided by internal policies, formulas, manuals and memoranda giving greater or lesser

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<sup>10</sup> Id.

<sup>11</sup> See *A Decade of Sentencing Reform*, REPORT OF THE OHIO CRIMINAL SENTENCING COMMISSION (March, 2007 No. 7), p. 11

<sup>12</sup> Plaintiffs filed an Amended Complaint and Motion to Certify. The Court has not ruled on the Motions. Defendants directed their Motion for Summary Judgment to the Complaint and Amended Complaint See Docs. 1, 34-1, 34, 43 and 61.

<sup>13</sup> Sample Decision Sheet.

weight to the criteria found in Rule 5120-1-1-7. In their summary judgment motion, Defendants assert that the criteria the APA applies for suitability determinations have not changed since 1975.<sup>14</sup> This is not correct.<sup>15</sup>

### **1. Pre-1987 Suitability Determinations**

In the APA's 2005 report commemorating 40 years of parole in the State of Ohio, the APA reviewed the most significant changes to the parole regulations:

Prior to the 1980's, parole hearings and the decision to release were made with few external constraints. The Parole Board was given broad discretion to determine each inmate's suitability for release. Discretion was limited only by the maximum sentence imposed by the sentencing court.<sup>16</sup>

### **2. The 1987 Matrix System**

The standards were changed in 1987 to balance concerns about public safety with concerns that not enough prisoners were being released. A new system was implemented to guide the APA's discretion and make it more objective.

The guideline system consisted of five components: Risk Scale, Offense Scale, Institution Adjustment Scale, Matrix and the felony level of the sentence the inmate is serving.<sup>17</sup>

The five components were reported on a Matrix. The Matrix represented "a movement away from the traditional decision-making strategy which has been in use in Ohio and most other states for a century, and toward a system-oriented and more objective approach."<sup>18</sup> The Matrix relied on the felony level of offenses of convictions.

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<sup>14</sup> Doc. 54 p. 21, *citing* OAC 5120-1-1-7

<sup>15</sup> Changes have been made to Rule 5120-1-1-7. For example, section 5120-1-1-7(b)(8) requires the APA to take into account "[t]he equivalent sentence range under Senate Bill 2, (effective July 1, 1996,) for the same offense of conviction if applicable." Clearly Senate Bill 2 was not a factor weighed by the APA in 1975.

<sup>16</sup> Ohio APA History Book p. 38 (Available online at <http://www.drc.ohio.gov/web/APAHistoryBook.pdf>)

<sup>17</sup> *Id.*

<sup>18</sup> 1987 Ohio Parole Board Guidelines, p. 1

The Matrix was subjected to testing and evaluation prior to implementation.<sup>19</sup> It assigned prisoners to a “guideline” that determined when they would most likely be released. (These “guidelines” are not the same “guideline ranges” that were adopted in later versions of the regulations). Prisoners who were evaluated under the Matrix served less time than prisoners whose fate was decided under future versions of the regulations. See *Dotson v. Wilkinson*, 2008 WL 162901, at p. 2-3 (6th Cir. 2008).

### **3. The 1998 Parole Guidelines**

The APA adopted a new set of regulations for parole determinations in 1998. The Matrix was *abolished* and replaced with a new guidelines chart. Although the Defendants’ Motion for Summary Judgment repeatedly refers to the new guidelines chart as the “Matrix,<sup>20</sup>” this is misleading. The 1998 guidelines chart is a completely different scheme, with a different formula for determining the number of months a prisoner should serve, and much lengthier ranges of incarceration. The key feature of the guidelines chart is a points system that assigns each prisoner to a category nominally corresponding to his offense of conviction. The inmate also receives a “criminal history risk score” which is based on his prior convictions and institutional conduct. The two points are plotted on the chart, which then assigns the prisoner to a range of months. Significantly, the APA has produced no evidence that the 1998 guidelines were the product of objective testing.

Although the 1998 guidelines were more onerous than the 1987 Matrix, they provided inmates serving indeterminate sentences with a means for determining when they could expect to be released provided they maintained good institutional behavior and participated in appropriate programming directed toward their rehabilitation. The seven

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<sup>19</sup> Id. p. 5

<sup>20</sup> See Doc. 61.

representative plaintiffs were repeatedly given recommendations tied to the 1998 guideline range. Doc. 34-1. Defendants conceded that under the 1998 parole regulations, prisoners were denied parole solely because they had not met the range established by the guidelines chart.<sup>21</sup>

#### **4. The 2007 Guidelines**

In 2005 the APA changed its parole regulations as a result of *Ankrom v. Ohio Adult-Parole Authority*, 2005 WL 737833 (Ohio App. 10 Dist. 2005). The *Ankrom* case held that the APA denied inmates meaningful consideration for parole in violation of *state law* because it failed to give inmates parole hearings by the date they were first eligible for parole under the criminal statutes. *Id.* 6. The Court in *Anrkom* also ordered the APA to stop assigning inmates an offense score that was based on conduct or offenses that they were not convicted of. *Id.* 6-7. In response, the APA stopped denying parole because the inmate had not served the time assigned by the guidelines range.<sup>22</sup> Defendants' new practice has been to make suitability determinations according to "the discretionary decision making" of the Ohio Parole Board.<sup>23</sup>

In 2007 the Parole Guidelines Manual was revised to reflect the post-2005 practices of the parole board. Defendants also continued to alter its regulations by issuing memoranda. Plaintiffs contend that the new regulations subject them to a significant risk of increased incarceration in several respects:

##### **a. Presumption of Mandatory Life**

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<sup>21</sup> Mautser Affidavit ¶10, submitted in *Hall v. Hageman*, case no. 0f-CVH-05-5459 (Franklin County, 2009)(see Exhibit A to Defendants Motion for Summary Judgment)

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

The 2007 guidelines removed the presumption that inmates serving non-mandatory life sentences would ever be released. “By making this change, any presumption that an offender convicted of murder will be released after a definitive amount of time and will not have to serve Life is removed.”<sup>24</sup>

**b. Conflation of Murder with Aggravated Murder**

The 2007 Guidelines Manual eliminated separate offense categories for aggravated murder and murder, ignoring the different elements of the crimes and the different penalties required by Ohio criminal law. The 2007 Guidelines Manual eliminated the definition of aggravated murder.<sup>25</sup> As a result, both murder offenses are automatically rated in the guidelines with an offense score of 13.<sup>26</sup> Inmates convicted of murder are for all practical purposes treated as if they were convicted of aggravated murder. The new category 13 in the 2007 guidelines provides a range of the statutory minimum to life.<sup>27</sup>

**c. Elevation of Offense Scores for Rape Convictions**

The 1998 Parole Guidelines Manual made no distinction between rape convictions that received life sentences and rape convictions with determinative sentences.<sup>28</sup> The category score was determined by the felony offense that the offender was convicted of, which is defined in the manual. The highest category score for rape was 10.<sup>29</sup> But the 2007 Manual automatically assigns inmates with non-mandatory life sentences for rape to category 13, regardless of whether their crimes were rape, felonious

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<sup>24</sup> 2007 Parole Guidelines Manual, p. 3

<sup>25</sup> 2007 Parole Guidelines Manual, p. 3

<sup>26</sup> 2007 Parole Guidelines Manual, p. 1, 3

<sup>27</sup> 2007 Parole Guidelines Manual, p. 1

<sup>28</sup> 1998 Parole Guidelines Manual, p. 12-15

<sup>29</sup> 1998 Parole Guidelines Manual, p. 12

sexual batter, felonious sexual penetration, gross sexual imposition or corruption of a minor.<sup>30</sup>

Rape convictions with life sentences were elevated to category 13 “to prevent any impression or presumption that an offender convicted of Rape with a Life sentence will be released after a definitive amount of time served, and will not be required to serve Life.”<sup>31</sup> The APA changed the offense score for sexual offenses so that the prisoners convicted of sex offenses would serve more time in prison than they did under the 1998 Manual.

### **5. The 2009 Changes to the APA’s Parole Practices**

Since this action was filed, Defendants have changed their use of the guidelines manual yet again. They now assert that the guidelines chart is not consulted until *after* the APA has already made the decision that a prisoner is unsuitable for release on parole. Defendants argue that after a series of state court cases, they abandoned the guidelines chart as a decision-making tool.<sup>32</sup> This represents a substantial change from the process that has been in place since 1998 and a departure from the process described in its 2007 Handbook. In light of Defendants’ new claims, there are clearly material contested facts about how the APA makes suitability determinations.

## **III. ARGUMENT**

### **A. Standard for Determining Summary Judgment.**

Summary judgment may be granted only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that

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<sup>30</sup> Compare 1998 Parole Guidelines Manual, p. 12-15 with 2007 Parole Guidelines Manual, p. 8

<sup>31</sup> 2007 Parole Guidelines Manual at p. 8

<sup>32</sup> Doc. 54, p. 9-10.

there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56 (c). The party moving for summary judgment has the burden of showing conclusively that no genuine issue of material fact exists. The evidence presented is construed in the light most favorable to the non-moving party, which is given the benefit of all favorable inferences that can be drawn there from. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993 (1962); *Cox v. Kentucky Dept. of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995)(in resolving a motion for summary judgment, the court “must afford all reasonable inferences, and construe the evidence in the light most favorable to the non-moving party”); *Singfield v. Akron Metropolitan Housing Authority*, 389 F.3d 555, 560 (6th Cir. 2004). “If ... the defendant disputes the plaintiff’s version of the story, the defendant must nonetheless be willing to concede the most favorable view of the facts to the plaintiff for purposes of [summary judgment].” *Phelps v. Coy*, 286 F.3d 295, 298 (6th Cir. 2002). Where, as here, “the non-moving party presents direct evidence refuting the moving party’s motion for summary judgment, the court must accept the evidence as true.” *Terrance v. Northville Regional Psychiatric Hosp.*, 286 F.3d 834, 841 (6th Cir. 2002). “The central issue is ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” *Spadafore v. Gardner*, 330 F.3d 849, 852 (6th Cir. 2003). Contested facts preclude summary judgment in this case.

**B. The Framework Established by *Garner* and its Precedents Forbid Retroactive Application of Laws That Pose a Significant Risk of Prolonging Incarceration.**

The Ex Post Facto Clause states that “[n]o State shall...pass any... ex post facto Law.” U.S.Const. art. I., 10, cl. 1. Ex post facto laws retroactively change the rules of evidence, retroactively alter the definition of a crime, retroactively increase the

punishment for a criminal act, or punish conduct that was legal when committed. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 1 L. Ed. 648, 653 (1798). The easiest ex post facto cases are those where prisoners **can demonstrate with certainty** that their punishment is increased as a result of the retroactive application of parole laws. This was the case in *Lynce v. Mathis*, 519 U.S. 443 (1997), which struck down a Florida law that cancelled provisional-release credits. *Id.* 436. Shortly after the plaintiff was released, the Florida legislature cancelled the credits, and he was re-arrested and incarcerated. The retroactive application “unquestionably disadvantaged petitioner because it resulted in his re-arrest and prolonged his imprisonment.” *Id.* at 446-47. The Florida law clearly violated the Ex Post Facto Clause.

The Supreme Court also invalidated a law reducing the availability of gain time because it changed the amount of gain time a prisoner could accrue, which naturally lengthened his sentence. *Weaver v. Graham*, 450 U.S. 24 (1981). In 1979 the state enacted a new law to calculate gain time. It was applied to a prisoner who was sentenced in 1976. The new law was ex post facto on its face because it reduced monthly gain-time credits that the plaintiff had already accrued under the old version of the law. The prisoner’s sentence was extended by two years as a result of the new law. “By definition, this reduction in gain-time accumulation lengthens the period that someone in petitioner's position must spend in prison.” *Id.* at 450. See also *Miller v. Florida*, 482 U.S. 423 (1987) (sentencing guidelines in effect when prisoner was sentenced would have given him a sentence of 3 1/2 to 4 1/2 years; guidelines in effect when he was sentenced called for a presumptive sentence of 5 1/2 to 7 years. The trial court erred by retroactively applying

the guidelines in effect at the time of sentencing, because the law increased the quantum of punishment for the crime. *Id.* 423)

However, a prisoner need not prove that his sentence was actually lengthened by retroactive application of the law for it to be unconstitutional. In evaluating the constitutionality of a law that has been retroactively applied to prisoners, it is sufficient to show that the new law “produces **a sufficient risk of increasing the measure of punishment** attached to the covered crime.” *California Dep't of Corrections v. Morales*, 514 U.S. 499, 509 (1995). In *Morales*, California had changed its parole laws to allow the parole board to hold suitability hearings every three years instead of annually. The change did not violate the Ex Post Facto Clause because it applied to a narrow class of prisoners (multiple murderers), changed only the timing of the hearing (rather than the substantive standard) and created a “speculative and attenuated” risk of increasing Morales’ punishment (because Morales had committed a murder while on parole for another homicide offense). *Id.* In *Lynce* the Court emphasized that its holding in *Morales* “rested squarely on the conclusion that ‘a prisoner’s ultimate date of release would be *entirely unaffected* by the change in the timing of [parole] suitability hearings.” *Lynce*, 519 U.S. at 444 (quoting *Morales*, 514 U.S. at 513) (emphasis added).

The Supreme Court elaborated on the *sufficient risk* test in *Garner v. Jones*, 529 U.S. 244 (2000). There an inmate challenged retroactive application of a Georgia law changing parole hearings from every three years to every eight years. The controlling inquiry was whether the application of the new law created a sufficient risk of increasing the measure of punishment attached to the crime, i.e. whether it created a **significant risk of prolonging the inmate’s incarceration**. *Id.* 253. If the new parole guidelines do not

show a significant risk of prolonged incarceration on their face, prisoners may demonstrate, by evidence drawn from the guidelines' practical implementation, that their application will result in a longer period of incarceration than under the earlier guidelines. *Id.* 255.

Jones could not show that parole board's decision to set a hearing in eight years instead of three years increased the risk that he would serve a longer sentence. *Id.* "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." *Id.* at 254. Jones had escaped from prison and committed a second murder, making his release extremely unlikely in the period between parole hearings. *Id.* 253-254.

*Garner* established three benchmarks for ex post facto analysis. First, the Court affirmed that changes in parole guidelines could violate the ex post facto clause. ("The danger that legislatures might disfavor certain persons after the fact is present even in the parole context.") *Id.* at 253. Second, the Court reiterated that "the presence of discretion does not displace the protections of the Ex Post Facto Clause." *Id.* at 253. Third, changes in guidelines may implicate the ex post facto clause even if the inmate is currently serving a non-mandatory life sentence. *Id.*

Most cases testing retroactivity of parole laws fall between the speculative risk of increased incarceration shown in *Morales* and *Garner* and the certainty of additional prison time demonstrated by *Lynce*, *Weaver* and *Miller*. In cases that fall in the middle of the continuum, the court must assess how the parole board exercises its discretion and whether the discretion has changed, subjecting the prisoners to a significant risk of

lengthier sentences. *Garner* 529 U.S. at 253; *Michael v. Ghee*, 498 F. 3d 371, 380 (6<sup>th</sup> Cir., 2007); *Dyer v. Bowen*, 465 F.3d 280, 289 (2006).

### **C. Contested Facts Preclude Summary Judgment for Defendants**

#### **1. Defendants' Exercise of Discretion Violates the Ex Post Facto Clause**

The Plaintiffs are being subjected to ex post facto laws that significantly increase the risk that they will serve longer prison sentences. However, Defendants allege that (a) they have total discretion to alter Plaintiffs' prison sentences, (b) that the APA only considers the criteria in the Ohio Administrative Code to determine suitability for parole, and (c) that their newest parole regulations have already passed constitutional muster.

There are genuine issues of material fact as to each of Defendants' claims.

#### **(a) Defendants Do Not Have Total Discretion over Prisoners Serving Indeterminate Sentences**

All of the Plaintiffs in the case at bar, and all old law inmates, are by definition serving indeterminate sentences. Many are serving non-mandatory life sentences. In their Motion for Summary Judgment, Defendants assert that their parole guidelines chart, memoranda and parole handbooks, "do not guide, restrict, or otherwise influence" parole decisions." Doc. 54 at 20. They announce that the guidelines chart is no longer used in the suitability determination. Doc. 54, p. 8. Defendants assert that they have "complete discretion" over the sentences of old law inmates because their guidelines "do not restrict" the parole board's discretion. Doc. 54 at 20. This is incorrect.

Parole regulations, even if they act as mere guides to parole board's exercise of its discretion, constitute "laws" subject to ex post facto analysis. "When the rule does not by its own terms show a significant risk, the [claimant] must demonstrate, by evidence drawn from the rule's *practical implementation* by the agency charged with exercising

discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule.” *Garner* at 255. *Garner* “foreclosed [a] categorical distinction between a measure with the force of law and guidelines ... from which [a parole board] may depart in its discretion.” *Fletcher*, 433 F.3d at 876. The labels “regulation” and “guideline” are not determinative. The presence of discretion is not determinative. *Id.*

These principles were reiterated in *Michael v. Ghee*, 498 F. 3d 371, 380 (6<sup>th</sup> Cir., 2007). In *Michael*, which involved the application of the 1998 guidelines chart, the Sixth Circuit overruled several unpublished opinions that were in conflict with *Garner*. See *Conley v. Ghee*, 23 Fed. Appx 506 (6<sup>th</sup> Cir., 2001)(incorrectly concluding that parole guidelines are only guidelines and not law, and are therefore not subject to the Ex Post Facto Clause); *Kilbane v. Kinkela*, 24 Fed. Appx. 241 (6<sup>th</sup> Cir., 2001) (incorrectly concluding that because Ohio’s parole officials have full discretion in determining whether to release inmates, guidelines directing that discretion does not violate the Ex Post Facto Clause); *Hunt v. Wilkinson*, 79 Fed. Appx. 861, 862 (6<sup>th</sup> Cir., 2003) (incorrectly concluding that the Ex Post Facto Clause was not implicated because the new parole guidelines would not increase the punishment that a person serving a life sentence was originally sentenced). *Id.* at 382. Defendants adopt the flawed logic arguments that were overruled by *Michael*.

Defendants also attempt to distinguish *Garner*, *Michael* and *Fletcher* by arguing that the APA no longer uses the parole guidelines chart (which it incorrectly refers as “the Matrix”) to make suitability determinations, therefore its discretion is unbridled. Doc. 54 p. 8-10. Although parole boards by necessity have discretion to enforce parole laws, the existence of discretion is not dispositive. “The controlling inquiry under *Garner*

is how the Board or the Commission exercises discretion in practice, and whether differences between the exercise of discretion in two systems actually ‘create a significant risk of prolonging [an inmate's] incarceration.’” *Fletcher v. Reilly*, 433 F.3d 867, 876-877 (C.A.D.C., 2006), citing *Garner*, 529 U.S. at 251, 120 S.Ct. 1362. See also *Dyer v. Bowlen*, 465 F.3d 280 (2006). (remanding case to lower court so prisoner could discover how the parole board exercised its discretion. *Id.* 290)

**(b) The APA Considers Criteria Outside OAC § 5120:1-1-07.**

The APA argues that it simply applies the criteria of OAC § 5120:1-1-07. The APA has never limited its decision-making to the factors in OAC § 5120-1-1-7, as they allege. The APA explicitly stated that the 1998 decision-making process could include factors that were not listed in 5120-1-1-7:

Prior to making any release decision, decision, the panel must consider factors specified in the Administrative Regulation 5120:1-1-07. ***These factors may include, but are not limited to;*** nature of the current offense, prior criminal record, recommendations from judges, prosecutors, or defense counsel, mental or psychiatric examination of inmate, reports relating to inmates prison adjustment and programming, parole plans, community support, and employment history/occupational skills.

In 1998 the APA also made the guidelines chart and its accompanying Guidelines Manual an integral part of its suitability determinations. “The Parole Board guidelines *must* also be reviewed and considered.”<sup>33</sup> Now Plaintiffs do not know what role the guidelines chart truly plays in parole suitability determinations. The decision sheets that inmates receive announcing the APA’s decisions leave prisoners guessing about which information was weighed. They continue to show the inmate’s criminal history risk and offense scores.

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<sup>33</sup> Ohio APA History Book, p. 39

**(c) There are Contested Facts About the Current Parole System that were Not Litigated in the Pro Se Cases**

Defendants claim that decisions in *Brown v. Collins*, 2009 U.S. Dist. LEXIS 107341 (November 18, 2009); *Nur v. Mausser*, Case No. 1:08CV110 (N.D. Ohio 2008) and *Louis v. Collins*, Case No. 3:08CV930 (N.D. Ohio 2008) found its new parole policies and procedures constitutional.<sup>34</sup> In those cases, pro se inmates contested the changes in the offense scores under the 2007 guidelines chart, as well as application of the 1987, 1998 and 2000 revisions to the guidelines.<sup>35</sup> Judges Carr and O'Malley dismissed their cases pursuant 28 U.S.C. §1915A, for failure to state a claims upon which relief could be granted.<sup>36</sup> In all three cases, Defendants did not answer the complaint; no discovery was taken; and the Judges were apparently unaware that the inmates were raising claims that were being litigated by Plaintiffs in the District Court in this case.<sup>37</sup>

Pro se prisoners are in the worst position to litigate claims against the APA because the APA controls all the discoverable information. *Dotson v. Wilkinson*, 2008 WL 162901 (6th Cir. 2008)<sup>38</sup>. Prisoners are not permitted to know what evidence was used against them during the parole hearings. They based their complaints on are the Guidelines Manuals and decision sheets, which indicated that the APA still relies on the guidelines chart. For example, Duane Brown filed a pro se, handwritten complaint attacking the APA's use of the 1987, 1998, 2000 and 2007 guidelines to his sentence, alleging that they were ex post facto laws. Doc. 6 p. 2-6. The Court held that Brown did

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<sup>34</sup> Doc. 54 p. 19-20.

<sup>35</sup> The judges concluded that the statute of limitations barred challenges to the pre-1997 guidelines.

<sup>36</sup> *Brown v. Collins*, 2009 U.S. Dist. LEXIS 107341 (November 18, 2009); *Nur v. Mausser*, Case No. 1:08CV110 (N.D. Ohio 2008) and *Louis v. Collins*, Case No. 3:08CV930 (N.D. Ohio 2008)

<sup>37</sup> *Id.*

<sup>38</sup> “Dotson has not presented statistics showing that inmates situated similarly to him receive longer sentences following the change in the 1998 guidelines; the State controls the information necessary to create these statistics, and Dotson's discovery request to obtain that information was denied.” *Id.* at 2.

not state a claim because his maximum sentence on the date he was convicted was life, and it remained so under the 2007 guidelines. This decision is contrary to the principles established in *Garner* and *Michael* allowing Plaintiffs discovery into the application of the parole laws. Moreover, Brown apparently only challenged the elevation of his offense score, not the other new features of the parole regulations.

Defendants have acknowledged that they are using their discretion under a new set of standards. Judge O'Malley's opinion in *Nur* is instructive. Nur challenged the application of the 1998, 2000 and 2007 guidelines to his sentence. Judge O'Malley held that the guidelines were not ex post facto on their face, observing that the APA apparently abolished "objective criteria." Doc. 6, at p. 6. Judge O'Malley dismissed *Nur*'s case because he had not yet had a parole hearing under the new guidelines making his claim premature. *Id.* at p. 6. There are contested facts about how the APA actually uses the guidelines chart. The Defendants assert that the guidelines chart is no longer used to make suitability decisions. As a result, the plaintiffs in the pro se cases were not even aware of what parole regulations caused their parole to be denied.

**D. Prisoners Serving Life Sentences are Still Protected by the Ex Post Facto Clause**

Defendants contend that the changes to the guidelines matrix and parole handbook are within the APA's discretion because the prisoners were sentenced to life and had no expectation of parole. Defendants characterize their argument as merely following the will of the sentencing court. Prisoners who are serving non-mandatory life sentences, (i.e. they are eligible for parole) are not beyond the protections of the ex post facto clause. See *Garner*.

The Court must permit plaintiffs searching discovery into the way a parole board exercises its discretion in cases involving prisoners serving life sentences. In *Mickens-Thomas v. Vaughn* 321 F.3d 374 (3rd Cir. 2003) the parole law in effect at the time of the inmate's conviction required the parole board to balance several factors when determining suitability for parole. Later versions of the parole board's internal standards suggested that public safety was given more weight than any other criteria. Before the parole law changed, the board relied heavily on the "Parole Decision Making Guidelines," a handbook that played a critical role in determining inmate's suitability for parole. The guidelines handbook was an evidence based system that provided an objective prediction of the likelihood of a successful parole by assigning numerical values based on objective studies about parolee recidivism rates. *Id.* 379. However, after a parolee committed murder in a high profile case, the parole board changed its philosophy to reflect public safety as its overriding concern. *Id.* 380.

Thomas had been imprisoned for almost 40 years. Over the years, the parole board had urged Thomas to participate in programming, maintain a good conduct record, and get mental health evaluations. *Id.* 381. Thomas successfully fulfilled all the prerequisites stated by the board in its decisions denying his parole. Internal psychiatric recommendations consistently supported Thomas' release. However, the parole board repeatedly denied his parole, claiming that he was high risk for assaultive behavior, in contradiction of the recommendations of counselors and psychiatrists. *Id.* 382. Despite several more years of reports that Thomas was a good candidate for parole, the parole board denied his parole repeatedly. In 2000, the board cryptically stated that it "has determined that the mandates to protect the safety of the public and to assist in the fair

administration of justice cannot be achieved through your release.” *Id.* at 382. The parole board also modified its guidelines worksheet, resulting in an elevation of Thomas’ risk score. *Id.* 383.

The board’s application of the parole regulations violated the ex post facto clause. The Court relied on numerous policy statements throughout the 1990s that concern for public safety caused the board to review the parole petitions with more scrutiny. *Id.* 385. Moreover, the statistical evidence supported Thomas’ claim. In 266 instances of commuted life sentences, Thomas was the only one who was not paroled on the first or second attempt. *Id.* 385. Making concern for public safety the top priority was ex post facto, “because [the board] defaulted its duty to consider all factors counseling in favor of release.” *Id.* at 387

Given its indifference to Thomas’s efforts to improve his parole candidacy, and its repeated reliance on Thomas’s “instant offense” and his potential for future “assaultive behavior,” despite the Guidelines finding that Thomas was not a recidivism risk, the Board appeared to rely exclusively on the nature of the underlying offense.” *Id.* at 389. The chance for commutation of his life sentence, although remote at the time of his conviction, existed. The application of the new parole policies rendered the possibility even more remote. *Id.* 392-393. Thus, the new policy substantially increased the period of incarceration. *Id.* 393. The facts in this case may well turn out to reveal a parole decision paradigm that was struck down in *Thomas*. Only full discovery will tell.

***E. Rooker-Feldman is Inapplicable: The Decisions in Ankrom, Layne and Hall do not bar Plaintiffs’ Claims***

Defendants accuse Plaintiffs of a collateral attack on the state court decisions in *Layne v. Ohio Parole Authority*, 97 Ohio St.3d 456, 780 N.E.2d 548 (2002), *Ankrom v. Ohio Adult-Parole Authority*, 2005 WL 737833 (Ohio App. 10 Dist. 2005) and *Hall v. Hageman*. These three cases dealt with state law principles and different parole regulations than the practices at issue in the case at bar.

The *Rooker-Feldman* Doctrine is properly invoked only where the federal claim is “inextricably intertwined” with the underlying state court claim and where the claim is a “specific grievance” challenging the application of law in a specific case. *See, e.g., Holloway v. Brush*, 220 F.3d 767 (6th Cir. 2000) (en banc); *Davis v. Montgomery*, 124 F. Supp. 2d 1107 (S.D. Ohio 2000)The Sixth Circuit has made clear that *Rooker-Feldman* involves a two-part test and that each element must be satisfied for it to properly apply. *See generally Catz v. Chalker*, 142 F.3d 279, 293 (6th Cir. 1998). In the case at bar, neither element is present and this Court therefore has jurisdiction to hear the Plaintiff class’ claim.

A “claim is not ‘inextricably intertwined’ merely because the action necessitates some consideration of the merits of the state court judgment.” *Kiowa Indian Tribe of Oklahoma v. Hoover*, 150 F.3d 1163, 1170 (10th Cir. 1998) (emphasis in original) (citing *Pennzoil Co. v. Texaco*, 481 U.S. 1 (1987)). Justice Marshall’s concurrence in *Pennzoil Co.* forms the basis of the Tenth Circuit’s assertion:

While the question whether a federal constitutional challenge is inextricably intertwined with the merits of a state-court judgment may sometimes be difficult, it is apparent, as a first step, that 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 may 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.<sup>11</sup>

*Pennzoil Co.*, 481 U.S. at 25 (Marshall, J., concurring).

Contrary to Defendants' assertion, Plaintiffs do not seek to overturn the state court judgments in *Ankrom*, *Layne* and *Hall*. Those judgments did not involve the post-2007 changes to the parole regulations, nor did they rule on the constitutionality of those changes. They have no bearing on any of the future parole hearings. In each case, the state courts found the Defendants had violated the Ohio Revised Code's mandate that inmates receive "meaningful consideration for parole." *R.C. 2967.13(A)*. *Layne* and *Ankrom* were challenges to the 1998 parole regulations. The *Hall* class challenged aspects of the parole regulations that were implemented between 2005 and 2007. None of the cases were about the APA's post 2007 practices and none decided the constitutional issues raised by Plaintiffs.

As to the second prong, the Plaintiffs bring forth a "general challenge," rather than a "specific grievance." *Rooker-Feldman* "applies only when a party asserts a 'specific grievance,' as opposed to a 'general challenge,' with respect to the constitutionality of a state law." *Planet Earth Entertainment v. Edwards*, 84 F. Supp. 2d 891, 900 (S.D. Ohio 1999) (Rice, J.) (hereinafter "Planet Earth"). In the *Planet Earth* case, the Court considered a complaint seeking an order both enjoining a state court from enforcing a state law revoking the plaintiff's liquor license and declaring the law to be unconstitutional. Judge Rice properly ruled that the former claim was barred by *Rooker-Feldman*, as it sought to overturn a state court judgment, while the latter claim could have been heard if the plaintiff had standing to assert it. Like the latter claim, the class action

complaint in the case at bar is not “challenging the judgment in any . . . case.” *Id.* (quoting *Van Harken v. City of Chicago*, 103 F.3d 1346, 1349 (7th Cir. 1997)).

In *Layne*, the Ohio Supreme Court relied on contract law principles and state separation of powers doctrine to find that inmates who pled guilty or no contest under plea agreements have a statutory right to “meaningful consideration” for parole (“the words “eligible for parole” in former R.C. 2967.13(A) ought to mean something.”) The APA denies meaningful consideration for parole when inmate is placed in an offense category that does not correspond to the offense of conviction. For example, inmate Howard Lee pled guilty to involuntary manslaughter and was given a sentence of 9-25 years. The APA considered his indictment, which was for aggravated murder, and assigned him an offense score of 13, the maximum score for aggravated murder. As a result his range was 360 months to life (equivalent to a minimum sentence of 30 years). The APA usurped the role of the judge, prosecutor and jury by ignoring statutory ranges established by the legislature and assigning ranges whose minimum terms were years longer than the statutory minimum prison term set by statute.

*Anrkrom* was brought by a class of inmates who had been convicted under plea agreements. The Court applied the principles of *Layne* to all inmates serving time under plea agreements. The Court held that the APA could not elevate the offense score based on non-convicted behavior, nor could it deny inmates a hearing on the first eligibility date established by Ohio sentencing laws. After *Ankrom*, courts required the APA to apply the same principles to inmates whose convictions were obtained at trial. *Larson v Ohio Adult Parole Authority* (Oct 19, 2006), Franklin App No 06AP-80, 2006 Ohio 5442, 13 (court applied holdings of *Layne* and *Ankrom* to inmate convicted by a jury).

However, some inmates were left off the list of re-hearings that occurred because of *Ankrom*. They filed a class action lawsuit in 2005, long before the APA issued the 2007 Parole Board Guidelines Manual. Doc. 54-1 Ex. A p. 13. The class was defined as all parole-eligible inmates whose convictions were obtained at a trial.<sup>39</sup> The Court held that they were entitled to re-hearings in accordance with the post-*Anrkrom* (post-2005) hearing procedures and policies. The Court did not address the constitutional claims.<sup>40</sup>

The parties in *Hall* entered into a settlement agreement formalizing the Court's order that the inmates who had not had a hearing since 2005 would be re-heard under the post-2005 parole procedures. They agreed that the state court would have jurisdiction for all disputes arising from the terms of the agreement and established a procedure for resolving disputes.<sup>41</sup> Defendants claim that because some of the Plaintiffs are on the list of people who will be re-heard under *Hall*, they are barred from bringing this lawsuit.<sup>42</sup> But *Hall* did not challenge the parole practices at issue in this case. In fact as Defendants acknowledge, their parole regulations are constantly evolving. The Hall hearings will be completed by June 2010, which will terminate the settlement agreement.<sup>43</sup>

Defendants accuse Plaintiffs of seeking to overrule their past parole hearings because they were unhappy with the result.<sup>44</sup> The case at bar has nothing to do with past hearings or past cases. Plaintiffs seek an injunction barring the APA from retroactively applying ex post facto procedures in their upcoming hearings and a declaratory judgment holding that the 2007 policies and procedures violate the Ex Post Facto Clause. The 2007

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<sup>39</sup> Doc. 54-1 Ex. A-15, Coakley affidavit

<sup>40</sup> Doc. 54-1, Ex. A p. 12.

<sup>41</sup> Doc. 54-1 Ex. A p 18-22

<sup>42</sup> Doc. 54-1 Ex. A-15, Coakley affidavit

<sup>43</sup> Doc. 54-1 Ex. A p. 22

<sup>44</sup> Doc. 54, p. 3

procedures have not been challenged in the state courts. Rather than serving as a defense to Plaintiff's claims, the fact that the OAPA is now a losing defendant in three other parole cases should simply suggest that there is a problem that needs thorough investigation – after full factual development.<sup>45</sup>

#### IV. CONCLUSION

After over a year of litigation in this case, Plaintiffs know little more about what they must show to prove their suitability for parole that they did when the case was filed. The APA refuses to reveal the information contained in the individual parole files.<sup>46</sup> The parole hearings remain shrouded in secrecy. The parole regulations continue to be a moving target. Under the precedents established by *Garner*, *Dyer*, *Michael* and *Dotson*, Plaintiffs are entitled to discovery.

This Court should hold the Motion for Summary Judgment in abeyance and reopen discovery.

Respectfully submitted,

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<sup>45</sup> The recent panel decision in *Foster et. al. v. Booker*, Case Nos. 05-71318; 05-72378, (6th Cir. Feb. 18, 2010) does not overturn *Garner*, *Dyer* or *Dotson*. Curiously, the ruling does not mention the recent panel decisions in *Dyer*, *Dotson* or *Michael* – decisions which defined the legal standard for proving ex post facto claims in the parole context. Where panel decisions conflict, the earliest opinion controls unless the prior opinion has been overruled by an intervening opinion from court sitting en banc or the Supreme Court. *See, e.g., Kovacevich v. Kent State Univ.*, 224 F.3d 806, 822 (6th Cir.2000) (“[W]e must defer to a prior case when two panel decisions conflict. Plaintiffs filed a Rule 56(f) Motion requesting discovery so that Plaintiffs could build a record that will survive under the standards articulated in *Dyer*, *Dotson* and *Michael*. Plaintiffs will file a response to Defendants Notice of Supplemental of Authority. Doc. 59.

<sup>46</sup> See Doc. 61, Plaintiffs’ Rule 56(f) Motion

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 12, 2010, a copy of the foregoing pleading was filed electronically. Notice of this filing will be sent to all parties for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing pleading and the Notice of Electronic Filing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically.

/s/Andrea L. Reino  
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