No. 99-137

In The

Supreme Court of the United States

J. WAYNE GARNER, former Chairman of the State Board of Pardons and Paroles of the State of Georgia, JAMES T. MORRIS, former Chairman of the State Board of Pardons and Paroles of the State of Georgia, GARFIELD HAMMONDS, JR., former Chairman of the State Board of Pardons and Paroles of the State of Georgia, BOBBY K. WHITWORTH, Member of the State Board of Pardons and Paroles of the State of Georgia, and TIMOTHY E. JONES, former Member of the State Board of Pardons and Paroles of the State of Georgia,

Petitioners,

v.

ROBERT L. JONES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED

Georgia's State Board of Pardons and Paroles is constitutionally and statutorily created. The Board is vested with the power of executive clemency and has the power to grant reprieves, pardons, and paroles. Both the Supreme Court of Georgia and the United States Court of Appeals for the Eleventh Circuit have surveyed the relevant Georgia statutory and constitutional provisions and concluded that the Board, exercises "virtually unfettered discretion" with its clemency power.

The questions presented are:

1. Whether the Ex Post Facto Clause of the United States Constitution bars Georgia from applying its regulation governing the reconsideration schedule for life-sentenced inmates who have been denied parole, when the regulation has no effect on the sentence imposed, the substantive formula for consideration for parole, or the determination of eligibility for parole, or whether the change creates only "the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment."

2. Whether the decision below conflicts with the decisions of other United States courts of appeals and the appellate courts of the several states as to the meaning and import of this Court's decisions in *California Department of Corrections v. Morales* and *Lynce v. Mathis*.

PARTIES BELOW

The parties to the proceeding in the Eleventh Circuit Court of Appeals and in the District Court were as listed in the caption. For purposes of Respondent's claims for declaratory and injunctive relief, pursuant to Fed. R. Civ. P. 25(d) of the Federal Rules of Civil Procedure, the Petitioners are Walter S. Ray, Chairman, Bobby K. Whitworth, Garfield Hammonds, Jr., Dr. Betty Ann Cook, and Dr. Eugene P. Walker, the current members of the Georgia Board of Pardons and Paroles.

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The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Jones v. Garner*, 164 F.3d 589 (11th Cir. 1999), and is printed and included in the appendix to the petition for a writ of certiorari ("Pet. App. ___"). *See* Pet. App. A, 1a. The order on the merits by the United States District Court for the Northern District of Georgia, No., 1:95-CV-3012-CAM (August 25, 1997) is unreported. *See* Pet. App. B, 20a.

JURISDICTION

The Eleventh Circuit entered its opinion and judgment on January 6, 1999 (Pet. App. A, 1a) and entered its denial of Petitioners' Motion for Rehearing and Suggestion of Rehearing En Banc on April 19, 1999 (Pet. App. C, 30a). The petition for writ of certiorari was filed on July 19, 1999, and this Court granted the petition on September 28, 1999.

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED IN THE CASE

U.S. Const. Art. I, § 10:

No State shall . . . pass any . . . ex post facto Law . . .

Ga. Comp. R. & Regs. r. 475-3-.05(2) (*effective December 1, 1979*) (*now superceded*):

Reconsideration of those inmates who have been denied parole shall take place at least

every three years. The Board will inform inmates denied parole of the reasons for such denial without disclosing confidential sources of information or possibly discouraging diagnostic opinions. (Text set out fully at J.A. 86-87).

Ga. Comp. R. & Regs. r. 475-3-.05(2) (*effective September 12, 1993*) (*presently in effect*):

Reconsideration of those inmates 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 possibly discouraging diagnostic opinions. (Text set out fully at J.A. 88-90).

STATEMENT OF THE CASE

This case stems from a change in the manner in which Georgia's Board of Pardons and Paroles ("Board") reconsiders life-sentenced inmates for parole after an initial denial of parole by the Board. No inmates in Georgia are ever entitled to parole. Life-sentenced inmates are in a unique class because they are *never* given a tentative parole month. The Board is required according to regulations adopted pursuant to Ga. Code Ann. § 42-9-40(a) to initially review life-sentenced inmates for parole after they have served a fixed number of years.

Thus, no issue regarding parole eligibility arises herein. Rather, Respondent Jones complains about a change in the Board's regulations allowing them to *reconsider* him for parole less frequently after the Board initially denied him parole and denied him on reconsideration twice subsequently.

In the eighties and nineties, many offenders, who had committed heinous crimes that would have resulted in the imposition of the death penalty in the past, received life sentences and subsequently became statutorily eligible for parole. Thereafter, the Board amended its rules to decrease the frequency of mandatory reconsideration after an initial denial of parole in an effort to conserve and better utilize its finite resources for the review of other inmates who had a realistic likelihood of parole. Similarly, the Georgia General Assembly enacted the "Sentence Reform Act of 1994" to statutorily address this concern. 1994 Ga. Laws 1959. A review of the underlying facts and an explanation of the Board's structure provide the backdrop for the legal issues presented.

A. Factual Background

In the parole reconsideration process, the severity of the offense and prior criminal history are factors considered by the Board. Thus, the facts of the underlying crimes are significant. Respondent, Robert L. Jones, has been convicted of two separate murders. *See Jones v. State*, 234 Ga. 108, 214 S.E.2d 544 (1975); *Jones v. State*, 251 Ga. 361, 306 S.E.2d 265 (1983). At the time of the first murder, the victim, Jack Bell, lived in the same rooming house where Jones resided. *Id.* Jones gained entry to Bell's bedroom and "began cursing loudly" until Bell awoke. *Id.*

Jones demanded his car on which Bell had made repairs. Bell asked Jones to pay the $58.00 for the repairs, and, in response, Jones "raised a shotgun and shot the victim as he lay in the bed." *Id.* Jones was sentenced to life in prison after his conviction for this murder July 23, 1974. (J.A. 48). On November 24, 1979, Jones escaped from custody. (J.A. 48).

On March 26, 1982, Jones murdered his second victim, Frances Tutt Davis, who was a stranger to Jones. *Jones*, 251 Ga. at 361, 306 S.E.2d at 266. That afternoon, Ms. Davis was waiting to board a train in downtown Atlanta when Jones stabbed her to death with an ice pick. *Id.* Jones fled the scene, "leaving the ice pick embedded" in Ms. Davis' chest. *Id.* Jones was convicted of the murder of Ms. Davis and was sentenced to a second term of life imprisonment on August 20, 1982. (J.A. 48).

Respondent was initially considered for, and denied, parole in September 1989. (J.A. 48). He was reconsidered, and again denied, in September 1992. (J.A. 49). Respondent was considered a third time, and again denied parole, in September 1995. (J.A. 49). At that time, Respondent was advised that his next reconsideration would come within the next eight years. (J.A. 49).

B. Procedural Background

Unlike most states, Georgia's Board is vested with "the power of executive clemency, including the power to grant reprieves, pardons, and paroles; to commute penalties; to remove disabilities imposed by law; and to remit any part of a sentence for any offense against the state after conviction." Ga. Const. Art. IV, § 2, ¶ 2(a). Both the

Supreme Court of Georgia and the United States Court of Appeals for the Eleventh Circuit have surveyed the relevant Georgia statutory and constitutional provisions and have concluded that the Board, in its exercise of clemency power has "virtually unfettered discretion." *Jones v. Georgia State Board of Pardons and Paroles*, 59 F.3d 1145, 1150 (11th Cir. 1995); *see also Vargas v. Morris*, 266 Ga. 141, 465 S.E.2d 275, *cert. denied sub nom. Vargas v. Garner*, 517 U.S. 1108 (1996).

Georgia's Board operates independently of the executive and judicial branches of government, and the General Assembly's statutorily articulated legislative policy is:

> In recognition of the doctrine contained in the Constitution of this state requiring the three branches of government to be separate, it is declared to be the policy of the General Assembly that the duties, powers, and function of the State Board of Pardons and Paroles are executive in character and that in the performance of its duties under this chapter, no other body is authorized to usurp or substitute its functions imposed by this chapter upon the board.

Ga. Code Ann. § 42-9-1. The Board is statutorily charged with "the duty of determining which inmates serving sentences imposed by a court of this state may be released on pardon and parole and fixing the time and conditions thereof." Ga. Code Ann. § 42-9-20. The Board must personally "study the cases of those inmates whom the board has the power to consider so as to determine their ultimate fitness for such relief as the board has power to grant." *Id.* Except as otherwise provided by law,

inmates serving sentences of life imprisonment become statutorily eligible for the exercise of the Board's powers after the service of seven years' imprisonment. Ga. Code Ann. § 42-9-45(f). The Board is authorized to provide, by regulation, for eligibility for reconsideration of those inmates previously denied parole. Ga. Code Ann. § 42-9-45(a).

So that it could effectively exercise its considerable discretion, the Board promulgated rules and established policies with regard to the parole consideration process. Ga. Comp. R. & Regs. r. 475-3-.06 ("An inmate serving a life sentence, for which parole is authorized by law is automatically considered for parole on the date permitted by applicable constitutional and statutory law."), and Ga. Comp. R. & Regs. r. 475-3-.05 ("Reconsideration of those inmates serving life sentences who have been denied parole shall take place at least every eight years."). Once parole is denied to a life-sentenced inmate, the Board's reconsideration policy is based upon its Rules and its policy statement regarding the "Interval for Reconsideration of Parole Denials in Life Sentence Cases," which provides that:

> All Life Sentence Cases denied parole may be set for reconsideration up to a maximum of eight years from the date of 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.

Board Policy Statement No. 4.110. (J.A. 55-7).

Prisoners convicted of crimes committed prior to the implementation of this policy challenged the application to them of the eight-year set off, and the United States Court of Appeals for the Eleventh Circuit found that the retroactive application of the amended regulation violated the Ex Post Facto Clause. *Akins v. Snow*, 922 F.2d 1558 (11th Cir.), *cert. denied*, 501 U.S. 1260 (1991). Thus, the Board amended its practices accordingly. (J.A. 49).

Subsequent to this Court's decision in *California Department of Corrections v. Morales*, 514 U.S. 499 (1995), and based upon advice from the Attorney General of Georgia that the *Morales* decision effectively overruled the Eleventh Circuit's holding in *Akins*, the Board resumed retroactive application of its amended regulation. (J.A. 49).

When the Respondent committed his second murder in 1982, the pertinent Board rule with regard to "Time-Served Requirements for Parole Consideration" provided:

> Persons serving felony sentences or combination felony and misdemeanor sentences of twenty-one or more years, including a life sentence, are eligible for parole consideration upon completion of the service of seven years.

Ga. Comp. R. & Regs. r. 475-3-.06(3). With regard to parole reconsideration, the rules provided in pertinent part, "Reconsideration of those inmates who have been denied parole shall take place at least every three years." Ga. Comp. R. & Regs. r. 475-3-.05(2). In 1985, and, again in 1993, Rule 475-3-.05(2) was amended to increase the maximum period for reconsideration of life-sentenced

inmates from three to eight years. The Respondent challenges the application of this "eight-year rule" to his two sentences of life imprisonment.

C. Proceedings Below

After being advised that his parole reconsideration was being set-off for eight years by the Board, Respondent initiated suit under 42 U.S.C. § 1983 alleging that the retroactive application of the amendment violated the Ex Post Facto Clause of the United States Constitution. Respondent sought damages, as well as a declaratory judgment that the application of the amended regulation in his case violated the Ex Post Facto Clause.

Following a period of discovery, the parties filed cross-motions for summary judgment. The District Court granted summary judgment to the Board, finding that, as in *Morales*, the amended regulation "creates 'only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment.' " (Pet. App. 27a).

On appeal, a panel of the Eleventh Circuit reversed and remanded. As a factual matter, the Circuit Court found that "Eight years is a long time." *Jones v. Garner*, 164 F.3d at 595. Also, the Circuit Court held that this "Court's reasoning in *Morales* and *Lynce [v. Mathis*, 519 U.S. 433 (1997)] reaffirms the correctness of our holding in [*Akins*]." *Id.* at 596. Finally, the Eleventh Circuit found that "there is a 'sufficient risk' that the amended Georgia regulation would 'increase the measure of punishment.' " The Circuit Court reversed the grant of summary judgment to the Board and remanded the case to the District

Court. The Eleventh Circuit subsequently denied the Board's Motion for Rehearing with Suggestion for Rehearing En Banc.

SUMMARY OF ARGUMENT

The United States Constitution forbids the states from passing ex post facto laws. Art. I, § 10, ¶ 1. In order to establish that a regulation is an ex post facto law, one must show that the "change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *California Department of Corrections v. Morales*, 514 U.S. 499, 507, n. 3 (1995). It is not sufficient to merely demonstrate "disadvantage" from the retroactive application. Moreover, such showing cannot be "speculative or attenuated [*Id.*, at 508-9]," but must rather demonstrate "with . . . certainty that the amended statutory scheme [is] more onerous than that at the time of the crime." *Lynce v. Mathis*, 519 U.S. 433, 446, n. 16 (1997).

Respondent challenged the application to him of an amendment to Georgia's parole reconsideration requirements for life sentenced inmates which allows the Board to "set-off" the parole reconsideration date of an inmate who has been initially denied parole for up to eight years, instead of the previous three years. The Regulation has no effect upon any inmate's parole eligibility, or upon the discretion of the Board as to whether it ever grants parole to life-sentenced inmates.

Under Georgia's parole system, life sentenced inmates have no expectation of parole, as it is the Board alone which ultimately determines whether they are ever

released from confinement. No other entity within Georgia's government is constitutionally permitted to interfere with the exercise of the Board's discretion in determining whether to grant parole to inmates within its jurisdiction.

The Eleventh Circuit's holding in the case below that the instant regulation is an ex post facto law is erroneous. Underlying this erroneous ruling is the fallacious assumption by the lower court that more frequent mandatory parole reconsideration ultimately leads to earlier release from confinement. This assumption ignores the reality that Georgia's Parole Board retains the ultimate authority to decide whether Jones is ever paroled.

Thus, the Circuit Court misapplied this Court's rulings in *Morales* and *Lynce* by employing a perfunctory application of the factors examined by this Court in *Morales*, rather than focusing on the ultimate effect of whether the retroactive application "constitutes a 'sufficient risk of increasing the measure of punishment attached to the covered crimes.' " *Morales*, 514 U.S. at 509. Moreover, the Circuit Court erred in placing the burden of proof upon the Board.

Had the Eleventh Circuit focused upon the question of whether it could be shown, beyond mere speculation, that Jones' sentences were increased by this retroactive change, it could not have reached its erroneous conclusion. Those errors require this Court to reverse the decision of the Eleventh Circuit. Additionally, the record, statutes and other authorities available demonstrate that

the District Court's grant of summary judgment to the Board was, indeed, correct.

ARGUMENT

I. GEORGIA'S APPLICATION OF ITS AMENDED REGULATION GOVERNING THE RECONSIDERATION SCHEDULE OF LIFE-SENTENCED INMATES WHO HAVE BEEN DENIED PAROLE DOES NOT VIOLATE THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION.

Article I, § 10 of the United States Constitution forbids the several states from passing any "ex post facto" law. Art. I, § 10, ¶ 1. "Although the Latin phrase 'ex post facto' literally encompasses any law passed 'after the fact,' it has long been recognized by this Court that the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them [cits. omitted]." *Collins v. Youngblood*, 497 U.S. 37, 41 (1990).

In his now-famous opinion in *Calder v. Bull*, 3 Dall. 386 (1798), Justice Chase described four categories of ex post facto laws:

> 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 offense, in order to convict the offender.

Id. at 390.

This venerated exposition on what comprises ex post facto laws is still consistently cited by this Court as a cornerstone of its ex post facto jurisprudence. *See*, e.g., *Miller v. Florida*, 482 U.S. 423 (1987); *Collins v. Youngblood*, 497 U.S. 37 (1990); *Morales*, 514 U.S. 499 (1995); *Lynce v. Mathis*, 519 U.S. 433 (1997). Likewise, this Court's explanation of ex post facto laws in *Beazell v. Ohio*, 269 U.S. 167 (1925), has been characterized as a "formulation . . . faithful to our best knowledge of the original understanding of the Ex Post Facto Clause: Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. at 43-44.

In *Collins*, this Court removed from the ex post facto lexicon the "procedural" versus "substantive" distinction which the Court noted had "imported confusion into the interpretation of the Ex Post Facto Clause." *Id.* at 45. In its place, this Court directed that the aforementioned *Calder* and *Beazell* definitions be used in analyzing alleged ex post facto laws. *Id.* at 50-51.

In *California Department of Corrections v. Morales*, 514 U.S. 499 (1995), this Court reviewed a legislative change to the frequency with which the California Board of Prison Terms reconsidered inmates who had been initially denied parole, finding no ex post facto violation, but rather that the change created "only the most speculative and attenuated risk of increasing the measure of

punishment. . . . " *Id.* at 514. Furthermore, in *Morales*, this Court reaffirmed its support for the *Calder* and *Beazell* definitions commended in *Collins*, stating that "[a]fter *Collins*, the focus of an ex post facto inquiry is . . . on whether any [legislative] change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Morales*, 514 U.S. at 507, n. 3. This Court also removed from ex post facto consideration the question of whether retrospective laws merely "disadvantage" offenders, calling "that language . . . unnecessary to the results . . . and inconsistent with the framework developed in *Collins v. Youngblood*. [cit.]" *Id.*[1]

Thus, based upon this evolution of ex post facto jurisprudence, in order to prevail on a claim that a change in the law, as applied to an individual, is an ex post facto law, one must do more than to merely demonstrate "disadvantage." Indeed, there must be a showing that the "change alters the definition of criminal conduct or increases the penalty by which a crime is punished." *Morales*, 514 U.S. at 507, n. 3. Such showing cannot be "speculative or attenuated [*Morales*, 514 U.S. at 508-9]," but it must instead be demonstrated "with . . . certainty that the amended statutory scheme was more onerous than at the time of the crime." *Lynce*, 519 U.S. at 446, n. 16.

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[1] Although this Court again used the term "disadvantage" in *Lynce v. Mathis*, 519 U.S. 433, 441 (1997), the Court was careful to remain true to the earlier definitions by cautioning, as it had in *Morales*, that the "relevant inquiry is whether the change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Lynce*, 519 U.S. at 443. Thus, it appears that the "disadvantage" standard is truly disfavored.

A. GEORGIA'S PAROLE BOARD IS INVESTED WITH BROAD AUTONOMY AND DISCRETION.

Unlike the California Board of Prisons Terms described by this Court in *Morales*, Georgia's Board of Pardons and Paroles is the sole seat of all executive clemency powers. Ga. Const., Art. IV, § 2, ¶ 2. Any attempt by the General Assembly to limit the discretion of the Board to parole inmates within its jurisdiction would violate the separation of powers provision of Georgia's Constitution. *Id. See also*, Ga. Code Ann. § 42-9-1.

The Eleventh Circuit has previously had occasion to review the constitutionality of Georgia's parole system. In *Sultenfuss v. Snow*, 35 F.3d 1494 (11th Cir.), *cert. denied*, 513 U.S. 1191 (1995), the Eleventh Circuit, addressing whether the parole "grid system" used for non-life sentence cases created a "liberty interest," found that the Board, because of its constitutional and statutory autonomy under Georgia law, exercised "substantial discretion . . . [which] belies any claim to a reasonable expectation of parole." *Id.* at 1502.

Similarly, in *Jones v. Georgia State Board of Pardons and Paroles*, 59 F.3d 1145 (11th Cir. 1995), the Eleventh Circuit found no ex post facto violation in the retrospective application of a change in the method of calculating a non-life sentence inmate's tentative parole month pursuant to the "grid system" because the Board exercised "virtually unfettered discretion" to deviate from those guidelines which *it* had established. *Id.* at 1150.

Georgia's General Assembly vested in the Board the authority to "promulgate rules and regulations, not

inconsistent with" Georgia law. Ga. Code Ann. § 42-9-45(a). Pursuant to that authority, the Board adopted, and later amended, the regulation in question, Ga. Comp. R. & Regs. r. 475-3-.05(2), providing for the frequency of parole reconsiderations in life sentence cases after an inmate is initially denied parole. (J.A. 86, 88).

The Board further described its intentions regarding parole reconsideration schedules, after having amended its policy to allow a "set-off" of reconsideration for up to eight years, through its written policies and procedures. Those policies clearly indicate how the Board intends to exercise its "virtually unfettered discretion" by stating that "[a]t the time the members vote to deny parole in a life sentence case, the members will indicate the number of years the inmate must serve prior to being next considered." (J.A. 56).

The Georgia Board of Pardons and Paroles has exercised its considerable discretion to free itself from focusing upon those inmates, like Jones, whose heinous crimes and multiple-offender status gives them, in the Board's opinion, virtually no near-term likelihood for parole, and instead focus its limited resources and time upon those cases which do. The propriety of this change is borne out by the fact that, unquestionably, it is the Board which has, and will continue to have, the only authority to decide whether Jones is ever released from prison.

Thus, the Board, empowered as it is with the ultimate decision-making power as to Jones' parole, should not be prohibited from determining how to best utilize its resources by deferring parole reconsideration of this inmate whom it has clearly indicated has little or no

likelihood of parole within the next eight years barring a significant change in circumstances. That, however, is exactly the effect of the Circuit Court's decision below.

Embodied in the state constitutional provisions, statutes, regulations and policies outlined above is the decision by the State of Georgia that its Pardons and Paroles Board should be the body which has the ultimate authority over the exercise of executive clemency. The regulation challenged in the trial court by Respondent Jones is, quite simply, the extension of that very decision.

The Board has, by and through that regulation and the accompanying policies and procedures, expressed its desire to bring its discretion to bear in a manner which is cost-effective and efficient, while still being fair and equitable to those inmates within its jurisdiction. Thus, inmates with no realistic near-term likelihood of parole (as determined by the ultimate decision-makers) are not caused to suffer the likely emotional stresses of being frequently considered, only to be frequently denied. Rather, those inmates are told, honestly and directly, that they cannot anticipate parole within the period of their "set-off," save for a "change in their circumstances or where the Board receives new information that would warrant a sooner review."

Apart from the above, this process has the additional salutary effect of encouraging inmates whose heinous crimes, lengthy criminal histories, or poor institutional records are tempered by no (or inadequate) attempts at rehabilitation to undertake such measures in hopes that those efforts will be viewed favorably by the Board at the inmate's next reconsideration. The ability of the Board to

set off reconsideration on an individual basis also provides that inmate with an indication of how extensive those efforts must be.

Additionally, the ability of the Board to effectively direct the expenditure of its resources allows it to focus those limited resources upon the inmates within its jurisdiction who do, in fact, have a realistic near-term likelihood for parole. Thus, the Board, faced as it and all other corrections-related entities are nationwide with burgeoning prison populations, is able to focus those resources where they can be most effective.

B. A CORRECT APPLICATION OF THIS COURT'S PRECEDENTS DEMONSTRATES THAT GEORGIA'S PAROLE RECONSIDERATION SCHEME DOES NOT VIOLATE THE EX POST FACTO CLAUSE.

What Petitioner seeks is an application by this Court of the ex post facto analysis which is set out above. By analyzing the effect of applying this change in the Regulation to Jones, this Court should conclude that no effect, aside perhaps from the salutary ones set out above, can ever be conclusively demonstrated. Such analysis, free from the speculation urged by Jones and engaged in by the Court below, leads inexorably to the conclusion that Jones' two life sentences, coupled with the heinous crimes for which he received them and the multiple parole denials by the Board, has no basis to *ever* expect to

be paroled. Thus, he can show nothing more than mere speculation in support of his claim.[2]

In *Morales*, this Court noted that the Ex Post Facto "Clause is aimed at the laws that 'retroactively alter the definition of crimes or increase the punishment for criminal acts'," 514 U.S. at 504, and found the relevant inquiry to be "whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *Id.* at 506, n. 3. Moreover, this Court warned the judiciary against "the micromanagement of an endless array of legislative adjustments to parole and sentencing procedures. . . . " *Id.* at 508.

Such an approach, guided by the admonition of this Court to "[focus] on the effect of the [change in the] law on the inmate's sentence," *Lynce*, 519 U.S. at 444, yields a review based upon the regulation in question, not a comparison between two systems, as was engaged in by the Eleventh Circuit.[3] An appropriate application of those

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[2] The same is, of course, true of any inmate serving a life sentence in Georgia, although the Board is only applying this policy to a limited class of inmates. (J.A. 49-50).

[3] Such was the case in numerous other circuits and states that have applied those notions to parole system changes within their own jurisdictions and have found no violation of the Ex Post Facto Clause. *See, e.g., Hill v. Jackson*, 64 F.3d 163 (4th Cir. 1995); *Roller v. Gunn*, 107 F.3d 227 (4th Cir.), *cert. denied*, 522 U.S. 874 (1997); *Shabazz v. Gabry*, 123 F.3d 909 (6th Cir.), *cert. denied*, 522 U.S. 1019 (1997); *Furnari v. Savaras*, 914 P.2d 508 (Colo. 1996); *Tuff v. State*, 732 So. 2d 461 (Fla. 1990); *Fletcher v. Williams*, 179 Ill. 2d 225 (1997); *Jordan v. Tennessee Board of Paroles*, 1997 Tenn. App. LEXIS 27.

factors to the change in the frequency of parole reconsideration in Georgia, free from the speculation engaged in by the Circuit Court, can only yield the result that there is no ex post facto violation in the application of this rule change.

Respondent Jones complains that the change by the Board to its rule extending the maximum "set-off" period for parole reconsideration to eight years is an ex post facto law. Neither the Circuit Court below nor Jones has ever pointed to any fact, statute, regulation, or policy that supports this claim. Instead, they rely upon the ***assumption*** that more frequent *mandatory parole reconsideration* leads to an earlier release date, and thus Jones' sentence is extended by the amended regulation; or, as stated by the Circuit Court, there is a "sufficient risk" that the amendment would "increase the measure of punishment attached to the crimes." *Jones v. Garner*, 164 F.3d at 595. (cits. omitted).

The cornerstone of Jones' argument, this alleged nexus between reconsideration frequency and the length of incarceration, ***cannot be proven.*** The Board has discretion over the ultimate question of whether Jones will ever within his life span be released from confinement, and the Board has clearly indicated in denying him parole in 1995 (as it had done twice previously) that "the main reasons for this decision cited by the Board . . . are [the] circumstances and nature of offenses, and multiple offenses." *Jones v. Garner*, 164 F.3d at 594, n. 7. Jones' assertion, and the Eleventh Circuit's decision, that the application to him of a change in parole reconsideration requirements is an ex post facto law is thus based solely upon "the most speculative and attenuated possibility of

producing the prohibited effect of increasing the measure of punishment." *Morales*, 514 U.S. at 509.[4]

Should this Court decide contrary to Petitioners in this cause, the effect will be to plunge the judiciary into the "micromanagement of an endless array of legislative adjustments to parole and sentencing procedures" warned of by this Court in *Morales*. 514 U.S. 508-9. Such predicted consequences are no mere hyperbole, as any observer of prisoner litigation is all too well aware.

The Board's policies and procedures clearly allow inmates to bring matters before the Board *at any time* when the inmate believes those matters warrant parole reconsideration. Likewise, the Board, pursuant to public information or its own investigation, might well *sua sponte* decide it necessary to reconsider inmates prior to their set-off reconsideration date. Thus, concerns regarding extended periods of "parole ineligibility" and "chances" for parole missed because of reconsideration set-offs are the true hyperbole in this case.

[4] Given the Circuit Court's previous holdings that Georgia's Parole Board is empowered with such broad discretion, and the Constitutional and statutory provisions which undergird that conclusion, one is forced to speculate that the Court below has concluded that, although it cannot compel the Board to exercise its discretion to release any inmate, it can, and will, force the Board to consider inmates for parole on a schedule which it deems appropriate. This premise rests upon the fallacious nexus between frequent reconsideration and earlier parole.

C. THE ELEVENTH CIRCUIT'S ANALYSIS OF GEORGIA'S PAROLE RECONSIDERATION SCHEME WAS ERRONEOUS AND MISAPPLIED THIS COURT'S CLEAR PRECEDENTS.

The Eleventh Circuit erred in reversing the District Court's grant of summary judgment in favor of the Board, and further erred in concluding that this Court's decision in *California Department of Corrections v. Morales*, 514 U.S. 499 (1995), did not overrule the Circuit Court's previous decision in *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991), but instead reaffirmed "the correctness of our holding in that case." *Jones v. Garner*, 164 F.3d at 596. A review of the Circuit Court's decisions in both the present case and in *Akins* reveals that the principal basis for the Court's erroneous rulings in these cases is its fundamental misunderstanding of the operation of Georgia's parole system.

The Eleventh Circuit's assumption in *Akins*, and later in its decision in the present case, that there is an inherent relationship between the frequency of mandatory parole reconsideration and how soon an inmate is released from confinement most clearly demonstrates its misunderstanding.[5] *See, e.g., Jones v. Garner*, 164 F.3d at 591, n. 4;

[5] This notion has been *specifically rejected* by the Sixth Circuit Court of Appeals, which found that "there exists no legal nexus between the decrease of regularly scheduled parole hearings and eligibility for parole," based upon *Morales*. *Shabazz v. Gabry*, 123 F.3d 909, 914 (6th Cir), *cert. denied* 522 U.S. 1019 (1997). The Court in *Shabazz* was openly critical of a lower court which "relied upon an assortment of anecdotal observations and speculation to conclude that the amendments may present sufficient risk of increased punishment. [The Sixth Circuit

Akins, 922 F.2d at 1562. The Court's misunderstanding of Georgia's parole system is further illustrated by its findings in *Akins*, which it later reaffirmed in *Jones v. Garner*, that "a parole reconsideration hearing is part of a prisoner's parole eligibility." *Jones v. Garner*, 164 F.3d at 591, n. 4 (quoting *Akins*, 922 F.2d at 1561-62).

Even assuming, *arguendo*, that parole eligibility is part of an inmate's sentence, that decision does not affect the inquiry here because Jones became eligible for parole after serving seven years of his second life sentence, at which time he was immediately reviewed for parole, and denied. The Board subsequently, based upon its clearly expressed policy, "set-off" its reconsideration of Jones for eight years.

The specific aspect of Georgia's parole system that the Court's premise fails to consider is that Jones became eligible for parole by operation of law after serving seven years of his 1982 life sentence, and he has remained eligible for parole since that date. The Court's conclusion that "eligibility in the abstract is useless," [*Akins*, 922 F.2d 1562; *Jones v. Garner*, 164 F.3d at 591, n. 4] fails to reckon with the reality that, in life, we may be eligible for many positions, honors, awards, or accolades, but it is the discretion of the decision-making body that may "keep" us from them, not "ineligibility." Under the Eleventh Circuit's definition of parole eligibility, the only time an

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found that such a] holding is erroneous in light of [this Court's] explicit rejection in *Morales* of the expansive view that 'the Ex Post Facto Clause forbids any legislative change that has any conceivable risk of affecting a prisoner's punishment'." *Id.* at 914-15.

inmate would be eligible for parole is the precise moment when the inmate is actively being considered by the Board.

Here, it is the discretion of the Board, lawfully granted and lawfully exercised, that has kept Jones from parole, not the frequency or infrequency of his reconsideration. Any other conclusion strains credulity and is unsupported by the record. If the Court below had, as it claimed, focused upon "a prisoner's ultimate date of release . . . to determine whether the change constitutes a 'sufficient risk of increasing the measure of punishment attached to the covered crimes' [*Jones v. Garner*, 164 F.3d at 593]," it could not have reached its conclusion that the change in Georgia's parole reconsideration scheme was an ex post facto law.

Unfortunately, however, the Court engaged in precisely the type of "speculative and attenuated" reasoning which this Court has rejected. *Morales*, 514 U.S. at 509. As noted above, because the ultimate decision of whether Jones will ever, during the course of his natural life, be released from prison is now and will always be within the discretion of the Board, he *cannot* demonstrate beyond mere speculation that he will (or even may) remain in prison longer because the Board changed its reconsideration schedule to allow themselves to review Jones as infrequently as every eight years. This fact is underscored by the further reality that the Board's particularized decision to "set-off" Jones' parole reconsideration for eight years was due to *its determination*, pursuant to its own policy, that "it is not reasonable to expect that parole will be granted during the intervening years." (J.A. 56).

The Eleventh Circuit's fundamental misunderstanding of Georgia's parole system, as discussed above and made evident in its decision below and in *Akins*, has manifested itself in the Circuit Court misapplying this Court's decision in *Morales* to the facts of the instant case.

Even a cursory review of the Eleventh Circuit's decision below reveals that its analysis of this Court's rulings in *Morales* is limited to a perfunctory application of the factors deemed appropriate by this Court *in that particular case*. The court below engaged in that perfunctory review process when it "examine[d] the [Georgia] regulation in light of the factors discussed in *Morales* and [found] it to be wholly distinguishable from the statute at issue in that case." *Id.* at 553.

In reviewing the instant regulation, the Eleventh Circuit found that the "set of inmates whose parole consideration will be affected by [the Georgia regulation] is thus *bound* to be far more sizeable than" the set in *Morales*. (Emphasis supplied). *Id.* at 594. The Circuit Court then went on to say that "[t]his set must . . . be comprised of many inmates who can *expect* at some point to be paroled [emphasis supplied]." *Id.*[6]

The fact that the Georgia regulation applies to all life-sentenced inmates is without significance. First, such criticism smacks of the "micromanagement" warned against by this Court in *Morales*, 514 U.S. at 508. Next, the Court

[6] As noted above, the Circuit Court has previously held that the "substantial discretion reserved by the Board belies any claim to a reasonable expectation of parole." *Sultenfuss v. Snow*, 35 F.3d 1494, 1502 (11th Cir.), *cert. denied*, 513 U.S. 1191 (1995).

below wholly disregarded the evidence in the record, in the form of the affidavit of the Board's Director of Legal Services, who averred that the Board's set-off policy was applied to "life sentenced inmates who have committed capital offenses and inmates serving life sentences under Georgia's Serious Violent Felony Recidivists laws." Also, as noted above in Petitioner's factual statement, the crimes for which Jones is incarcerated are equally horrific to those committed by Morales. Lastly, the Board is under no obligation to *ever* parole *any* inmate serving a life sentence.

The Court below described Ga. Comp. R. & Regs. r. 475-3-.05(2) as not "carefully tailored" to further the legitimate end of saving time and money and not increasing punishment.[7] That criticism was comprised of several aspects, including the "lack" of a requirement to make any particularized findings in its decision to "set-off" an inmate for a period beyond the previous three year interval, the "lack" of "any sort of hearing on this question,"

[7] This inquiry seems to be in conflict with this Court's admonition in *Lynce* that "to the extent that any purpose might be relevant in this case, it would only be the purpose behind the" Board's 1995 amendments. *Lynce*, 519 U.S. at 433. An application of such mandate, mindful of the Board's broad discretion, leaves one to ask what possible purpose the Board could have had to promulgate such a regulation other than to relieve itself of the continual burden of reviewing inmates about whom it had determined "it is not reasonable to expect that parole would be granted during the intervening years," and focus upon the overwhelming remainder of those inmates under its jurisdiction.

and that the "default" frequency under the Georgia regulation is "at least every eight years." *Jones v. Garner*, 164 F.3d at 595.

The Circuit Court's criticism stems, again, from a lack of understanding about Georgia's parole scheme. To hold that a Board which is under no requirement, either constitutional or statutory, to *ever* hold parole consideration hearings or make particularized findings regarding the decision to deny parole to an inmate should nonetheless be required to hold such hearings or make such findings supporting a decision to delay *reconsideration* for parole simply does not follow.[8] As the Court cites nothing in support of its apparent belief in the constitutional significance of this factor, it amounts only to the type of "speculative and attenuated possibility of . . . increasing the measure of punishment" which this Court held in *Morales* was insufficient "under any threshold we might establish under the Ex Post Facto Clause." *Id.* at 509.[9]

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[8] Note, however, that among the reasons for denying parole to Jones and setting off his reconsideration are the reasons stated in the Board's 1995 letter to him: i.e., the "circumstances and nature of the offense, and multiple offenses." Given the Board's reliance on such factors (which had been static for 15 years) in denying parole and setting off reconsideration, one wonders how Jones' term of confinement is actually increased by setting off his reconsideration for an additional five years, given his ability to bring important changes to the Board's attention in the interim and request expedited review.

[9] *See also, Shabazz v. Gabry*, 123 F.3d 909, 915 (6th Cir.), *cert. denied*, 522 U.S. 1019 (1997) ("anecdotal observations and personal speculation" provide no basis for finding ex post facto violation).

Also, the Court below characterized the Board's "default" reconsideration schedule as "at least every eight years." This conclusion is belied by Board procedure 4.110, which indicates that "[a]t the time the members vote to deny parole in a life sentence case, the members will indicate the number of years the inmate must serve prior to being next considered." (J.A. 55-7). Thus, there is no "default" set-off period, rather there is only the individualized determination by the Board as to how long that inmate's next parole consideration should be deferred. The Circuit Court's formulaic approach to this scheme is best summarized by its statement that "eight years is a long time." *Jones v. Garner*, 164 F.3d at 595. Given such an incredible conclusion, the Eleventh Circuit found the Board's specific policy, described above, to be inadequate.[10]

Although the Circuit Court below tacitly acknowledges this Court's later clarifications of *Morales* made in

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[10] Moreover, the Board's policies and procedures in this regard are essentially its own interpretation of the requirements upon it, which the Court below has previously held to be "entitled to great deference, unless clearly erroneous." *Sultenfuss v. Snow*, 35 F.3d 1494, 1503 (11th Cir.), *cert. denied*, 513 U.S. 1191 (1995). The Circuit Court's conclusion that the Board's Policy Statement is inadequate because it is "unenforceable and easily changed" clashes with the presumption in Georgia law, first stated by Justice Lumpkin of the Georgia Supreme Court in 1846 that "must not this Court, in favor of Public Officers, presume that they discharged their duty, in compliance with the law, in absence of all proof to the contrary?" *Doe, ex dem. Truluck, et al. v. Peeples*, 1 Ga. 1 (1846). *See also, Brantley v. Thompson*, 216 Ga. 164 (1960); *Jarrett v. City of Boston*, 209 Ga. 530 (1953); *Kirk v. State*, 73 Ga. 620 (1884).

Lynce, the Eleventh Circuit fails to properly focus, as this Court directed, on the effect of the law on the inmate's sentence. *Lynce*, 519 U.S. at 444. Had the Circuit Court held true to that directive, it perhaps would have avoided the perfunctory application of the factors of California's law to that in Georgia's parole scheme. Instead, the Eleventh Circuit, bound as it was to the erroneous notion of a nexus between the frequency of parole reconsideration and the date of release, effectively limited this Court's decision in *Morales* to its facts. Such cannot be what this Court intended.[11]

The fact-bound interpretation of this Court's decision in *Morales* which was rendered by the Circuit Court below is inconsistent with a system of federalism which allows states the freedom to approach a problem from a variety of perspectives. The Circuit Court's interpretation further fails to recognize the organic nature of state law in a system of federalism. How can Georgia be expected, based upon its vastly different historical and constitutional underpinnings, to produce a parole system identical to California's? And, more importantly, why should it, in a system of federalism, be expected to do so?[12]

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[11] Other jurisdictions have applied the holding in *Morales* to parole scheme changes more broad than those in that case, and have found those changes not to be ex post facto laws. Thus, those decisions reject the limited application given *Morales* by the Court below. Indeed, the Fourth Circuit Court of Appeals has explicitly rejected such a limited interpretation of *Morales*. *Roller v. Gunn*, 107 F.3d 227, 237 (4th Cir.), *cert. denied*, 522 U.S. 874 (1997); *Hill v. Jackson*, 64 F.3d 163 (4th Cir. 1995).

[12] This is not to say that the Circuit Court below erred in undertaking to review the present matter to determine whether the rule in question is an ex post facto law. Rather, the Circuit Court's error was in drawing from this Court's decision in *Morales* a command to conduct such an analysis in a perfunctory and fact-specific manner. To draw so little from this Court's opinion in *Morales* ignores the fact that, given the paucity of cases which this Court can consider each year, its decisions *must* be something more than mere fact-specific rulings from which no guidance can be drawn for other circumstances faced by inferior Courts in the future.

In comparing, by rote, the characteristics of the California statute in *Morales* to the Georgia parole scheme, the Circuit Court has espoused a view that any system not exactly like that reviewed in *Morales* is likely to be constitutionally infirm if it is forced by burgeoning prison populations, limited resources and limited time to change the frequency with which it reviews inmates for parole. Such a conclusion fundamentally misapplies this Court's decision in *Morales*.

II. THE ELEVENTH CIRCUIT ERRONEOUSLY PLACED THE BURDEN OF PROOF UPON PETITIONERS, CONTRARY TO THIS COURT'S CLEAR DIRECTIVE IN *MORALES*.

The Eleventh Circuit reviewed the instant grant of summary judgment by the District Court *de novo*.[13] In so doing, however, the Court below erroneously placed the burden of proof upon the Board. See, *e.g.*, *Jones v. Garner*, 164 F.3d at 595-96.

At its essence, the opinion of the Circuit Court below finds that the Board has not carried its burden of proving that, in light of the Eleventh Circuit's previous opinion in

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[13] *Tackitt v. Prudential Ins. Co.*, 758 F.2d 1572 (11th Cir. 1985).

Akins, the amended regulation in question does not violate the Ex Post Facto Clause. Thus, the Court below has apparently substituted its holding in *Akins* for the requirement that Jones bear the burden of proof, and has cast that burden, instead, upon the Board to "prove the negative" that there is no ex post facto violation in the application of that amended regulation to Jones.

As this Court stated in *Morales*, "we have never suggested that the challenging party may escape the ultimate burden of establishing that the measure of punishment itself has changed. Indeed, elimination of that burden would eviscerate the view of the Ex Post Facto Clause that [was] reaffirmed in [*Collins v. Youngblood*, 497 U.S. 37 (1990)]." 514 U.S. at 510, n. 6. Indeed, it is the presumption of the Circuit Court below (born, as set forth above, from its misunderstanding of Georgia's parole scheme) that there is a nexus between the frequency of mandated parole reconsideration and the date of release from confinement which has been substituted herein below for the burden of proving "that the measure of punishment has changed." *Id.*

The evidence *produced by the Board* demonstrated that Jones had been considered for and denied parole in 1989, 1992, and 1995. *Jones v. Garner*, 164 F.3d at 590. Jones has never demonstrated that his confinement has been lengthened by the instant regulatory change. Indeed, as shown herein above, Jones cannot demonstrate beyond mere supposition that his confinement *could be lengthened*. Instead, in the proceedings below, it was the Circuit

Court's assumption that was substituted for that proof, thereby shifting the burden to the Board. This was error.[14]

The only claim posited by Jones (or, on his behalf by the Circuit Court below) is the assumption, without proof, that the increased interval between parole reconsideration reviews lengthened his sentence.[15] Thus, the burden of proof has been erroneously shifted to the Board.

Had the Eleventh Circuit correctly followed the mandate of this Court in *Morales*, Jones would have been required to provide proof to support his claims. Instead, the Eleventh Circuit improperly shifted the burden of proof to the Board. Had this Court's mandate been followed, the Circuit Court would have reached the inevitable conclusion that Jones' ex post facto violation claim

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[14] In *Johnson v. Gomez*, 92 F.3d 964 (9th Cir. 1996), *cert. denied*, 520 U.S. 1242 (1997), the Ninth Circuit, applying this Court's reasoning in *Morales*, found that "[i]n this case, [the inmate] is similarly unable to demonstrate that an increase in his punishment actually occurred, because, like Morales, he had not actually been paroled under the old law." *Johnson*, 92 F.3d at 967.

[15] In *Roller v. Gunn*, 107 F.3d 227 (4th Cir.), *cert. denied*, 522 U.S. 874 (1997), the Fourth Circuit Court of Appeals rejected as "conjecture" an inmate's unsubstantiated claims that a decrease in the required frequency of parole reconsideration increased his punishment. *Id.* at 236. Such an approach is consistent with this Court's "sufficient risk of increasing the measure of punishment" analysis in *Morales*, 514 U.S. at 509, because the Fourth Circuit recognized that mere "conjecture" can never form the basis of a "sufficient risk."

was *necessarily* premised upon supposition and assumption. The Eleventh Circuit's failure to properly place the burden of proof is error requiring reversal.

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Petitioner prays that this Honorable Court reverse the judgment of the Eleventh Circuit Court of Appeals, and direct that judgment be entered in favor of Petitioners.

Respectfully submitted,

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