

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

ROBERT J. ALLEN, et al., : Civil Action No. 1:08cv1780  
: :  
Plaintiffs, : :  
: : Judge Oliver  
v. : :  
: :  
TERRY COLLINS, et al. : RESPONSE TO DEFENDANTS' NOTICE  
: OF SUPPLEMENTAL AUTHORITY re  
Defendants. : FOSTER V. BOOKER (Doc. 59)  
:

PLAINTIFFS' RESPONSE TO DEFENDANTS' NOTICE OF SUPPLEMENTAL  
AUTHORITY RE FOSTER V. BOOKER (DOC. 59)

Defendants have filed a Notice of Supplemental Authority notifying the Court of the Sixth Circuit's decision in *Foster v. Booker*, Nos. 05-71318; 05-72378, (6th Cir. Feb. 18, 2010). The *Foster* case was brought by Michigan inmates challenging several recent changes to the parole regulations. After thorough discovery, an extensive factual record was developed. Both sides waived their right to a trial and instead proceeded on cross-motions for summary judgment. Doc. 59-1 at 2. The Sixth Circuit reversed the district court's finding that the Michigan Parole Board retroactively applied parole regulations in violation of the Ex Post Facto Clause. This Court asked the parties to brief whether discovery in this case should be denied based on *Foster*. The answer is no. Discovery must go forward and Plaintiffs' must be permitted to develop the evidence necessary to prove their claim.

**I. *Foster v. Booker* does not Dispose of Plaintiffs' Claims**

Under Ohio law, there are four reasons the Ohio APA may deny parole:

- (1) There is substantial reason to believe that the inmate will engage in further criminal conduct, or that the inmate will not conform to such conditions of release as may be established under rule 5120:1-1-12 of the Administrative Code;
- (2) There is substantial reason to believe that due to the serious nature of the crime, the release of the inmate into society would create undue risk to public safety, or that due to the serious nature of the crime, the release of the inmate would not further the interest of justice nor be consistent with the welfare and security of society;

(3) There is substantial reason to believe that due to serious infractions of rule 5120-9-06 of the Administrative Code, the release of the inmate would not act as a deterrent to the inmate or to other institutionalized inmates from violating institutional rules and regulations;

(4) There is need for additional information upon which to make a release decision.

*OAC Rule 120:1-1-07(A)*

According to Defendants, *Foster* stands for the proposition that “an inmate fails to state an ex post facto claim where the scope of a parole board’s discretion has remained the same.” Doc. 59 at 1. Defendant argues that since the factors in the administrative rule have remained static since 1975, the Court must reject Plaintiffs’ claims. They contend that after *Foster* the Sixth Circuit will no longer consider statistical evidence to determine whether a retroactive law creates a sufficient risk of increasing the length of a prisoner’s sentence (“the fundamental nature of a discretionary parole system effectively precludes the use of statistical evidence to prove an ex post facto claim.”) Doc. 59 at 2. The *Foster* panel did not disavow fact-finding or create bright-line rules. In *Foster* the Court carefully examined the statistical evidence, along with policy statements, directives and guidelines to conclude that the Michigan parole board’s retroactive practices were a legitimate exercise of the board’s discretion. The Court held that it could not distinguish the effect of the board’s *legitimate exercise of discretion* from the effect of statutory changes to the parole processes. *Foster, Id.* 21.

The Defendants will point to the dicta in *Foster* that said the board could adopt a “get tough” attitude that resulted in longer sentences so long as the sentence was within the range available when the offender was convicted. *Id.* 13. However, the Court qualified its statement by saying that discretion must be legitimate in its exercise. *Id.*

The *Foster* case addressed modifications to the Michigan parole process, including the length of continuances between hearings, the structure of the board, prisoner access to in-person interviews, abolition of the right to appeal parole decisions and elimination of written reasons for board decisions not to move forward with parole. Doc. 59-1 at 7. *Foster* did not cite any of the

other Sixth Circuit panel decisions challenging parole decisions as ex post facto. See *Foster*. *Allen* challenges the most recent policies and procedures that guide the Ohio APA's discretion. Unlike *Foster*, the Ohio regulations alter the substantive standards for assessing standards of parole, rather than the timing of the hearings, appeal, or paper. Assessing the scope of the APA's discretion is only the first step in ex post facto analysis. Under all of the relevant caselaw – including *Foster*, the APA must still exercise its discretion *properly* to avoid violating the prohibitions of the Clause. *Foster* found that the board did not abuse its discretion by changing the way the hearings were held, the appeal process or the makeup of the board. *Id.* 15. Therefore, this Court must undertake the same analysis by assessing the impact of the new parole regulations on the exercise of the APA's discretion.

## **II. Garner and its Progeny Established a Fact Intensive Standard of Review**

Defendants' interpretation of *Foster* assumes that the Sixth Circuit has sounded the “death knell,<sup>1</sup>” for ex post facto parole cases. That reading disregards the principles established by the Supreme Court and its progeny, which require a fact-intensive review of retroactive parole laws. The *Foster* panel followed the template established by *Garner v. Jones*, 529 U.S. 244 (2000), which requires the court to evaluate the way the parole board exercises its discretion in parole determinations.

### **A. The Parole Board does not have Absolute Power**

Discretion in parole matters is not boundless, no matter how long its scope has remained unchanged. In *Garner v. Jones*, the Supreme Court established the standard for determining whether retroactive application of a parole law violates the Ex Post Facto Clause. Rather than articulating “a single formula,” the Court held that retroactive laws should be examined in the context of the parole system as a whole.<sup>2</sup> The Court upheld a Georgia law that increased the

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<sup>1</sup> Counsel for Defendants made this claim during the hearing on March 22, 2010. See Doc. 72.

<sup>2</sup> “States must have due flexibility in formulating parole procedure and addressing problems associated with confinement and release. This case turns on the amended Rule's operation *within the whole context* of Georgia's parole system.”(emphasis added) *Id.* 245.

number of years the parole board could wait between parole hearings from three years to eight years because Jones could not show that the law significantly increased his measure of punishment. The law did not reduce Jones' opportunity to be paroled, because the law allowed the parole board to hold a hearing before eight years if circumstances warranted. However, the Supreme Court found that the lower court erred by ignoring the parole board's internal policy statements interpreting the statute's effect. *Id.* 246. While recognizing the parole board's right to change the way it exercised discretion, *Garner* said that discretion is still subject to objective benchmarks.

The key to unlocking the Court's interpretation of parole board's legitimate use of discretion is the following paragraph:

The presence of discretion does not displace the protections of the *Ex Post Facto* Clause, however. [citations omitted]. The danger that legislatures might disfavor certain persons after the fact is present even in the parole context, and the Court has stated that the *Ex Post Facto* Clause guards against such abuse. [citations omitted]. On the other hand, to the extent there inheres in *ex post facto* doctrine some idea of actual or constructive notice to the criminal before commission of the offense of the penalty for the transgression, see *Weaver, supra*, at 28-29, 101 S.Ct. 960, we can say with some assurance that where parole is concerned discretion, by its very definition, is subject to changes in the manner in which it is informed and then exercised. **The idea of discretion is that it has the capacity, and the obligation, to change and adapt based on experience. New insights into the accuracy of predictions about the offense and the risk of recidivism consequent upon the offender's release, along with a complex of other factors, will inform parole decisions.** See, e.g., *Justice v. State Board of Pardons and Paroles*, 234 Ga. 749, 751-752, 218 S.E.2d 45, 46-47 (1975) (explaining, by illustration to one prisoner's circumstances, that parole decisions rest upon the \*254 Board's consideration of numerous factors specific to an inmate's offense, rehabilitative efforts, and ability to live a responsible, productive life). 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. The statutory structure, its implementing regulations, and the Parole Board's unrefuted representations regarding its operations do not lead to this conclusion."

Emphasis added. *Id.* at 253-254.

*Garner* does not grant parole authorities unfettered discretion to increase the amount of time prisoners must serve. Changes in discretion must be anchored to insights about recidivism and the safety risks of releasing prisoners into society. *Id.* 253. This focus on recidivism is the first standard set out in the OAC. Thus, among other inquiries, plaintiffs will utilize national parole expert James Austin to study whether the Defendants' exercise of discretion has been exercised based on the "substantial reason to believe that the inmate[s] will engage in further criminal conduct," OAC Rule 120:1-1-07(A)(1); Docs. 36 and 45. If in fact recidivism rates play no part in the exercise of discretion that will be one important step in establishing an ex post facto violation under *Garner*.

**B. Defendants' Guidelines, Policy Statements and Unwritten Practices Guide its Suitability Determinations**

By resisting discovery in this case, the Defendants are basically arguing that their policies, practices and guidelines should not be scrutinized because they are not parole "laws" for purposes of ex post facto analysis. This argument has already been rejected. *Garner* made clear that parole policies, guidelines and practices are as crucial to the ex post facto inquiry as statutory authority:

At a minimum, policy statements, along with the Board's actual practices, provide important instruction as to *how the Board interprets its enabling statute and regulations*, and therefore whether, as a matter of fact, the amendment to [the rule] created a significant risk of increased punishment. It is often the case that an agency's policies and practices will *indicate the manner in which it is exercising its discretion*.

Emphasis added. *Id.* at 256-57.

In *Himes v. Thompson*, 336 F.3d 848 (9th Cir. 2003) the Ninth Circuit held that the parole board violated the Ex Post Facto clause by applying parole regulations effective in 1994 to a prisoner who had committed his crimes in 1978. The Court rejected the state's contention that in both 1978 and in 1994, the board had the same statutory authority to require an inmate to serve his full sentence.

That authority, however, was channeled by Or.Rev.Stat. § 144.395, requiring the Board

of Parole to ‘*adopt rules ... relating to the rerelease of persons whose parole has been revoked.*’ We must therefore consider whether the 1994 regulations thus adopted, as compared to the 1978 regulations, created a significant risk of a more onerous sentence.’ We focus on the regulations even though *neither the 1978 nor the 1994 regulations completely circumscribed the Board of Parole’s ability to deny Himes’ rerelease* pursuant to Or.Rev.Stat. § 144.343(2)(b). The principle that legislation that sufficiently channels official discretion may violate *ex post facto* principles, even if some discretion is retained, was definitively established in *Miller*, 482 U.S. at 425, 107 S.Ct. 2446.

Emphasis added. *Id.* at 855.

The Court held that the term ‘laws’ includes “every form in which the legislative power is exerted, including regulation or order.” *Id.* at 854. In the case at bar, the Ohio legislature delegated authority to the APA to promulgate rules and develop policies to determine which prisoners were suitable for parole. The policies that the APA developed are laws circumscribing its discretion.<sup>3</sup> The Defendants’ statements in the Motion for Summary Judgment and the conference held on March 22, 2010, indicate that the APA is retreating even further from objective benchmarks. If the Defendants abandon the points of reference guiding their discretion, then their exercise of discretion is no longer proper.

### **III. Defendants’ Parole Standards are a Moving Target**

#### **A. The APA’s Parole Standards**

What evidence must an Ohio prisoner scheduled for a 2010 parole hearing produce in order to demonstrate his or her fitness for parole? This is a contested question of fact that even Defendants have not been able to clearly answer in this case. That is the question that Dr. James Austin stands ready to explore with Plaintiffs.

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<sup>3</sup> See also *Johnson v. Million*, 102 Fed. Appx. 15, 2004 WL 954429 (6th Cir. 2004), (Ex Post Facto Clause “applies to any statutory *or policy change* that ‘alters the definition of criminal conduct or increases the penalty by which a crime is punishable.’” *Id.* at 17 (*emphasis added*)); *Fletcher v. District of Columbia*, 391 F.3d 250 (D.C. Cir. 2004) (noting that there was no distinction between laws and guidelines in the court’s *ex post facto* cases); *Knox v. Lanham*, 895 F. Supp. 750, 755-58 (D. Md. 1995), *aff’d*, 76 F.3d 377 (4th Cir. 1996) (an *unwritten policy* can be “law” covered by the Ex Post Facto Clause; the unwritten policy of the Parole Commission requiring plaintiffs to be on active work release and family leaves before receiving a parole recommendation constitutes violated the *ex post facto* clause); *Ganci v. Washington*, 318 Ill. App. 3d 1174, 1187-81 (Ill. App. Ct. 2001) (allegations of informal policy changes that increased punishment were sufficient to withstand a motion to dismiss).

When an Ohio prisoner is reviewed for parole, the APA issues a “decision sheet” that lists the prisoner’s offense score and criminal history risk score (the two scores are combined to produce a recommended range of months to be served) and comments on institutional programming and institutional adjustment. If the prisoner is denied, the APA checks a box corresponding to the four categories listed in OAC Rule 120:1-1-07(A). Throughout the 1970s, the APA had no objective tests or tools to help them apply the standards articulated in the rule. In 1987, the APA adopted a “matrix system” in order to make the process less subjective.<sup>4</sup> Starting in 1998, most of the APA’s standards for parole were published in a Parole Guidelines Handbook. Between 1998 and 2007, Plaintiffs were explicitly told how many months they were expected to serve in their assigned guideline range. They were also reminded to maintain their programming and good behavior to be suitable for release.

In 2007, the APA increased the number of months in the guidelines range, increased the offense category scores for most inmates, and made other changes.<sup>5</sup> Plaintiffs are now serving more months than the APA recommended under the older guidelines. Counsel for Plaintiffs reviewed hundreds of decision sheets from 2007 to 2010. Nearly all of them show inmates being denied because of Rule 120:1-1-07(A)(2), indicating that public safety would be jeopardized by their release. Many of these inmates were given low risk scores and had superior or good programming and adjustment ratings. The Defendants have denied Plaintiffs access to the parole files to determine what information that APA has that contradicts the prisoner’s low criminal history risk score and positive institutional marks.

By reviewing seven prisoner files, Dr. Austin will be able to evaluate how the APA arrives at a decision that the inmate cannot be paroled due to one of the four factors in the Rule. *Foster* certainly does not preclude Plaintiffs from obtaining discovery on the matter. Contrary to

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<sup>4</sup> *History of Parole Guidelines in Ohio*, Doc. 64.

<sup>5</sup> See Doc. 64, *Plaintiffs’ Memorandum in Opposition to Summary Judgment* and Doc. 34-1, *Plaintiffs’ Amended Complaint*.

the Defendants' assertion, the *Foster* panel did not disavow statistical fact-finding. In *Foster* the Court carefully examined statistical evidence. See *Foster*, 16-21.

While this lawsuit has been pending, the APA made another significant departure from its standards. In its *Motion for Summary Judgment*, filed on February 1, 2010, the APA announced that it no longer considered the offense score, criminal history risk score or recommended sentence range in evaluating a prisoner's suitability for parole. All of those measures are still reported on the decision sheet, however. The 2007 parole guidelines handbook has not been rescinded or updated. The Defendants have not revealed which tools, if any, are being utilized to make suitability determinations.

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>6</sup> Since this development has not been memorialized outside of Defendants' pleadings, such confusion is predictable. This development was not present in Michigan or discussed in *Foster* and further underscores the importance of accurate fact finding in this case.

#### **B. The Improper Use of Discretion Violates the Ex Post Facto Clause**

Ex post facto challenges to guidelines systems with similar benchmarks as Ohio have been successful<sup>7</sup>. In *Brown v. Williamson*, 2009 WL 205626 (3<sup>rd</sup> Cir. 2009), the Third Circuit considered parole standards that in practice placed more weight on the death of the victim. Brown was sentenced in 1980. In 1987 the Washington D.C. parole board implemented a points-based scoring system that formalized the way it exercised its discretion. *Id.* 2. Under the system, the

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<sup>6</sup> Doc. 54 at p.8.

<sup>7</sup> See also *Nulph v. Faatz*, 27 F.3d 451, 455 (9<sup>th</sup> Cir 1994) ("Indeed, the matrix range appears to serve as a sort of benchmark which guides the Board's exercise of its discretion with respect to sentencing decisions regarding all defendants who are the subject of judicially imposed minimum terms. The new rule has increased this benchmark punishment... Thus, we conclude that the 1987 statute operates in an ex post facto manner."); *Curtis v. Benik*, 2005 WL 300381, at 2 (W.D. Wis. 2005) (Illinois prisoner stated an *ex post facto* claim by alleging that retroactive application of a new parole policy – designed to "keep violent offenders in prison as long as possible under the law" – was the cause of his denial of parole).

inmate's total score determined whether he was suitable for parole. *Id.* In 1997, the D.C. Parole Board was abolished and U.S. Parole Commission replaced it. The Commission's guidelines also gave prisoners a guidelines score. However, under the new guidelines the score was used to determine a range of months the prisoner should serve beyond his minimum. The Commission had discretion over whether to parole or deny a prisoner upon completion of the range. *Id.*

Under the Commission's guidelines, Brown was assessed six points for the death of his victim. *Id.* 2-3. The corresponding sentencing range was 98-164 months past his statutory minimum eligibility date. The 1987 guidelines would have given Brown a score of one instead of six for the death of the victim. *Id.* 4. The six points added nine to twelve years to Brown's guideline range. *Id.* 5. Brown alleged that the parole guidelines that were applied to him emphasized different factors and were objectively harsher than the guidelines that were in effect at the time of his offense. The government contended that the substantive criteria were the same under both sets of guidelines, but the new guidelines gave the parole commission more open-ended discretion. *Id.* 3.

The Court held that although the guideline range itself did not necessarily indicate a significant risk of prolonged incarceration, the length of the sentence was striking in comparison to Brown's score under the prior sets of guidelines. The 1987 guidelines, which are similar to the Ohio APA's 1987 standards, would have probably recommended Brown be paroled at his second annual rehearing. *Id.* 5. The Court held that the Commission improperly changed the parole criteria by giving more weight to criminal history and assigning less significance to rehabilitation, health and institutional experience. *Id.* 5-6. "Whereas the prior guidelines emphasized the internal and external problems that might have driven an offender to commit a crime and his efforts to overcome them, the current guidelines focus almost exclusively on the severity of the underlying crime and the offender's criminal history." *Id.* at 6.

The Court reiterated *Garner*'s directive that discretion be properly exercised:

Although a parole agency or state "may learn from experience" and adjust its parole criteria accordingly, that "does not mean that those who were sentenced at an earlier juncture may now be more severely re-sentenced in the light of newly-found wisdom. This is precisely what the Ex Post Facto Clause prohibits." *Mickens-Thomas*, 321 F.3d at 387. The discrepancy between the emphasis placed on an offender's mental, physical, and social characteristics by the prior guidelines and the lack of consideration given to those factors by the current guidelines indicates a substantive shift that might subject Brown to a more severe sentence.

*Id.* at 6.

The Court held that Brown was entitled to a "searching comparison of the old and new regimes." *Id.* at 6. Ohio's old law inmates have been subjected to three different parole schemes. Under the 1987 Matrix, the plaintiffs most likely would have been released after one or two continuances. The 1998 guidelines abolished the matrix and created a guidelines chart with substantially longer sentence ranges, which the APA admitted resulted in longer sentences. The 2007 guidelines gave the APA more discretion and once again increased the number of months in the ranges of time the prisoner must serve. Plaintiffs are entitled to a statistical comparison of the time served under various parole schemes and are then entitled to explore whether the discretion exercised by defendants was unfettered or proper. *See Dyer v. Bolwen*, 465 F.3d 280, 289 (2006); *Michael v. Ghee*, 498 F. 3d 371, 380 (6<sup>th</sup> Cir., 2007); *Dotson v. Wilkinson*, 2008 WL 162901 (6<sup>th</sup> Cir. 2008).

Defendants repeatedly state that because some prisoners received maximum sentences of life, their eligibility for parole is the same under the old and new guidelines. Under this interpretation, a prisoner serving a non-mandatory life sentence can never be at risk of having an increased sentence sufficient to offend the Ex Post Facto Clause. Although Defendants claim that prisoners were always on notice that they could serve life with out parole, this misses the point. Notwithstanding that parole in not guaranteed under any of the parole regimes, "[a]n adverse change in one's prospects for release disadvantages a prisoner just as surely as an upward change in the minimum duration of sentence." *Mickens-Thomas v. Vaughan*, 321 F.3d 374, 392 (3d Cir. 2003)(emphasis added). In other words, the Ex Post Facto clause is violated wherever a new

parole scheme detrimentally affects “eligibility for reduced imprisonment, rather than any fixed guarantee of release.” *Lynce v. Mathis*, 519 U.S. 433, 445 (1997), *Mickens-Thomas*, 321 F.3d at 391. Indeed, Plaintiffs expect that discovery in this case will show that the application of the 2007 parole guidelines have, in effect, upwardly changed the maximum duration of Plaintiffs’ sentences.

### **CONCLUSION**

*Foster v. Booker* does not prevent this Court from reopening discovery and appointing plaintiffs’ expert to analyze Defendants’ parole records.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on March 24, 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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