CASENOTE

Garner v. Jones: Restricting Prisoners' Ex Post Facto Challenges to Changes in Parole Systems*

In *Garner v. Jones*,[1] the United States Supreme Court laid out rules for lower courts to determine whether granting parole boards the discretion to change retroactively the frequency of parole reconsideration hearings would violate the Ex Post Facto Clause. The Court held that a prisoner challenging one of these statutes must produce certain evidence that the statute "created a significant risk of increasing his punishment."[2]

I. FACTUAL BACKGROUND

In July 1974, Robert L. Jones was convicted of murder and sentenced to life in prison in the Superior Court of Fulton County, Georgia.[3] At the time of Jones' first conviction, the Official Code of Georgia Annotated

---

*. I wish to extend my gratitude to Elizabeth Kertscher for her helpful suggestions in preparing this Note.

1. 120 S. Ct. 1362 (2000).
2. *Id.* at 1370.
3. Jones v. Garner, 164 F.3d 589, 589-90 (11th Cir. 1999).

("O.C.G.A.") section 42-9-45(b)[4] provided that the State Board of Pardons ("Board") must consider those serving life sentences for initial parole consideration after seven years.[5] Under Georgia Rules & Regulations, Rule 475-3-.05(2), subsequent reconsideration hearings were to take place every three years.[6]

However, five years after being sentenced to life in prison and prior to Jones' initial parole consideration hearing, Jones escaped from prison. While a fugitive, Jones committed a second murder. After he was recaptured in 1982, Jones was sentenced to a second life term.[7] Before his initial parole consideration hearing, the Board amended Rule 475-3-.05(2) and applied the amendment retroactively.[8] Parole boards were granted the discretion to increase the time to eight years between subsequent parole reconsideration hearings for those denied initial consideration and serving life sentences.[9]

Jones was first considered for parole in 1989, seven years after his 1982 conviction. At that time, Jones was denied parole and his subsequent parole reconsideration hearing was set, under the 1985 amendment, for eight years later in 1997.[10] However, the Board subsequently amended its rules again in response to the 1991 decision of *Akins v. Snow*[11] by the Eleventh Circuit. The Eleventh Circuit held that the retroactive application of the Georgia Rules changing the time between reconsideration hearings violated the Ex Post Facto Clause of the United States Constitution.[12] Jones' reconsideration hearings were again set for three-year intervals, in 1992 and in 1995.[13] The Board

---

4. O.C.G.A. § 42-9-45(b) (1997). The statute provides in pertinent part: "Except as otherwise provided in Code Sections 17-10-6.1 and 17-10-7, inmates serving sentences aggregating 21 years or more shall become eligible for consideration for parole upon completion of the service of seven years."

5. 120 S. Ct. at 1365-66 (citing O.C.G.A. § 42-9-45(b) (1982)).

6. *Id.* at 1366 (citing GA. COMP. R. & REGS. r. 475-3-.05(2) (1979)).

7. *Id.*

8. The amended rule provides: "Reconsideration of those inmates serving life sentences who have been denied parole shall take place at least every eight years. The Board will inform inmates denied parole of the reasons for such denial without disclosing confidential sources of information or possible discouraging diagnostic opinions." GA. COMP. R. & REGS. r. 475-3-.05(2) (1985).

9. 120 S. Ct. at 1366 (citing GA. COMP. R. & REGS. r. 475-3-.05(2) (1985)). The Board's policy statement provides that the purpose behind the amendment was to "establish the maximum possible interval between parole denials and reconsideration in a Life Sentence Case." Brief for Respondent at 26 n.19. *Garner*, 120 S. Ct. 1362 (No. 99-137).

10. *Id.* at 1366.

11. 922 F.2d 1558 (11th Cir. 1991).

12. *Id.* at 1565.

13. 120 S. Ct. at 1366.

denied parole each time, citing the "multiple offenses" and "circumstances and nature of the second offense."[14] But, in 1995 the Board read the subsequent decision of *California Department of Corrections v. Morales*[15] from the United States Supreme Court to overrule *Akins*.[16] After Jones' 1995 review and denial, the Board scheduled Jones' next parole reconsideration hearing in conformity with its amended rules for eight years later, in 2003.[17]

Jones brought an action under 42 U.S.C. § 1983[18] in the Northern District of Georgia alleging that the amendment to Rule 475-3-.05(2) violated the Ex Post Facto Clause of the United States Constitution.[19] He sought a motion for leave to discover evidence for his claim. Citing *Morales*, the district court granted the petitioner's motion for summary judgment and dismissed Jones' claim.[20] Because the amended Rules created "only the most speculative and attenuated possibility" of increasing a prisoner's punishment, the court held that there was no ex post facto violation.[21]

However, on appeal the Eleventh Circuit reversed and distinguished *Morales*.[22] The court of appeals stated that determining whether retroactive application of the Georgia rules violated the Ex Post Facto Clause must focus on the effect on the "prisoner's ultimate date of release."[23] In *Morales* the Court relied on several factors that the Supreme Court believed safeguarded against producing a "sufficient risk of increasing the measure of punishment attached to covered crimes."[24] However, those safeguards were absent from the present case. Unlike in *Morales*, the Georgia law applies to "all those inmates serving life sentences," does not require a particularized finding of fact as to the reasons for denial, increases the time between parole reconsideration from one to eight years, and grants too much discretion for board review.[25] The court also noted that while the purpose behind a statute

---

14. *Id.* (citing *Akins*, 922 F.2d at 1565).
15. 514 U.S. 499 (1995).
16. 120 S. Ct. at 1366.
17. *Id.*
18. 42 U.S.C. § 1983 (1994).
19. As is typical in the Georgia parole system, Jones was denied the right to appointed counsel. He therefore argued his case *pro se* before the district court. Telephone Interview with Elizabeth T. Kertscher, Counsel for Respondent at United States Supreme Court (Dec. 5, 2000).
20. 120 S. Ct. at 1366.
21. *Id.* (quoting *Morales*, 514 U.S. at 509).
22. *Jones*, 164 F.3d at 593-96.
23. *Id.* at 593 (quoting *Morales*, 514 U.S. at 513).
24. *Id.* (quoting *Morales*, 514 U.S. at 509).
25. *Id.* at 593-96.

would never "be a sufficient basis for concluding that a law violated the Ex Post Facto Clause," a change for the purpose of increasing a prisoner's punishment could support that conclusion.[26] Furthermore, the Policy Statement of the Board allowing inmates to request an expedited review is insufficient to mitigate the effect on the inmate's punishment because those statements do not carry the weight of law and enforcement is left entirely to the discretion of the Board.[27] The Supreme Court granted certiorari and reversed, holding that states are not required to adopt the exact procedures in *Morales* to satisfy the Ex Post Facto Clause.[28]

II. LEGAL BACKGROUND

The doctrine of holding ex post facto criminal laws void originated several centuries prior to the adoption of the United States Constitution and is deeply rooted in our legal history. During the debate over the Constitution, Alexander Hamilton wrote that "the prohibition of ex post facto laws . . . are perhaps the great[est] securities to liberty and republicanism than any [the Constitution] contains."[29] As applied to the states, the Ex Post Facto Clause states, "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ."[30]

Calder v. Bull[31] is the primary case interpreting the meaning and scope of the Ex Post Facto Clause. Justice Chase believed that the purpose of the Ex Post Facto Clause was to prevent abuses by the legislature by giving advance notice to citizens of what actions constitute a crime.[32] Chase stated that those laws that are ex post facto laws fall within four categories:

---

26. *Id.*

27. *Id.* at 595. The relevant language of the Policy Statement provides:

> It is the policy of the Board that all Life Sentence Cases denied parole may be set for reconsideration up to a maximum of eight years from the date of the last denial when, in the Board's determination, it is not reasonable to expect that parole would be granted during the intervening years. Inmates set-off under this policy may receive expedited parole reviews in the event of a change in their circumstances or where the Board receives new information that would warrant a sooner review.

State Board of Pardons and Paroles Policy Statement No. 4.110 §§ 1.105-06 (1996).

28. *Garner*, 120 S. Ct. at 1368.

29. THE FEDERALIST No. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

30. U.S. CONST. art. I, § 9.

31. 3 U.S. 386 (1798).

32. *Id.* at 388-89.

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offence, [sic] in order to convict the offender.[33]

Because the ex post facto doctrine is one of the "vital principles in our free Republican governments," any act contrary to the doctrine would be considered an invalid exercise of legislative authority.[34]

In *In re Medley*,[35] the Supreme Court reiterated its interpretation of the Ex Post Facto Clause to include those laws that are retrospective and "which [alter] the situation of the accused to his disadvantage."[36] Petitioner challenged the retroactive application of a statute that required those being held for capital crimes to be held in solitary confinement. The former law, in effect at the time petitioner committed the crime, contained no requirement of this sort.[37] The Court held that, because the new statute imposed "additional punishment of the most important and painful character," the act was void under the United States Constitution.[38]

Beazell v. Ohio[39] demonstrates the Court's twentieth-century approach to the Ex Post Facto Clause and assesses the degree to which a retrospective application of a law disadvantages the offender.[40] *Beazell* involved an Ohio statute that made discretionary the granting of separate trials for those jointly indicted of felonies, amending an earlier statute that required felons to be tried separately.[41] The Court denied defendant's ex post facto challenge.[42] The Court explained that determining whether a procedural change violates the Ex Post Facto Clause requires an analysis of the degree to which the person was disadvantaged and cannot be established in a definitive set of rules or

---

33. *Id.* at 390.
34. *Id.* at 388.
35. 134 U.S. 160 (1890).
36. *Id.* at 171.
37. *Id.* at 170-72.
38. *Id.* at 171.
39. 269 U.S. 167 (1925).
40. *Id.* at 171.
41. *Id.* at 169-70.
42. *Id.* at 169.

propositions.[43] Statutory changes that affect a method of trial or deprive an accused of a defense "in a limited or unsubstantial manner to his disadvantage, are not prohibited."[44]

This analysis became the basis for the Court's decision in *Lindsey v. Washington*,[45] in which the Court had to determine whether the Ex Post Facto Clause applied to a retroactive application of a statute that removed the possibility of a shorter sentence and made the possibility of parole revocable at will.[46] The Court held that this sort of statute was ex post facto because it increased the possibility of a penalty by lengthening the required sentence.[47] "The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer."[48] Because the petitioners were denied an opportunity to gain their freedom from custody under the shorter term mandated at the time they committed the crime, the new statute was to their "substantial disadvantage."[49]

The Supreme Court would later rely on several lower court opinions utilizing this method of analysis in determining the constitutionality of various changes in parole procedures. In *Greenfield v. Scafati*,[50] a United States district court held that the retroactive application of a statute that forfeited good conduct deductions for those who violated parole conditions to those already under sentence was to the disadvantage of the accused and violated the Ex Post Facto Clause.[51] The court recognized that statutory reductions in the amount of good conduct allowances after incarceration could be invalidated because they deprived the prisoner of time off he deserved.[52] The availability of good conduct time is considered an essential element of the crime.[53] Furthermore, the fact that parole is discretionary does not mean that depriving a prisoner of parole could never be found ex post facto. The court concluded that entirely depriving the prisoner of both the right to earn good conduct time and the right to qualify for parole, even for a brief period, "materially 'alters the situation of the accused to his

43. *Id.* at 169-70.
44. *Id.* at 170.
45. 301 U.S. 397 (1937).
46. *Id.* at 398.
47. *Id.* at 401-02.
48. *Id.* at 401.
49. *Id.*
50. 277 F. Supp. 644 (D. Mass. 1967).
51. *Id.* at 646.
52. *Id.* at 645.
53. *Id.*

disadvantage.'"[54] Thus, the legislation, enacted and applied after the offense, was unconstitutional.

Likewise, in *Rodriguez v. United States Parole Commission*,[55] the United States Court of Appeals for the Seventh Circuit held that the retroactive elimination "of all opportunity to be released on parole also comes within the scope of [the Ex Post Facto Clause]."[56] The court first acknowledged that prior case law has not required a technical increase in punishment.[57] However, the Constitution forbids any legislation that operates to the "substantial disadvantage" of the prisoners.[58] If a court finds that parole is an essential element of the punishment for which a prisoner is convicted, the retroactive elimination of the prisoner's opportunity to be released on parole is "plainly to his substantial disadvantage."[59]

Two years later, in *Weaver v. Graham*,[60] the Supreme Court held that the retroactive application of a statute reducing the amount of gain time available for good conduct was unconstitutional as an ex post facto law.[61] Justice Marshall first rejected the argument that a law must "impair a 'vested right' to violate the *ex post facto* prohibition."[62] For a law to be declared ex post facto, two elements must be satisfied. First, the law must be retrospective by having the "effect" of altering the consequences of acts completed prior to the law's effective date.[63] Gain time can be a decisive factor in determining an offender's prison term even though it may alter punitive conditions external to the sentence.[64] Therefore, removal of gain time after the commission of a crime is retrospective because it "substantially alters the consequences attached to a crime already completed, and therefore changes 'the quantum of punishment.'"[65]

---

54. *Id.* at 646 (quoting *Medley*, 134 U.S. at 171).

55. 594 F.2d 170 (7th Cir. 1979).

56. *Id.* at 175. For a more general discussion of the Ex Post Facto Clause and the federal parole system, see Russell G. Donaldson, Annotation, *United States Parole Commission Guidedlines for Federal Prisoners*, 61 A.L.R. FED. 135, 155-59 (1983).

57. 594 F.2d at 174.

58. *Id.*

59. *Id.* at 175.

60. 450 U.S. 24 (1981).

61. *Id.* at 35-36; *see also* Miller v. Florida, 482 U.S. 423, 431 (1987), in which the Supreme Court rejected the argument that revised sentencing guidelines survived attack because they provided notice that the laws "might be changed." *Id.* at 431.

62. 450 U.S. at 29.

63. *Id.* at 29-30.

64. *Id.* at 31-32.

65. *Id.* at 32-33 (quoting Dobbert v. Florida, 432 U.S. 282, 293-94 (1977)).

Second, a retrospective law will be held unconstitutional only if the statute disadvantages the offender.[66] A statute does not need to increase the punishment attached to a crime to be disadvantageous but can simply lengthen the term that a prisoner must spend in prison or reduce an opportunity to shorten his time in prison.[67] Marshall explained that courts should look to the statute itself and not to any provisions that "mitigate its effect on the particular individual."[68] A statute that reduces the opportunity to earn early release through gain time solely for good conduct increases the amount of time a prisoner must spend in prison and "makes more onerous the punishment for crimes committed before its enactment."[69] Curiously absent from Marshall's language was the phrase "substantial disadvantage," replaced only with "to [the prisoner's] disadvantage."[70]

This rationale was extended in *Akins v. Snow*,[71] in which the United States Court of Appeals for the Eleventh Circuit thoroughly addressed the issue of whether the retroactive reduction in the frequency of parole reconsideration hearings violates the Ex Post Facto Clause.[72] The court addressed what it saw as "three preliminary issues" prior to its analysis of the ex post facto challenge.[73] First, the court determined that Board rules have the "force and effect of law" because the legislature delegated the authority to the Board to enact rules.[74] Second, because an inmate is not eligible for parole without a parole hearing, parole hearings are "an essential part of parole eligibility."[75] After being denied parole at his initial parole consideration, a prisoner must receive a reconsideration before parole can be granted.[76] Finally, the court found that parole eligibility is part of a prisoner's sentence.[77] The court then applied the *Weaver* two-prong analysis to determine if the Board rules violated the Ex Post Facto Clause.[78] First, the court determined that the law was retrospective.[79] By changing the frequency of parole reconsideration

66. *Id.* at 33.
67. *Id.* at 33-34.
68. *Id.* at 33.
69. *Id.* at 36.
70. *Id.* at 34 (citing *Medley*, 134 U.S. at 171).
71. 922 F.2d 1558 (11th Cir. 1991).
72. *Id.* at 1563-64.
73. *Id.* at 1561.
74. *Id.*
75. *Id.* at 1562.
76. *Id.* at 1561-62.
77. *Id.* at 1562.
78. *Id.* at 1563-64.
79. *Id.* at 1564.

hearings after prisoners commit crimes, the "Board effectively altered the consequences of their crimes after they were completed."[80] Second, the court held the law "substantially disadvantage[d]" the prisoners' parole eligibility.[81] Relying on its holding that a parole reconsideration hearing is an essential part of parole eligibility, the court stated that alterations in the frequency of parole reconsideration hearings also alter a prisoner's parole eligibility.[82] Because this alteration results in an increase in the amount of time a prisoner must spend in prison before becoming eligible for parole, the change "substantially disadvantages a prisoner."[83]

In *California Department of Corrections v. Morales*,[84] the Supreme Court held that determining whether a California statute that decreased the frequency of reconsideration hearings violated the Ex Post Facto Clause turned on whether the specific changes created "a sufficient risk of increasing the measure of punishment attached to covered crimes."[85] Defendant, who was convicted of multiple murders, claimed changes of this sort violate the Ex Post Facto Clause because they stiffen the punishment attached to the crime by creating the possibility of affecting a prisoner's punishment.[86] Justice Thomas rejected this argument, stating the Court's ex post facto analysis has never been set in a single formula but has been determined by the "degree" to which the legislative adjustments affect the prisoner.[87]

In deciding whether the California statute increased the punishment for a crime after its commission, Justice Thomas noted several factors.[88] The scope of the statute was limited to "a class of prisoners for whom the likelihood of release on parole is quite remote."[89] Furthermore, the statute is replete with safeguards ensuring that its application does not result in extending an inmate's sentence.[90] First, the statute was "carefully tailored" to the end of saving time and money by not requiring

---

80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. 514 U.S. 499 (1995).
85. *Id.* at 509. For a more general analysis of the Ex Post Facto Clause and punishment, see Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261 (1998); *see also* JOSEPH G. COOK, 1 CONSTITUTIONAL RIGHTS OF THE ACCUSED § 1:20 (3d ed. 1996).
86. 514 U.S. at 508.
87. *Id.* at 509 (citing *Beazell*, 269 U.S. at 171).
88. *Id.* at 510-13.
89. *Id.* at 510.
90. *Id.* at 510-11.

the parole board to conduct hearings for an inmate it believed had no chance of release.[91] Second, the parole board was required to conduct "'a full hearing and review' of all the relevant facts," stating a reason for its finding.[92] Third, the statute allowed the parole board to tailor the frequency of subsequent hearings based on the "particular circumstances of the individual prisoner."[93] Fourth, the Court found that a "prisoner's ultimate date of release would be entirely unaffected by the change in the timing of suitability hearings."[94] Finally, the California Board of Prison Terms could expedite a release date if it felt that the facts of any case warranted such an early release.[95] Courts should not be subjected to reviewing countless minor legislative adjustments in parole and sentencing guidelines that have only the mere possibility of impacting a prisoner's term of confinement.[96] Justice Thomas believed the totality of the changes created "only the most speculative and attenuated risk of increasing the measure of punishment attached to covered crime" and were, therefore, not prohibited by the Ex Post Facto Clause.[97]

The dissent, consisting of Justices Stevens and Souter, described the majority's description of the respondent's claim of increased punishment as "speculative" to be "not only unpersuasive, but actually perverse."[98] Justice Stevens believed prior case law made clear that any retroactive application of a law that decreases the frequency of parole reconsideration hearings would eliminate a prisoner's chance to earn release.[99] Completely eliminating the chance to earn release when it existed previously would be an an increase in punishment and would violate the Ex Post Facto Clause.[100] The majority's reliance on the fact that the statute affected only one class of persons is the danger the Ex Post Facto Clause was enacted to prevent: "[administering] justice unfairly against particular individuals."[101] Furthermore, the provision, which requires the parole board to make particular findings of fact prior to denial, fails to satisfy the Ex Post Facto Clause.[102] Justice Stevens stated that the

91. *Id.*
92. *Id.* at 511 (quoting CAL. PENAL CODE ANN. § 3041.5(b)(2) (West 1982)).
93. *Id.*
94. *Id.* at 513.
95. *Id.* at 512-13.
96. *Id.* at 508-09.
97. *Id.* at 514.
98. *Id.* at 526 (Stevens, J., dissenting).
99. *Id.* at 516-17.
100. *Id.* at 516.
101. *Id.* at 520.
102. *Id.* at 522-23.

statute provides no means to review Board decisions of erroneous decisions or change in circumstances.[103]

Two years later, in *Lynce v. Mathis*[104] a unanimous Supreme Court applied the *Morales* standards and held that retroactive cancellation of accumulated overcrowding credits violated the Ex Post Facto Clause.[105] Petitioner had been released from prison based on accumulated overcrowding credits but was subsequently rearrested after all the credits were retroactively canceled for those convicted of murder.[106] Justice Stevens explained that, because the statute was clearly retrospective as applied to petitioner, the key determination was whether the statute was to his disadvantage.[107] Justice Stevens stated that the Court in *Weaver* and *Morales* had not focused on the legislative purpose behind the statute but on whether the effect of the statute was to lengthen the petitioner's period of incarceration.[108] The decision in *Morales*, which only removed a mechanism creating an opportunity for early release, had only a speculative effect on prisoners.[109] However, in *Lynce* the Court stated there is no need to speculate about the effect of the legislative adjustment when the petitioner had been rearrested: "The 1992 statute has unquestionably *disadvantaged* petitioner because it resulted in his rearrest and prolonged imprisonment."[110]

Garner v. Jones[111] was the next case in which the Supreme Court addressed the application of the ex post facto doctrine to alterations in subsequent parole reconsideration hearings. In *Garner* Justice Kennedy distinguished the Georgia statute from those factors present in *Morales*.[112]

III. THE COURT'S RATIONALE

In *Garner* the Supreme Court laid out several rules for lower courts to determine whether the Ex Post Facto Clause is violated by statutes which grant parole boards the discretion to decrease the frequency of reconsideration hearings after the commission of a crime.[113] Justice Kennedy stated the court of appeals erred by not properly determining

103. *Id.* at 523.
104. 519 U.S. 433 (1997).
105. *Id.* at 446-47.
106. *Id.* at 435-36.
107. *Id.* at 441.
108. *Id.* at 444.
109. *Id.*
110. *Id.* at 446-47 (emphasis added).
111. 120 S. Ct. 1362.
112. *Id.* at 1366-68.
113. *Id.*

whether the amended rules "created a significant risk of increasing the measure of punishment attached to the covered crimes."[114]

The first inquiry is whether a rule, on its face, creates a "sufficient risk of prolonging respondent's incarceration."[115] Justice Kennedy noted that states were not required to replicate the exact procedures adopted by California in *Morales* to satisfy the Ex Post Facto Clause.[116] States must have adequate flexibility in dealing with issues involving confinement and release.[117] Consistent with this notion, granting parole boards discretion can actually allow an amendment to a rule setting the frequency of reconsideration hearings to satisfy the Ex Post Facto Clause.[118] While changing a punishment after the commission of the crime is the evil that the Ex Post Facto Clause is intended to prevent, the change inherent in a parole board's discretion allows the board to make decisions based on prior experience and gives the board the ability to adapt to new situations.[119] Courts should presume, absent any clear evidence, that parole boards will exercise their discretion to grant early review.[120]

Furthermore, Justice Kennedy stated that the Georgia law decreasing the frequency of parole reviews was qualified for two additional reasons.[121] First, despite the parole board's discretion to grant reviews based on changes in circumstances, parole boards were required by law to set reconsideration hearings at a maximum of eight years.[122] Second, Georgia Parole Board rules permitted additional "reviews in the event of a change in [prisoner's] circumstance or where the Board receives new information that would warrant a sooner review."[123] These qualifications ensure a more accurate exercise of the parole boards' discretion.[124] Not only can a board set reconsideration hearings based on the likelihood of release, but boards can also focus their resources on those prisoners identified as having a better possibility of release.[125]

---

114. *Id.* at 1367 (citing *Morales*, 514 U.S. at 509).
115. *Id.* at 1368 (citing *Morales*, 514 U.S. at 509).
116. *Id.* at 1367.
117. *Id.* at 1368.
118. *Id.* at 1367-68.
119. *Id.* at 1369.
120. *Id.* at 1370-71.
121. *Id.* at 1369.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 1370.

If a prisoner is unable to show a "significant risk" of increased incarceration based on the terms of the statute, then the prisoner must show "that as applied to his own sentence the law created a significant risk of increasing his punishment."[126] To challenge an amendment, a prisoner is allowed to present evidence demonstrating that the application of the amended rule "increases, to a sufficient degree," the probability of prolonging his incarceration.[127] Justice Kennedy instructed courts to consider "the general operation of the [state's] parole system."[128] Evidence in support of the statute could come from how a parole board exercises its discretion, including the parole board's internal policy statements or its actual practices.[129] In the present case, the Georgia statute had the additional safeguard of allowing prisoners the right to petition the Board for expedited consideration based on a change in circumstances.[130] Furthermore, courts are to presume that parole boards will exercise their discretion to grant additional reviews based on the assessment of the likelihood of each inmate's release.[131] Because the court of appeals analysis "failed to reveal whether the amendment to Rule 475-3-.05(2), in its operation, created a significant risk of increased punishment," the Court remanded the case for this consideration.[132]

In his concurrence, Justice Scalia admonished the majority for remanding the case, noting that the Ex Post Facto Clause concerns "increases in punishment" not "decreasing the likelihood of parole."[133] Scalia emphasized that the decision in *Morales*, which also found a state's statute changing the frequency of parole reconsideration did not violate the Ex Post Facto Clause, applied to cases when the parole board was granted discretion to decrease the frequency of reconsideration hearings.[134] But in *Garner* the Georgia Parole Board had always been entrusted with the discretion to decide the ultimate period between reconsideration hearings and the ultimate decision of parole.[135] Furthermore, Justice Scalia stated that parole itself was a matter of "mercy or clemency," in no way affecting the ultimate punishment a

126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 1371.
132. *Id.*
133. *Id.* (Scalia, J., concurring).
134. *Id.*
135. *Id.*

prisoner could receive when he committed a crime.[136] "[A]ny risk engendered by changes to the length of that period is merely part of the uncertainty which was inherent in the discretionary parole system, and to which respondent subjected himself when he committed his crime."[137] Contrary to the majority opinion, there was no need to remand the case to review the Board's policy statements because the statements in no way created a "reasonable expectation of entitlement" giving rise to an ex post facto concern.[138]

In a dissent joined by Justices Stevens and Ginsburg, Justice Souter criticized the majority for failing to recognize the "risk that the class affected by the change will serve a longer sentence as a result."[139] The dissent first demonstrated what it saw as an increase in the punishment of prisoners under the Georgia rule by comparing the average terms served under the new and old rules.[140] Justice Souter also warned that the majority's decision was contrary to the Court's opinion in *Morales*.[141] While the California law in *Morales* impacted only those shown to have a minimal chance for release, the Georgia amended rules had the possibility of increasing the "punishment for all life-sentenced prisoners."[142] Furthermore, the lower courts' refusal to allow for discovery severely limited defendant's ability to prove a "substantial risk of longer sentences."[143] Justice Souter also believed that there was inadequate evidence to show that the parole board's discretion to re-examine a prisoner's case in any way mitigated the "substantial probability of increased punishment."[144]

IV. IMPLICATIONS

Garner represents a dramatic shift from the Supreme Court's ex post facto jurisprudence as applied to parole systems. The Court has changed its recent holding in both *Morales* and *Lynce* that the standard for challenging retroactive changes in the parole systems is whether the amended rule "produces a sufficient risk of increasing the measure of punishment attached to covered crimes."[145] Instead, the Court now

136. *Id.*
137. *Id.* at 1372.
138. *Id.*
139. *Id.* (Souter, J., dissenting).
140. *Id.* at 1373.
141. *Id.*
142. *Id.*
143. *Id.* at 1374.
144. *Id.*
145. *See Morales*, 514 U.S. at 509; *Lynce*, 519 U.S. at 444.

requires that prisoners challenging retroactive changes in parole systems show that the amended rule, "in its operation, created a significant risk of increased punishment" for the inmate.[146]

As with all issues relating to prison systems, the Court must balance the interests of parole boards and prison systems with the constitutional rights of prison inmates. In *Garner* the Court stated that the "States must have due flexibility in formulating parole procedures and addressing problems associated with confinement and release."[147] However, at what point can it be said that changes in parole systems have gone too far? Furthermore, it is unclear what changes to a parole system will meet the "significant risk of increasing . . . punishment" test. If the Supreme Court has upheld changing the interval from one to three years, and three to eight years, would it be going too far to change the interval from eight to twenty, thirty, or fifty years?

The Court's decision also leaves open the question of what evidence an inmate could produce to satisfy the "significant risk of increasing . . . punishment" standard. Under the *Morales* standard, a prisoner could produce statistics demonstrating the system-wide effect on the average length of those serving life sentences.[148] But *Garner* narrows the already thin line of evidence available to bring ex post facto challenges to changes in parole systems. This effect could not be any more apparent than when the new standard is applied to the Georgia parole system. Under the Georgia system, an inmate does not have an in-person hearing before the Board. Instead, a "parole officer" conducts an investigation detailing the arrest records, court records, and current and prior offenses.[149] As the Board notes, "the overriding factor in determining whether or not to parole a person under life sentence is the severity of the crime."[150] When a decision is reached, neither Georgia law, Georgia rules, nor the Board's policy statement requires the Board to give a detailed factual reasoning for its decision. Furthermore, if an inmate is denied parole, the inmate is not permitted to review any information within the Board's file as its contents are considered "confidential state secrets" under Georgia law.[151]

---

146. *Garner*, 120 S. Ct. at 1371.

147. *Id.* at 1368.

148. *Id.* at 1370.

149. *See* State of Georgia Board of Pardons and Paroles, *Parole Decisions* (visited Dec. 7, 2000) <http://www.pap.state.ga.us/decisions.htm>.

150. *Id.*

151. O.C.G.A. § 42-9-53(b) (1997); *see also* Jackson v. Reese, 608 F.2d 159, 160 (5th Cir. 1979).

The Georgia system seems to suggest that an inmate's success in bringing an ex post facto challenge could be entirely determined by what information a parole board or state legislature wished to grant the inmate. Given the inmate's limited access to information and lack of a detailed explanation for denial, one must wonder how Georgia inmates, who do not have the right to appointed counsel in the parole process, could produce sufficient evidence of "a significant risk of increasing . . . punishment." Furthermore, if a Board member's term is limited to seven years under the Georgia Constitution,[152] how would an inmate know what new Board members would be looking for eight years later?[153]

What also remains uncertain is whether other prison systems will view the *Garner* decision as a license to make additional retroactive changes in parole systems, further expanding a parole board's discretion.[154] The danger inherent in the *Garner* decision is that it may be read as the United States Supreme Court's willingness to limit severely an unpopular group's ability to bring ex post facto challenges to any changes in a highly political and disfavored arena. Prison systems must remember that "it is well and good for any state to wage a war on crime, but our Constitution commands that, in such a war, the State must fight fair."[155]

ROBERT A. RENJEL

---

152. *See* GA. CONST. art. IV, § 2, ¶ 1 (1983).

153. On September 26, 2000, Elizabeth Kertscher, counsel for the Respondent, filed a Suggestion of Death under Rule 25 to inform the court that Robert L. Jones passed away on Tuesday, September 5, 2000. Telephone interview with Elizabeth Kertscher, Counsel for Respondent at the United States Supreme Court (Dec. 5, 2000). However, two Georgia state prisoners, Timothy W. Kramer and Jerome T. Pattillo, subsequently filed Motions to Intervene as Plaintiffs, each believing that the dismissal of the case would "impair and/or impeade [sic] his ability to protect his interest." Applicant's Claim Supporting Intervention ¶ 6.

154. Several appellate courts stayed their decisions anticipating the decision in *Garner*. *See* Harris v. Hammonds, 217 F.3d 1346 (11th Cir. 2000); Ray v. Jacobs, 272 Ga. 760, 534 S.E.2d 418 (2000); Jernigan v. South Carolina, 531 S.E.2d 507 (S.C. 2000).

155. Brief for Respondent at 37, *Garner*, 120 S. Ct. 1362 (No. 99-137).