

**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’ BRIEF IN SUPPORT OF NOTICE OF SUPPLEMENTAL
AUTHORITY – *FOSTER v. BOOKER* (Doc. 59).**

I. INTRODUCTION

The recent Sixth Circuit decision of *Foster v. Booker*, Nos. 08-1371; 1372; 1626 (6th Cir. 2010) (copy attached as Exhibit A) (hereinafter, “*Foster*”) endorses and reinforces Defendants’ argument that they are entitled to judgment as a matter of law. *Foster* stands for the proposition that an *ex post facto* claim does not exist “[w]ithout some legal change other than a difference in the proper exercise of discretion.” *Foster*, pg. 13. Accordingly, the question before the Court is whether the Sixth Circuit’s analysis of the relationship between the scope of a parole board’s statutory discretion and parole guidelines that do not affect or influence that discretion, entitles Defendants to judgment as a matter of law.

Plaintiffs’ vague and amorphous allegations of “harsher parole standards” and a new “life means life” policy fail as a matter of law under *Foster*. See *Foster* at pgs.12-13. Under *Foster*, where the statutory scope of the Ohio Adult Parole Authority’s (“APA”) discretion has not been changed by a parole law or guideline, a mere change in

the way a parole board exercises its discretion, without some other legal change, does not implicate the *Ex Post Facto* Clause. *Id.* This is the identical argument presented by Defendants in their *First Motion for Summary Judgment* (“MSJ”) (See Doc. 41, MSJ, pgs. 20-27). Furthermore, contrary to what Plaintiffs may argue, *Foster* does not disregard nor overturn Supreme Court or Sixth Circuit precedent.

Accordingly, at this point in the case, where Defendants’ are entitled to judgment as a matter of law on all claims asserted by Plaintiffs, the improvident pursuit of irrelevant statistical data would be an inefficient use of State and Judicial resources. Thus, discovery should not move forward and the Court should first issue a judgment as a matter of law.

II. FOSTER ENTITLES DEFENDANTS TO JUDGMENT AS A MATTER OF LAW.

In *Foster*, the Sixth Circuit came to the common sense conclusion that inmates fail to state an *ex post facto* claim where the “statutory scope of the Boards’ range of discretion has remained the same.” The *Foster* Court states that “[w]ithout some legal change other than a difference in the proper exercise of discretion” an inmate fails to state an *ex post facto* claim. *Foster*, pg. 13.¹ Thus, *Foster* unambiguously rejects the Eastern District of Michigan’s belief, as stated in *Foster-Bey v. Rubitschun*, No. 05-71318, 2008 WL 7020690 (E.D. Mich. Oct. 23, 2008), that “the discretionary nature of the Board’s decision whether to grant parole does not preclude plaintiffs’ *ex post facto* challenge.”

¹ As stated *infra*, and explained in detail in Defendants’ MSJ filed prior to the *Foster* decision, this standard does not conflict with the Supreme Court case of *Garner v. Jones*, 529 U.S. 244 (2000), the Sixth Circuit case of *Michael v. Ghee*, 498 F.3d 372 (6th Cir. 2007) (cert. denied), or the D.C. Circuit case of *Fletcher v. Reilly*, 433 F.3d 867 (D.C. Cir. 2006).

Foster, pg. 12; citing *Foster-Bey v. Rubitschun*, No. 05-71318, 2008 WL 7020690, *9 (E.D. Mich. Oct. 23, 2008).²

Foster is the death knell for *ex post facto* claims directed at any parole law or guideline that does not actually have an affect on the manner in which a parole board exercises its discretion. The 2007 Guidelines do not cause a “legal change” that effects a change in the APA’s scope of statutory discretion. That is not to say that the 2007 Guidelines are not “laws” for *ex post facto* purposes. Rather, a set of guidelines that do not restrict or otherwise influence the APA’s grant of statutory discretion, does not cause a “legal change”. As explained in detail in Defendants’ MSJ, the 2007 Guidelines have absolutely no affect on the APA’s determination of whether an inmate serving a life sentence is suitable for release. Further, as explained in Defendants’ MSJ, since *Ankrom v. Hageman*, 2007 Ohio App. Lexis 4496 (10th App. Dist., 2005), Ohio’s parole guidelines have no affect on any inmate’s suitability for release.

More importantly, the *Foster* Court rejects, as a matter of law, the plaintiffs argument based on their allegations of “harsher standards” and a new “life means life” policy. The *Foster* Court rejected this argument because how the Michigan Parole Board exercises its discretion, whether through the implementation of supposed “harsher standards” or a new “life means life” policy, does not effect a legal change. Ultimately, the Michigan Parole Board’s decision was still within the bounds granted to it by the Michigan Legislature and still within the bounds of the sentence handed down by the sentencing court.

² It is worth noting that Plaintiffs’ herein modeled their Amended Complaint on the *Foster-Bey* Complaint and decision, and even attached a copy of the *Foster-Bey* decision to their Proposed Plan for Limited Discovery. (See Doc. 45).

In this case, Plaintiff's *ex post facto* allegations regarding "harsher standards" and a new "life means life" policy under the 2007 Guidelines essentially mirror the *ex post facto* allegations set forth by the plaintiffs in *Foster-Bey*. (See Amended Complaint, pgs. 4-9). However, the *Foster* Court unequivocally rejected this argument as a matter of law. *Foster*, pg. 12-13.

III. FOSTER DOES NOT CONFLICT WITH SIXTH CIRCUIT OR SUPREME COURT PRECEDENT.

Plaintiffs will undoubtedly argue that the Supreme Court case of *Garner v. Jones*, 529 U.S. 244 (2000), and the Sixth Circuit case of *Michael v. Ghee*, 498 F.3d 372 (6th Cir. 2007) (cert. denied), mandate discovery and proscribe this Court's ability to issue a judgment as a matter of law. Plaintiff's position is not well taken. *Foster's* holding, as it pertains to the scope of a parole board's discretion relative to a guideline that does not effect a "legal change", does not conflict with either of these two cases. Again, the *Foster* decision, as it relates to this case, stands for the common sense proposition that "[w]ithout some legal change other than a difference in the proper exercise of discretion," an inmate fails to state an *ex post facto* claim. *Foster*, pg. 13. This is the very argument presented by Defendants in their MSJ. (See Doc 41, pgs. 20-27).

In both *Garner* and *Michael* there was a "legal change other than a difference in the proper exercise of discretion" that barred judgment as a matter of law and necessitated extensive discovery. In *Garner*, an inmate's parole *eligibility* was effectively altered as a matter of law. As explained in detail in Defendant's MSJ (See Doc 41, pgs. 20-27), the regulation at issue in *Garner* mandated an increase in time between suitability hearings, effectively delaying an inmate's eligibility for parole. This

is a prime example of a “legal change” that under *Foster* may implicate the *Ex Post Facto* Clause and require extensive discovery.³

In *Michael*, application of the 1998 parole guidelines caused a “legal change” because of the potential that inmates’ actual *eligibility* for parole was delayed until the minimum guideline range had been met by an inmate. (See Doc 41, pgs. 20-27).⁴ This was the same concern expressed by the Franklin County Court of Common Pleas in *Ankrom*. The *Michael* Court explicitly recognized that the 1998 Guidelines were subject to *ex post facto* scrutiny because they guided the exercise of the APA’s discretion. See *Michael*, 498 F. 3d at 382-83. Under the circumstances presented in *Garner* and *Michael*, where a law or guideline actually restricts or influences a parole board’s discretionary power, discovery directed at the cause and effect of the restriction on the parole board’s discretion is appropriate.

In stark contrast, the 2007 Guidelines effect no “legal change”. The 2007 Guidelines do not mandate any particular outcome and cannot possibly delay an inmate’s eligibility for parole. In fact, the 2007 Guidelines do not even suggest a particular outcome for any inmate serving a maximum term of life in prison.

Plaintiffs’ position with respect to inmate’s serving a maximum term of life in prison – that a guideline range identical to the statutory scope of the APA’s range of discretion creates an *ex post facto* violation – is inconsistent with *Foster* and contrary to common sense. The 2007 Guidelines do not change the fact that Ohio inmates serving a

³ This is similar to one of the issues in *Foster*. See *Foster*, pg. 16. The *Foster* Court held that plaintiff’s proof on this issue was not sufficient. However, this issue, and the *Foster* plaintiffs allegation regarding in-person interview, which both arguable constitute a “legal change” under *Foster*, are not at issue in this case. Thus, allowing Plaintiffs’ to pursue their discovery plan on this basis is neither necessary nor appropriate.

⁴ In addition, the new re-parole guidelines at issue in the D.C. Circuit case of *Fletcher v. Reilly*, 433 F.3d 867 (2006), caused a “legal change” because they significantly changed the *suitability* criteria the United States Parole Commission would apply at re-parole hearings.

maximum term of life in prison face a “significant risk” of having to serve their entire life sentence. *See Foster*, pg. 12. For this Court to decide otherwise would be an impermissible intrusion on the APA’s legislatively sanctioned discretion to grant or deny parole within the bounds set by Ohio’s legislature. (*See* Doc 54, MSJ, pgs. 26-27). Accordingly, at a minimum, those Plaintiffs serving a maximum life sentence must be dismissed because the 2007 Guidelines provide no basis for an *ex post facto* claim. *See 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)

In addition to endorsing Defendants’ position that they are entitled to judgment as a matter of law, the *Foster* Court correctly determined that statistical evidence in the parole context is patently deficient when used to describe why an inmate was denied parole. Statistics, by their very nature, cannot discern between the effects of the legitimate exercise of a parole board’s legislatively sanctioned discretion, and the alleged effects of amendments made to Ohio’s parole guidelines. *See Foster*, pg. 16. Consequently, the statistics regarding Ohio’s parole rates that Plaintiffs hope to obtain through discovery in this case are irrelevant as they have no tendency to prove or disprove a fact material to this case.

Assuming, *arguendo*, that this Court does not believe that Defendants are entitled to judgment as a matter of law (contrary to *Foster*), extensive discovery in this case is nonetheless futile. Even if the statistics show an increase in time served and a decrease in parole rates, there is “no way for this court to determine whether any decrease in the parole rate or any increase in the average years served is due to the challenged statutory changes to the parole process or to the Board’s stricter exercise of its discretion.” *Foster*,

pg. 16. The *Foster* Court made 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.

IV. PROCEEDING WITH PLAINTIFFS' DISCOVERY PLAN IN LIGHT OF *FOSTER* AT THIS POINT WOULD CAUSE THE IMPROVIDENT USE OF SCARCE STATE AND JUDICIAL RESOURCES.

In this case, Defendants have submitted a properly supported MSJ that argues that they are entitled to judgment as a matter of law on all claims asserted by Plaintiffs. The Sixth Circuit's decision in *Foster* significantly strengthens Defendants argument that they are entitled to judgment as a matter of law. The expense and disruption inevitably associated with extensive discovery should not be incurred in light of *Foster*. This is especially true considering the fact that Plaintiffs herein modeled their Complaint and discovery plan after *Foster*. Limitation of discovery is appropriate where claims are subject to dismissal "based on legal determinations that could not have been altered by any further discovery." *Muzquiz v. W.A. Foote Mem'l. Hosp., Inc.*, 70 F.3d 422, 430 (6th Cir. 1995).

V. Conclusion

Foster's recognition that laws and guidelines that do not affect the scope a parole board's discretion do not implicate *ex post facto* entitles Defendants to judgment as a matter of law. *Foster* does not conflict with established Sixth Circuit or Supreme Court precedent. Accordingly, Defendants request that the Court issue judgment on the arguments presented herein and in their MSJ prior to reopening discovery to preserve scarce State and Judicial resources.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 24, 2010 a copy of the foregoing, Defendants' Brief in Support of 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 Dolan
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