No. 99-137

IN THE SUPREME COURT OF THE UNITED STATES

GARNER, J. WAYNE, et al.,
Petitioners,

v.

JONES, ROBERT L.,
Respondent.

BRIEF OF RESPONDENT

Filed December 6, 1999

QUESTION PRESENTED

Whether the Ex Post Facto Clause of the United States Constitution bars the State of Georgia from applying its amended parole regulations to inmates whose crimes predated the amendment, where the amendment increases the maximum time between life-sentenced inmates' parole reconsideration from three to eight years without procedural safeguards.

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STATEMENT OF THE CASE

A. Introduction

Respondent, Robert L. Jones, is one of many life-sentenced inmates in the Georgia prison system. Like other life-sentenced inmates whose crimes were committed between 1979 and 1985, Mr. Jones was entitled upon conviction to an initial parole consideration after seven years, and reconsideration "at least every three years" thereafter. (J.A. 86) (hereinafter the "three-year rule"). In 1985, the State of Georgia Board of Pardons and Paroles (hereinafter "Parole Board" or "the Board") changed its rules for reconsideration of life-sentenced inmates. Rather than providing for parole reconsideration on a three-year basis, the new rules provided for reconsideration "at least every eight years." (J.A. 88) (hereinafter the "eight-year rule").[1]

B. Georgia's Parole System and the Eight-Year Rule

As explained by the Court of Appeals in *Akins v. Snow*, 992 F.2d 1558, 1561-62 (11th Cir. 1991), *cert. denied*, 501 U.S. 1260 (1991), an inmate's parole reconsideration right in Georgia is considered to be "an essential part of parole eligibility." This is the case because, if a prisoner is denied for parole on his initial consideration, a reconsideration must take place before parole is granted. *Id.* Therefore, an inmate is effectively ineligible for parole throughout the period that runs between two parole reviews. *Id.*

In the Georgia prison system, an inmate who comes up for parole consideration does not have the opportunity for

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1 Inmates whose crimes were committed prior to 1979 were entitled to reconsideration on *an annual basis*. However, if the Parole Board's retroactive application of the eight-year rule is upheld, they face a possible delay of *seven years* over the annual consideration they were guaranteed prior to the Board's 1995 amendment. *See Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991).

an in-person hearing before the Board of Pardons and Paroles. *See Jones v. Garner*, 164 F.3d 589, 594 (11th Cir. 1999). *See also* State of Georgia Board of Pardons and Paroles, *Parole Decisions* (visited December 5, 1999) <http://www.pap.state.ga.us/PRFrames.htm>. Instead, inmates are offered only an interview with a parole officer (not a Parole Board member), who completes a form that sets forth information such as "where [the inmate] has resided and worked; who his family members are and where they live; where he plans to live and work; and what his own account is of the crime." *Id.* In the event the inmate's request for parole is denied, the inmate is not allowed to review his file to determine the reasons for denial or what he can do to improve his chances of obtaining parole in the future; the contents of parole files are designated by statute as "confidential state secrets." O.C.G.A. § 42-9-53.

Georgia's eight-year rule does not require the Board to make any particularized inquiries in order to postpone the time of the inmate's parole reconsideration beyond the three-year period that the 1979 version of the regulations had required. (J.A. 88). The revised regulation also does not contain any guidance as to any particular facts or circumstances that should exist for the Board to delay reconsideration.

Instead, the Board issued a general directive, through a Policy Statement adopted in 1996, that the Board should set reconsideration dates for 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." (J.A. 55-57). This Policy Statement was not adopted until one year after the Parole Board began to apply the eight-year rule retroactively and until after the Board had deferred Mr.

Jones' next consideration for eight years, until 2003. (*Compare* J.A. 55-57 *with* J.A. 54).

Like the regulation, the Policy Statement does not require any inquiry beyond a cold-record review of the contents of an inmate's parole file before putting off reconsideration for eight years. *Id.* In making this decision, Board members, whose terms of service are limited to seven years by the State Constitution, Ga. Const. Art. IV, § II, ¶ 1, do not convene to discuss an inmate's file. Rather, Board members consider files independently. *See* State of Georgia Board of Pardons and Paroles, *Parole Decisions* (visited December 5, 1999) <http://www.pap.state.ga.us/PRFrames.htm>.

The application of the amended parole regulations to inmates whose crimes pre-date the amendment extends to all life-sentenced inmates, including Respondent Jones. This class is not limited, as Petitioners suggest, to persons "who ha[ve] committed heinous crimes that would have resulted in the imposition of the death penalty in the past." *See* Pet'r Br., p. 3. Rather, the Board's Policy Statement includes "*all* Life Sentence Cases eligible for parole consideration." (J.A. 56) (emphasis added). This includes, for example, persons convicted of repeat violations of the Controlled Substances Act. *See* O.C.G.A. § 16-13-30.

There also is no basis to conclude that Georgia's policy applies only to a class of inmates who have "virtually no near-term likelihood of parole." *See* Pet'r Br., p. 15. In fact, as of 1993 (shortly prior to the Board's decision to apply the eight-year rule retroactively after this Court's decision in *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995)), the average time that life sentenced inmates in Georgia served was twelve years. Joanne D. Spotts, *Sentence and Punishment: Provide for the Imposition of Life Sentence Without Parole*, 10 Ga. St. U. L.

Rev. 183 (1993) (quoting former State Representative and current Georgia Attorney General Thurbert E. Baker).

Due to the District Court's initial rulings, there has been no discovery in this case. Nonetheless, the Board's own Policy Statement acknowledges that the eight-year rule was made applicable retroactively "to establish the maximum possible interval, in a Life Sentence Case, between a decision to deny parole and the time at which reconsideration for parole will occur." (J.A. 56). This statement, and other public statements made by the Board, *see infra* n. 19, support the inference that the Board's rule change reflected part of a systematic effort to "crack down" on life-sentenced inmates by extending the length of their prison sentences. The Board takes issue with this inference, by asserting that the eight-year rule is justified as a cost-saving measure. In support of this assertion, however, Petitioners presented no evidence in the District Court. They offer only the unsupported allegations made in the papers filed in this Court.

C. The Facts Regarding Retroactive Application of the Eight-Year Rule

In 1986, the Board began to apply the eight-year rule not only to inmates who were sentenced to life imprisonment for crimes committed after the rule's effective date, but also to those inmates, including Mr. Jones, whose crimes pre-dated the rule's adoption. In *Akins*, the Eleventh Circuit Court of Appeals held that this retroactive application of the eight-year rule violated the Ex Post Facto Clause. After *Akins*, the Board discontinued its retroactive application of the eight-year rule and resumed its original practice of considering inmates under the rules in effect at the time their offenses were committed.

In 1995, this Court decided *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995). Even though

the Court in *Morales* was careful to limit its ruling to the particular factual circumstances persented in that case, *see* 514 U.S. at 510 n.6, the Georgia Parole Board nevertheless interpreted *Morales* as supporting retroactive application of the eight-year rule. As a result, notwithstanding *Akins'* admonitions to the contrary, the Board again chose to apply the eight year rule to all life-sentenced inmates, regardless of when their crimes were committed. The consequence for Respondent Jones was that, when he was reconsidered for parole in 1995, he was informed that "[t]he board has decided to consider you again for parole during August 2003." (J.A. 54).

D. Proceedings Below

Jones filed suit pursuant to 42 U.S.C. § 1983, claiming that the Board's action violated the Ex Post Facto Clause. (J.A. 16).[2] Although Jones requested leave to conduct discovery to support his claims, the District Court denied his Motion for Leave to File Discovery. (J.A. 6).

Shortly thereafter, Petitioners filed a Motion for Summary Judgment, asserting that there was no genuine issue of material fact requiring further proceedings. (J.A. 34). Jones opposed the Board's Motion, and also moved for Summary Judgment on the grounds that retroactive application of the eight-year rule constituted a violation of the Ex Post Facto Clause under controlling precedent. (J.A. 58).

The District Court granted Petitioners' Motion for Summary Judgment, finding that *Morales* permitted the Board

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[2] There are two Ex Post Facto Clauses contained in the United States Constitution. The clause in Article I, § 10 prohibits state governments from passing ex post facto laws; the Clause contained in Art. I, § 9 applies the same prohibition to the Federal government. Unless otherwise specified, further references to the "Ex Post Facto Clause" herein refer to the Article I, § 10 clause that applies to state governments.

to apply the eight-year rule retroactively. (Pet. App. B, 20a). Jones appealed, and the Eleventh Circuit reversed, finding that the eight-year rule differed materially from the rule considered in *Morales*. The court's detailed opinion, authored by Judge Barkett and joined by Judge Birch and Judge Hancock (sitting by designation from the Northern District of Alabama), reasoned that the length of the set-off, combined with a lack of procedural safeguards and application of the rule to a "far more sizeable" group than that involved in *Morales*, 164 F.3d at 594, "seemed certain to ensure that some number of inmates will find the length of their incarceration extended." *Id.* at 595. Petitioners moved for reconsideration *en banc*. (Pet. App. C, 30a). Their request was denied with no dissenting vote. Petitioners then filed a Petition for a Writ of Certiorari with this Court.

SUMMARY OF THE ARGUMENT

Georgia's retroactive application of its eight-year rule violates the Ex Post Facto Clause. For a prisoner, few, if any, matters are of greater moment than the possibility of early release. As a result, this Court's jurisprudence firmly recognizes that "retroactive alteration of parole or early release provisions . . . implicates the Ex Post Facto Clause." *Lynce v. Mathis*, 519 U.S. 433, 445 (1997).

Here, Georgia has fundamentally reordered its parole provisions on an ex post facto basis. It has done so by replacing—for the broad class of all life inmates—a fixed entitlement to consideration for parole at least every three years, with an entitlement to consideration no more frequently than every eight years based on a perfunctory decision. Because consideration for parole is a necessary prerequisite for parole, Georgia's eight-year rule offends the basic principle that "the right to qualify for, and hence

earn, parole" may not be retroactively diminished. *Weaver v. Graham*, 450 U.S. 24, 34 (1981).

It is well settled that a delay in the initial consideration of a prisoner's parole eligibility would violate the Ex Post Facto Clause. *See infra*, pp. 12-13. As a matter of both logic and fairness, however, "[t]here is no principled distinction between changing the date of the initial hearing and changing the period between parole reconsideration hearings. Both substantially disadvantage a prisoner's parole eligibility and therefore his opportunity for parole." *Akins*, 922 F.2d at 1564. Indeed, because initial parole considerations commonly result in parole denials, the timing of parole reconsiderations often is of greater practical consequence to the prisoner. It follows that a prisoner's reconsideration rights may well constitute "a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *Weaver*, 450 U.S. at 32. Dramatically altering such reconsideration rights—from every three years to every eight years (or, under the Board's rationale, to every 20, 40, or 60 years)—thus involves the sort of "harsh and oppressive" retroactive treatment the Ex Post Facto Clause prohibits. *Beazell v. Ohio*, 269 U.S. 167, 169 (1925).

This Court's decision in *Morales* confirms this conclusion. In that case, this Court focused meticulously on the distinctive features of the California system in holding that the state's carefully circumscribed adjustment of its earlier provision of annual parole hearings did not violate the Ex Post Facto Clause. This Court so concluded because the new rule: (1) postponed parole suitability hearings for a short period of time, (2) applied to only a narrow class of prisoners, (3) required specific findings to be made after a full hearing, and (4) operated within

a system that would allow the Board to correct any errors it might have made in ordering postponement. Thus, the risk of harm to prisoners was so "speculative and attenuated" that this change was of no constitutional significance. *Morales*, 514 U.S. at 509.

None of these circumstances applies to Georgia's eight-year rule. Unlike the California rule, Georgia's rule: (1) extends reconsideration intervals by five years, (2) covers all life prisoners, (3) affords no meaningful procedural safeguards, and (4) wholly lacks the no-harm-no-foul safeguard present in California. Georgia's rule thus offends *Morales*' governing standard by producing a "sufficient risk of increasing the measure of punishment." *Lynce*, 519 U.S. at 444 n.14. If this "sufficient risk" test is ever to be met, it must be where, as here, a state goes so far as to extend the time for parole reconsideration for a broad class of prisoners for five full years by way of a summary process.

Faced with these facts, Petitioners have no choice but to ask this Court to invent a novel and unyieldingly overreaching principle of law. They argue that the Ex Post Facto Clause can never be offended by a post-conviction adjustment of parole reconsideration rights. This assertion flies in the face of the whole tenor and nature of this Court's fact-specific analysis in *Morales* and its explicit teaching that cases of this kind concern a "matter of 'degree.'" 514 U.S. at 509. Even more fundamentally, the state's wholesale-exemption approach to the Ex Post Facto Clause threatens core concerns about tyranny, liberty and fairness that led the Framers to embrace that clause at our nation's founding.

As this Court has recognized time and again: "Retroactivity is generally disfavored in the law . . . in accordance with 'fundamental notions of justice' that have been

recognized throughout history." *Eastern Enterprises v. Apfel*, 524 U.S. 498, ——, 118 S.Ct. 2131, 2151 (1998). There are special and powerful reasons why this principle should apply to this case. This case does not involve merely a monetary loss, *see Eastern Enterprises*, *id.*, but a threat to the most basic of all human freedoms: freedom from physical confinement. This case does not concern a mere modification of legal procedures, *see Dobbert v. Florida*, 432 U.S. 282, 293-94 (1977), but an after-the fact tampering with the actual temporal dimensions of an inmate's sentence. This case does not hinge on a claim of "reasonable expectations" for purposes of procedural due process, *see Sultenfuss v. Snow*, 35 F.3d 1494 (11th Cir. 1994), *cert. denied*, 513 U.S. 1191 (1995), but involves an ex post facto interference with rights concerning parole, which this Court has described as "a regular part of the rehabilitative process." *Solem v. Helm*, 463 U.S. 277, 300 (1983). And most important, this case—in pointed contrast to *Morales*—presents such a radical reformulation of parole reconsideration rights that it generates an obvious risk of lengthening actual periods of confinement for many prisoners in the real world. In sum, Georgia's eight-year rule offends the Ex Post Facto Clause because, in a practical way, it retroactively and profoundly diminishes "a prisoner's eligibility for reduced imprisonment." *Weaver*, 450 U.S. at 32.

ARGUMENT

I. RETROACTIVE APPLICATION OF GEORGIA'S EIGHT-YEAR RULE OFFENDS THE EX POST FACTO CLAUSE BY CREATING A "SUFFICIENT RISK" OF INCREASED PUNISHMENT FOR PAROLE ELIGIBLE LIFE-TERM PRISONERS.

Our Constitution provides that: "No State shall . . . pass any . . . ex post facto Law." U.S. Const. Art. I,

§ 10, cl. 1. From the earliest days of the Republic, this Court has insisted that the clause bars not only the post hoc creation of crimes, but also any law "that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. (Dall.) 386, 390 (1798).[3] In its most recent treatment of the Ex Post Facto Clause protections, this Court reaffirmed that this prohibition on increased punishment extends to after-the-fact reformulations of parole eligibility rules. As stated in *Lynce*: "retroactive alteration of parole or early release provisions, like the retroactive application of provisions that govern initial sentencing, implicates the ex post facto clause . . . ." 519 U.S. at 445 (*citing Weaver v. Graham*, 450 U.S. at 321).

This Court's vigilance in guarding against retroactive dismantling of parole rights stems from a recognition of the extraordinary importance of parole eligibility. The Court often has noted that parole, when granted, is of surpassing significance to the prisoner because it "is a long step toward regaining lost freedom." *Warden v. Marrero*, 417 U.S. 653, 663 (1974).[4] No less important,

[3] Time and again, the Court has embraced and applied this formulation from *Calder* in its modern Ex Post Facto Clause cases. *See, e.g., Lynce*, 519 U.S. at 440; *Morales*, 514 U.S. at 504; *Miller v. Florida*, 482 U.S. 423, 428 (1987); *Weaver*, 450 U.S. at 29.

[4] In *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972), the Court explained that: "The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. . . . Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison." *See also Wolff v. McDonnell*, 418 U.S. 539, 561 (1974) (noting that deprivation of good time—even when it "may be restored"—"is unquestionably a matter of considerable importance," in part because it "can postpone the date of eligibility for parole.").

this Court has emphasized that parole, when available, is so often "granted regularly," that "[a]ssuming good behavior, it is the normal expectation in the vast majority of cases." *Solem*, 463 U.S. at 300, 302.[5] Notably, the likelihood of parole holds true in Georgia, where the average actual prison term of "life" inmates was only 12 years during the period immediately preceding the state's post-*Morales* reinstitution of its eight-year rule. *Spotts*, *supra* at p. 3. These real-world conditions create powerful expectancy and reliance interests in parole consideration rights. In particular, as this Court reiterated in *Lynce*: "a 'prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed.'" *Lynce*, 519 U.S. at 445-46 (*quoting Weaver*, 450 U.S. at 31).[6]

[5] *See id.* at 300 ("Parole is a regular part of the rehabilitative process"); *Morrissey*, 408 U.S. at 477 ("the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system"). This Court, moreover, has recognized that this "normal expectation" fully extends to life prisoners; indeed *Solem* itself involved a discussion by the Court concerning the likelihood of parole for life prisoners. *See also Solem*, 463 U.S. at 316-317 (Burger, C.J., dissenting) (noting that early release is not limited to parole-based systems; even where commutation system substitutes for parole, early release is "what so many 'lifers' experience"); *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 462 (1980) (accepting lower court's assertion of an "overwhelming likelihood that Connecticut life inmates will be pardoned and released before they complete their minimum terms").

[6] *See also Warden v. Marrero*, 417 U.S. at 658; *Hearings on H.R. 1598 and Identical Bills before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary*, 93d Cong., 1st Sess., 163-164, 193 (1973) (testimony and statement of Antonin Scalia, Chairman of the Administrative Conference of the United States) (noting that courts set maximum sentences anticipating "that a prisoner who demonstrates his desire for rehabilitation will not serve the maximum

In light of these settled principles, Petitioners neither can nor do suggest that a state may wholly negate pre-existing parole eligibility by way of retrospective action. *See Weaver*, 450 U.S. at 32 (*citing without question, Rodriguez v. United States Parole Commn.*, 594 F.2d 170 (7th Cir. 1979) for proposition that "elimination of parole eligibility [has been] held an ex post facto violation"); *Greenfield v. Scafati*, 277 F. Supp. 644, 646 (Mass. 1967) (same), *aff'd*, 390 U.S. 713 (1968). Likewise, there is and can be no contention that the state could retroactively alter "the date of any prisoner's *initial* parole suitability hearing." *Morales*, 514 U.S. at 511 (emphasis added). *See, e.g., Dobbert*, 432 U.S. at 298 (noting, without question, Florida Supreme Court's holding to this effect.[7] In fact, this Court has repeatedly barred retroactive interference with parole-eligibility rights,[8] except where there is "no reason to conclude that

term or anything approaching the maximum") (*cited in Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1, 31 (1979) (dissenting opinion)). The risk of unfair state repudiation of parole rights relied upon in plea bargains was clearly on the Court's mind in *Lynce*. *See* 519 U.S. at 440 (noting that the Ex Post Facto Clause "places limits on the sovereign's ability to use its law-making power to modify bargains it has made with its subjects," including with regard to "the indigent defendant engaged in negotiations that may lead to an acknowledgment of guilt").

[7] The federal circuit courts appear to agree on this point. *See Fender v. Thompson*, 883 F.2d 303, 307 (4th Cir. 1989); *Devine v. New Mexico Dept. of Corrections*, 866 F.2d 339, 343 (10th Cir. 1989); *Yamamoto v. United States*, 794 F.2d 1295, 1300 (8th Cir. 1986); *Beebe v. Phelps*, 650 F.2d 774, 777 (5th Cir. Unit A 1981); *Geraghty v. United States Parole Comm.*, 579 F.2d 238, 266 (3rd Cir. 1978), *vacated on other grounds*, 445 U.S. 388 (1980); *Shepard v. Taylor*, 556 F.2d 648, 654 (2nd Cir. 1977); *Love v. Fitzharris*, 469 F.2d 382, 383 (9th Cir. 1972), *vacated on other grounds*, 409 U.S. 1100 (1973).

[8] *See Lynce*, 519 U.S. at 449; *Weaver*, 450 U.S. 36; *Greenfield*, 390 U.S. at 713.

[the state's action] will have any effect on any prisoner's actual term of confinement." *Morales*, 514 U.S. at 512, *quoted in Lynce*, 519 U.S. at 444.

Petitioners, however, now argue for a much broader principle—a principle that, in effect, would permit the state retroactively to put off any parole reconsideration to whatever later date it wished to choose in the exercise of its "virtually unfettered discretion." Pet'r Br. at 15. Petitioners cannot succeed in this effort to hermetically seal off parole reconsideration rights from initial consideration rights for Ex Post Facto Clause purposes. Indeed, because parole is often denied at the initial consideration stage, the nature and timing of reconsiderations may well be of *even greater* importance to the prisoner behind bars or the defendant considering a plea. Dramatically postponing reconsideration rights—under the Board's rationale, to every 20, 40 or 60 years—thus involves exactly the sort of "harsh and oppressive" treatment that the Ex Post Facto Clause forecloses. *Beazell v. Ohio*, 269 U.S. 167, 170 (1925).

There is another powerful reason why there is "no principled distinction between changing the date of the initial hearing and changing the period between parole reconsideration hearings." *See Akins*, 922 F.2d at 1564. Once an initial denial occurs, parole eligibility exists for an inmate only to the extent that the inmate is entitled to reconsideration. While there is no guarantee that any particular prisoner will actually be released after any particular reconsideration, there is a guarantee that a prisoner *cannot* be released until a reconsideration occurs. *Akins*, 922 F.2d at 1562. Such a precious chance for freedom—indeed, the only chance for freedom—may not be retroactively impaired by the state through extended deferrals of parole reconsideration consistent with the

Ex Post Facto Clause. Otherwise, the Clause's protection of "the right to qualify for, and hence earn, parole," *Weaver* at 34, *quoting Greenfield*, 277 F.Supp. at 646, would become a hollow promise.[9]

Petitioners also seek to render this Court's rulings an empty letter by requiring Respondent to prove "with . . . certainty" that the eight-year rule has led in fact to lengthened prison terms. Pet'r Br. at 9. This is not the law.[10]

[9] This Court's precedents outside the parole context support the same conclusion. In *Lindsey v. Washington*, 301 U.S. 397 (1937), this Court found an *Ex Post Facto Clause* violation in a state's substitution of a mandatory 15-year sentence for a discretionary sentence range of up to 15 years. Likewise, in *Miller v. Florida*, 482 U.S. 423 (1987), this Court struck down the state's retroactive substitution of a presumptive sentencing range of 3½ to 4½ years for a presumptive range of 5½ to 7 years. In both cases, undermining the sentencing authority's preexisting "discretion" to impose "a much shorter sentence" was the downfall of the statutory revision. *Dobbert*, 432 U.S. at 300. This same principle controls this case because the discretionary power to reduce the length of a prisoner's sentence has likewise been taken away. That this discretionary choice has been removed on the back-end (*i.e.*, with respect to the later Parole Board decisions), rather than the front end (*i.e.*, with respect to the decisions of sentencing judges) makes no difference "in the light of reason and common sense." *Rooney v. State of North Dakota*, 196 U.S. 319, 325 (1905).

[10] Petitioners' newly minted "with . . . certainty" proof standard is derived by quoting wholly out of context a tiny fragment of the following statement in *Lynce*: "[W]e rejected the inmate's claim in *Morales*, because it could not be said with any certainty that the amended statutory scheme was more 'onerous' than at the time of the crime." 519 U.S. at 447, n.19. Petitioner's attempt to characterize this statement as requiring prisoners to prove "with . . . certainty" that they would in fact receive an earlier release date under the old system than the new (by conveniently substituting an ellipsis for the word "any") is flatly inconsistent with the Court's "sufficient risk" standard. *Morales*, 514 U.S. at 509; *Lynce*, 519 U.S. at 444 n.14. *See also Miller*, 482 U.S. at 432 (rejecting state's argument that defendant must "show definitively that he would have gotten a lesser sentence" because this argument "is foreclosed by our decision in *Lindsey*"). In a similar vein, Petitioners misstep in claiming that the Court of Appeals somehow misallocated the burden of proof on the "sufficient risk" issue. Pet'r Br. at 29-32. Petitioners, however, can and do cite no language in the lower court's opinion—because there is none—that reveals any departure from the controlling burden of proof principles outlined in *Morales*. *See* 514 U.S. at 510 n.6.

As this Court made clear in both *Morales* and *Lynce*, Respondent need only show that the eight-year rule "produces a *sufficient risk* of increasing the measure of punishment attached to the covered crimes." *Morales*, 514 U.S. at 509 (emphasis added); *see also Lynce*, 514 U.S. at 444 n.14. If this "sufficient risk" test is ever to be met, it must be met here: where the state has extended reconsiderations for all life inmates, based on only the most perfunctory process, for five additional years.

Petitioners seek to skirt this result by advancing three novel contentions. First, they argue that Respondent Jones cannot challenge Georgia's retroactive alteration of parole reconsideration rights because he cannot prove that retention of the three-year rule would advantage him personally, given the particular features of his case. *See* Pet'r Br. 10, 17. The controlling answer to this contention is that it has been squarely rejected by this Court. For purposes of the Ex Post Facto Clause, "[t]he inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular [offender]." *Weaver*, 450 U.S. at 33.[11]

Second, relying on *Sultenfuss v. Snow*, 35 F.3d 1494 (11th Cir. 1994), *cert. denied*, 513 U.S. 1191 (1995),

[11] *Accord*, *Morales*, 514 U.S. at 510 ("a party asserting an *ex post facto* claim need not carry the burden of showing that he would have been sentenced to a lesser term under the measure or range of punishments in place under the previous statutory scheme"); *Miller*, 482 U.S. at 432; *Lindsey*, 301 U.S. at 401. *See also Lynce*, 519 U.S. at 446 n.16 (inquiring whether "the amended statutory scheme was more onerous").

Petitioners emphasize that inmates in Georgia have been held to lack a "reasonable expectation" of parole. Pet'r Br. at 17-18, 24 n.6. Petitioners' logic seems to be that removing reconsideration rights for Georgia prisoners, who have no "reasonable expectation" of parole to begin with, cannot possibly cause them harm. The flaw in this argument lies in Petitioners' mistaken attempt to transplant a Fourteenth Amendment procedural due process concept into the very different Ex Post Facto Clause setting. In ruling that Georgia inmates lack a "reasonable expectation," the Circuit Court was using a term of art that denoted only that it is not the law that "the Board *shall* release the inmate when findings prerequisite to release are made." *Board of Pardons v. Allen*, 482 U.S. 369, 381 (1987); *accord, id.* at 381 (O'Connor, J., dissenting) (inquiry whether respondents have a "legitimate expectation" of parole "sufficient to give rise to an interest protected by procedural due process" hinges on whether proof of "specific statutory predicates" mandates a parole grant). States create a protected liberty interest by placing substantive limitations on official discretion. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 462 (1989). Such a ruling in no way suggests that parole is routinely unavailable in Georgia and says nothing about the actual prospects for release of individual inmates affected by the eight-year rule. Indeed, *Sultenfuss* is beside the point because—while the "Due Process Clauses . . . protect pre-existing entitlements"—"[t]he presence or absence of an affirmative enforceable right is not relevant . . . to the *ex post facto* prohibition." *Weaver*, 450 U.S. at 30.

Finally, the state argues that the Parole Board's radical remaking of parole-reconsideration rules is permissible because the Board has "virtually unfettered discretion" over all aspects of the parole process, including "the ultimate decision-making power as to Jones' parole." Pet'r Br. at 15. This argument proves too much. Its logical end-point is that the state can retroactively eliminate parole altogether—a result that (as we have seen) the Ex Post Facto Clause condemns. *See supra* pp. 12-13.[12]

The fact that the Board has substantial discretion whether or not to grant parole only makes the inmate's reconsideration rights that much more important. The key point is that present-day attempts to predict the highly discretionary actions of future parole boards—especially when those predictions reach eight years into

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12 *See also Greenfield v. Scafati*, 277 F. Supp. at 646 (holding that while "a prisoner's entitlement to parole lies in the discretion of the parole board," it is nonetheless "an unlawful ex post facto burden to deprive him altogether of the right to be found qualified"), *aff'd*, 390 U.S. 713 (1968).

The Petitioners' ardent reliance on the discretionary nature of parole rights also raises concerns about evenhandedness and doctrinal symmetry. This is so because, in upholding long prison terms against attack under the Cruel and Unusual Punishment Clause, this Court has "relied heavily" on state entreaties that the prisoner who was given the long term was at the same time also made "eligible for parole." *Solem*, 463 U.S. at 297. States in such cases have vigorously and successfully resisted counterarguments that parole eligibility rights should be ignored because parole "is simply an act of executive grace" that gives rise to "no constitutionally enforceable interest," thus justifying nothing more for the prisoner than "speculation that he might be pardoned before the sentence [is] carried out." *Rummel v. Estelle*, 445 U.S. 263, 293-94 (1980) (Powell, J., dissenting). The states cannot have it both ways. They cannot in fairness assert that the discretionary nature of parole rights removes them from Ex Post Facto Clause protection, even while urging—with success in this Court—that those same discretion-laden rights have dispositive significance in saving state sentences from Eighth Amendment attack. *Id.* at 281 (rejecting Eighth Amendment challenge to life sentence subject to parole imposed on three-time violator of criminal fraud and check forgery laws involving $80, $26 and $120; "a proper assessment of Texas' treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life").

the future—are intrinsically fraught with peril. That peril arises because the "parole-release decision . . . is . . . subtle and depends on an amalgam of elements, some of which are factual but many of which are purely subjective. . . ." *Greenholtz*, 442 U.S. at 9. *See also id.* at 8 (noting that parole decisions involve "an 'equity' type judgment" that "involves a synthesis of record facts and personal observation filtered through the experience of the decisionmaker"). Moreover, the danger of faulty prediction is particularly acute in Georgia because Parole Board members, who now may put off reconsideration decisions for eight years, themselves serve at most for seven-year terms. Ga. Const. Art. IV, § II, ¶ 1.

In practical effect, the eight-year rule creates a very real likelihood that a prisoner will receive, over a 15-year period, only one reconsideration in place of a previously provided-for five. Given the continuous membership changes of the Parole Board and the fact that "parole release decisions are inherently subjective and predictive," *Board of Pardons v. Allen*, 482 U.S. 369, 374 (1987), the consequences of this five-for-one tradeoff are apparent. Such a profound reformulation of reconsideration rights creates at least a "sufficient *risk* of increasing the measure of punishment" for parole-eligible life-term prisoners to violate the Ex Post Facto Clause.

The discretionary nature of parole rights in Georgia cannot be divorced from this Court's recognition that parole is "the normal expectation" for prisoners with eligibility to receive it. *Solem*, 463 U.S. at 300.[13] In the

[13] A broader problem with the state's "virtually unfettered discretion" argument is that it misses the crux of the Ex Post Facto Clause prohibition. For example, state legislatures have "virtually unfettered discretion" to fix criminal sentences. But that fact does not allow state legislatures retroactively to make more severe a sentence that the legislature had fixed before the crime was committed. Indeed, the whole point of the Ex Post Facto Clause is to prohibit just such would-be exercises of "discretion." *See Weaver*, 450 U.S. at 29 ("[a] law need not impair a 'vested right' to violate the ex post facto prohibition"); *id.* at 29-30 ("[e]ven if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense").

Solem case, Chief Justice Burger was so emphatic on this point that he declared that: "[o]nly a fraction of 'lifers' are not released within a relatively few years" after they "become eligible for parole." *Id.* at 316. In Georgia, the prospect of prolonged delays in parole considerations for all life prisoners—from a 3, 6, 9 year pattern to a pattern of 8, 16, 24—does more than create a "sufficient risk" that prisoner release dates will be pushed back. It all but guarantees that result.[14]

In the end, the reason why the Ex Post Facto Clause invalidates Georgia's eight-year rule is simple. A retroactively applicable law offends the Constitution if it "increases the *penalty* by which a crime is punishable." *Morales*, 514 U.S. at 507 n.3 (emphasis added). And "only an unusual prisoner could be expected to think that he was not suffering a *penalty* when he was denied

[14] To be sure, the current Georgia Parole Board may take an intensely negative view of parole. But a present day embrace of a non-historical perspective cannot serve to diminish Georgia prisoners' constitutional rights—particularly because it is unfair and unfounded to assume that the same negative stance will persist three years, five years or eight years hence. During such a lengthy period of time, a great deal can happen. Prison overcrowding may force more parole grants; court orders may be entered; new research may suggest that factors other than the nature of the prisoner's offense (such as prisoner age, demonstrated good behavior, employability or family support structure) are the best indicators of parole suitability; or newly appointed parole board members may independently reach similar conclusions. In effect, the eight-year rule fences out all prisoners it affects from receiving the benefit of any such future development.

eligibility for parole." *Warden v. Marrero*, 417 U.S. at 662 (emphasis added). The Board suggests that its eight-year rule does not adversely affect a prisoner's "eligibility for parole" because it leaves in place the prisoner's initial eligibility date and the substantive criteria by which parole decisions are made. But this argument glorifies form over substance in violation of the cardinal principle that the Ex Post Facto Clause pays no heed to the "technical" and "sophistic." *Dobbert*, 432 U.S. at 297.[15] Parole eligibility exists only if parole eligibility is considered. By massively altering prisoners' entitlements to regular, triannual evaluations of their claims for parole, the Board has "effectively postponed" when a prisoner "become[s] eligible for early release" in violation of the Ex Post Facto Clause. *Lynce*, 519 U.S. at 896.

II. THIS COURT'S DECISION IN *MORALES* CONFIRMS THAT GEORGIA'S RETROACTIVE APPLICATION OF THE EIGHT-YEAR RULE VIOLATES THE EX POST FACTO CLAUSE.

Georgia's retroactive application of its eight-year rule fails the ex post facto analysis articulated by this Court in *Morales*. In *Morales*, this Court upheld the retroactive application of a change to California's parole reconsideration rules. The Court rested its ruling on pointedly narrow and practical grounds. There was, this Court emphasized, "*no reason* to conclude that the amendment

[15] *See, e.g., Beazell v. Ohio*, 269 U.S. 167, 170 (1925) (Ex Post Facto Clause's limits apply to "laws, whatever their form"); *Miller*, at 430, *quoting Dobbert* at 293 (Ex Post Facto Clause focuses on "matters of substance"); *Weaver*, 450 U.S. at 24 ("it is the effect, not the form, of the law that determines whether it is ex post facto"); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867) (Under the Ex Post Facto Clause, "what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows.").

will have *any effect* on *any prisoner's* actual term of confinement. . . ." 514 U.S. at 512 (emphasis added).

Recently reiterating that the principle of *Morales* reaches no further, the Court noted that *Morales* "rested squarely on the conclusion that 'a prisoner's ultimate date of release would be entirely unaffected by the change in timing of suitability hearings.'" *Lynce*, 519 U.S. at 444. The Court in *Morales* reached its conclusion only after a thorough comparison of the old California parole provisions and the new. The Court recognized that "the question of what legislative adjustments 'will be held to be of sufficient moment to transgress the constitutional prohibition' must be a matter of 'degree.'" 514 U.S. at 509 (quoting *Beazell v. Ohio*, 269 U.S. at 171). The Court focused meticulously on the distinctive "circumstances" presented by the California parole reform. The Court expressed "no view as to the constitutionality of any of a number of other statutes that might alter the timing of parole hearings under circumstances different from those presented here." *Id.* at 510. The Court went on to uphold the California revision solely because it "creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes . . ." 514 U.S. at 514. *Accord, Lynce*, 519 U.S. at 450 (Thomas, J., concurring).

The facts presented in this case stand in stark factual contrast to those considered in *Morales*. Indeed, this case differs from *Morales* in at least five critical respects. First, the duration of the tolerated delay in the two cases is fundamentally different. In *Morales*, California granted authority to postpone parole reconsiderations for at most two years, creating the possibility that reconsideration intervals would move from every one to every three years. Here, in contrast, the Board claims power to delay recon-

siderations for *five* years, thus extending reconsideration intervals from every three to every eight years. In finding *Morales* to be "wholly distinguishable," the Circuit Court bluntly observed that "eight years is a long time." *Jones*, 164 F.3d at 595. While Petitioners ridicule this statement, Pet'r Br. at 27, the Circuit Court's reasoning is a valid recognition of the risks inherent in a deferral of reconsiderations for an extended period of time. As the Circuit Court noted, "[m]uch can happen in the course of eight years to affect the determination that an inmate would be suitable for parole." *Jones*, 164 F.3d at 595.

Second, the Court in *Morales* emphasized that the new California rule applied only to a distinctively "narrow class of prisoners"—namely, multiple murderers—for whom inevitably the "likelihood of release on parole is quite remote." 514 U.S. at 510. In contrast, as the Circuit Court emphasized, Georgia's parole provisions apply to *all life sentenced inmates*, a class which encompasses inmates convicted of a broad range of crimes. Carefully canvassing local law, the Circuit Court concluded that the affected class of prisoners is extremely broad. It might include:

> prisoners convicted of murder . . . felony murder . . . rape . . . armed robbery . . . kidnapping for ransom . . . hijacking an aircraft . . . more than one count of child molestation . . . perjury that was the cause of someone else being sentenced to death . . . more than one count of possession or use of a machine gun, sawed-off rifle, sawed-off shotgun, or a firearm equipped with a silencer during the commission or attempted commission of a series of enumerated offenses [16]; and more than one count of a series of prohibitions on the manufacture, possession, sale or distribution of certain controlled substances.

Jones, 164 F.3d at 593-94 (citations omitted).

Drawing on this survey of Georgia law, the Court of Appeals had no difficulty concluding that: "The set of inmates whose parole considerations will be affected . . . must . . . be comprised of many inmates who can at some point expect to be paroled." *Id.*[17] It is the traditional practice of this Court to defer to such state-law-based conclusions of circuit courts. *See, e.g., Phillips v. Washington Legal Foundation*, 524 U.S. 156, 167 (1998). But wholly apart from the appropriateness of such deference, the lower court's reasoning squares exactly with what this Court has said before: that, "[a]ssuming good behavior, [parole] is the normal expectation in the vast majority of cases." *Solem*, 463 U.S. at 300.

Third, the Court in *Morales* repeatedly emphasized that the California Parole Board's decision to postpone any reconsideration hearing was marked by elaborate procedural protections. The Court relied, for example, upon the fact that the Board was required to conduct a "full hearing and review" of all relevant facts (including a particularized inquiry, in addition to that for the parole denial, with respect to facts supporting deferral of future

[16] The Court noted that these enumerated offenses include aggravated assault; aggravated battery; robbery; armed robbery; murder or felony murder; voluntary manslaughter; involuntary manslaughter; sale, possession for sale, transportation, manufacture, offer for sale, or offer to manufacture controlled substances; terroristic threats or acts; arson; influencing witnesses; and participation in criminal gang activity. *Jones*, 164 F.3d at 594 n.6.

[17] Although Petitioners claim that the rule is in fact more limited, arguing that it applies only to prisoners whose "heinous crimes and multiple-offender status gives them, in the Board's opinion, virtually no near-term likelihood for parole. . ." (Pet'r Br. at 15), that is decidedly incorrect under the terms of the Policy Statement, upon which they rely so heavily for other propositions. (J.A. 56).

hearings). 514 U.S. at 511. California's hearing process also protected the inmates by: (1) allowing the inmate to "be present, to ask and answer questions, and to speak on his or her own behalf," (2) providing a stenographic record of all proceedings, (3) requiring that either legal counsel or another suitable representative participate and insure that all facts relevant to the decision were presented at the hearing, and (4) requiring the Board to send the prisoner a written statement of the reasons for denial and a suggestion of activities that would benefit the inmate during his incarceration. Cal. Penal Code § 3041.5. After conducting this hearing, the Board was required to make a specific determination that "it is not reasonable to expect that parole would be granted at a hearing during the following years," and to "state[] the basis for the findings." 514 U.S. at 511. The use of these elaborate procedural protections in California led the Court in *Morales* to conclude with assurance that a decision to defer reconsideration was "no arbitrary decision." *Morales*, 514 U.S. at 511.

In contrast, the Georgia parole system utterly fails to provide any procedural safeguards to prevent inmates from being harmed by lengthy postponements of their parole consideration dates. Georgia's Parole Board provides no live hearing or even a personal meeting with Parole Board members. In addition, Georgia inmates who are denied parole are given only the most cursory reasons for the decision, and are given no guidance at all as to how to improve their future chances for parole. (J.A. 52-54). As a result, the Georgia Board has a much-reduced ability to gauge an inmate's future potential for parole in comparison to the California system.[18]

[18] Petitioners argue that any reliance on the nature of the hearing is inappropriate because, in Georgia, the Parole Board "is under no requirement, either constitutional or statutory, to *ever* hold parole consideration hearings or make particular findings." Pet'r Br. 26 (emphasis added). This argument confuses the requirements of procedural due process (and of the Georgia Code) with those of the Ex Post Facto Clause. Applying the latter clause, this Court in *Morales* could not have been more explicit in declaring that the procedural carefulness of the postponement hearing is important (as common sense suggests it is) because safeguards against unjustified postponements eliminate the risk of increased punishment that arises when unjustified postponements occur. In short, under *Morales* the elaborateness of an inmate's hearing rights (whether or not required by procedural due process or by statute) "provides assurance that any postponement decision [will] be well-founded." *In re Jackson*, 703 P.2d 100, 106 (Cal. 1985) (upholding California regime later endorsed in *Morales*).

The Court in *Morales* relied on a fourth fact that clearly distinguishes that case from this one: in California, a prisoner's actual release date typically comes "at least several years after a finding of suitability." 514 U.S. at 513. The significance of this fact is that the California Board has the opportunity to cure any error that might otherwise occur due to the delay of a suitability hearing by advancing the prisoner's release date. *Id.* In contrast, there is no evidence in this record, or any indication in the Georgia statutes or parole rules, that inmate releases are delayed for any significant period of time following a finding of suitability for parole. In any event, errors resulting from a five-year delay obviously cannot be corrected. It is telling that the Petitioners here do not even try to advance the same sort of "no harm no foul" defense that occupied so much of this Court's attention in *Morales*. *See* 514 U.S. at 513.

A fifth and final distinction between *Morales* and this case arises out of the difference in the ways the California and Georgia reforms came into existence. In *Morales*, this Court noted that the State Legislature, upon investigation, concluded that the California amendment directly alle-

viated a needless administrative burden that arose from holding live, full-blown, annual parole hearings. This Court recognized the plausibility of this benign purpose and found that the Board's retroactive application of the changed parole rules was "carefully tailored" to eliminate the problem without harming the inmates. 514 U.S. at 511.

In contrast, there is no evidence that retroactive application of Georgia's amended policy will result in significant administrative savings, since the change only delays reviews of inmate files. Moreover, there is no evidence that reducing administrative burdens was the intent of the eight-year rule. In fact, Board statements to the popular media indicate otherwise, as does the language in the Policy Statement on which Petitioners so heavily rely.[19] In light of these materials, in clear contrast to *Morales*, the eight-year rule and its retroactive application could be viewed as having the primary purpose of lengthening life inmates' terms of incarceration, in which

[19] The Policy Statement asserts that the eight-year rule's purpose is to "establish the maximum possible interval between parole denials and reconsideration in a Life Sentence Case." (J.A. 56). In a Parole Board Press Release it issued in 1998, the Board issued the following statement: "Since 1991 the Board has steadily and consistently amended and refined its guidelines and policies to provide for lengthier prison service for violent criminals." State of Georgia Board of Pardons and Paroles, *News Releases*, (visited December 5, 1999) <http://www.pap.state.ga.us/NRFrames.htm> (Jan. 2, 1998 release, "Policy Mandates 90% Prison Time For Certain Offenses"). Further, in an article published in the Savannah Morning News, former Parole Board Chairman James T. Morris was quoted as saying: "We established [in-house classifications for life-sentenced inmates] in 1985 and it's just started to catch up to us in the last three years . . . It's now beginning to show the toughness we intended. And I think you're going to continue to see the time that lifers serve continue to go up". *Savannah Morning News*, July 25, 1993, p. 8A. Of course, given the procedural posture of this case, Respondent has not been able to conduct discovery with respect to these or other statements.

case Georgia's eight-year rule revision would violate the Ex Post Facto Clause wholly apart from its "consequences," *Lynce*, 519 U.S. at 442, and "impact," *id.* at 443, because it appears that "in changing that sentencing scheme, the [parole board] *intended* to lengthen the inmate's sentence." *Id.* (emphasis added).

Petitioners' effort to invoke the principle of *Morales* hinges on the only arguable similarity between the amended parole legislation in that case and this one—the purported opportunity of Georgia inmates to request an expedited consideration in the event there has been a change in the inmate's circumstances.[20] Even assuming that an opportunity generally exists in Georgia (*but see* note 20, *supra*), this single similarity does not outweigh the many dissimilarities between this case and *Morales*. Indeed, four separate reasons show why Georgia's new "changed-circumstances" approach reduces the impact of eight-year rule in only the most modest way, if it reduces that impact at all.

First, the changed-circumstances approach places the burden to request expedited consideration on the inmate who previously would have been automatically entitled to such review.[21] Rather than being routinely considered, the

[20] The opportunity to request expedited consideration is found nowhere in the Parole Board's rules. Instead, the Board relies on its Policy Statement in an attempt to salvage a regulation that on its face does not come close to passing constitutional muster. As the Circuit Court noted, "[t]his policy does not sufficiently mitigate the defects in the regulation itself to defeat an ex post facto challenge. Policy statements, unlike regulations, are unenforceable and easily changed, and adherence to them is a matter of the Board's discretion. These are qualities that caution against treating their contents as if they had the authority of officially promulgated statutes or regulations." *Jones*, 164 F.3d at 595.

[21] Courts have held that imposition of new laws that shift the burden of proof or production to a defendant violate the Ex Post

prisoner must now show there is something so distinctively exceptional about that prisoner's case that it should be singled out from all others for special treatment. No matter how receptive to parole a later constituted parole board might be, it is counter-intuitive to believe that a Board will often approve requests for early review. Thus, the eight-year rule—coupled only with the conjectural possibility of expedited reviews based on changed circumstances—departs radically from the three-year rule because it wholly changes the decisional baseline from which the Parole Board operates. *See, e.g., Weaver*, 450 U.S. at 35 (where state retroactively removes fixed entitlement to earn gain-time credits, Court finds no adequate substitute in new program affording gain-time credits because "the award of [them] is purely discretionary" and requires inmates "to satisfy . . . extra conditions"); *Miller*, 482 U.S. at 432-33 (rejecting argument that judge's ability to depart from new and more onerous presumptive sentencing range negated Ex Post Facto Clause problems because limitations on judge's ability to make departure "substantially disadvantaged" the defendant).

Second, for an inmate to be protected against the possibility of a Board postponement, the inmate must articulate the change of circumstances in a manner that is persuasive to the Parole Board. It will be difficult for most, and impossible for many, inmates who are not entitled to legal counsel and may be illiterate or unskilled in their writing ability to persuasively articulate the changed circumstances. Inmates serving life sentences, sequestered

Facto Clause. *See, e.g. State v. Niska*, 514 N.W.2d 260, 265 (1994). Even more important, this Court's precedent looks askance at rule changes of this kind. In this case, as in *Miller*, the substituted changed-circumstances rule does not "simply provide flexible 'guideposts' for use in the exercise of discretion." 482 U.S. at 435. Rather it "create[s] a high hurdle that must be cleared before discretion can be exercised" at all. *Id.*

in high security prisons, with few privileges, no legal counsel, and poor communication skills are hardly in a position to present their own cases under such a rule.

Third, reliance on a changed-circumstances review scheme presumes that an inmate is in a position to recognize when relevant circumstances have changed and then to highlight those changes in an individual changed-circumstances petition. This often will not be the case, however, as inmates are not given guidance by the Board as to what steps they might take in the future to secure parole release. Further, parole decisions may be made for reasons having nothing to do with the individual inmate's circumstances. Instead, an inmate's chances for parole may depend largely on how that inmate's circumstances compare to other similarly situated inmates in the parole consideration pool. Other relevant changes may concern such matters as overcrowding or changes in Parole Board membership or political philosophy.

Fourth and finally, there is no evidence whatsoever to indicate a potential for expedited reviews in fact meaningfully offsets (or even reduces) inmates' retroactive loss of triannual reconsideration rights. Common sense provides a basis for skepticism in this regard. Given the Board's ardent protestations that it is too busy to conduct triannual reviews, it would be surprising to find that it often engages in individualized expedited reconsiderations based upon changed circumstances.

In sum, Georgia's parole rules are so vastly different from those considered in *Morales* that it is not surprising the Circuit Court reached a different result in this case. Indeed, *Morales* requires a different result.[22] There, for

[22] The weaknesses of Petitioners' attempted reliance on *Morales* is underscored by their suggestion that the Court should essentially ignore the underlying reasoning of that case. Thus, referring to

each of the reasons identified above, the Court found California's modest parole-reconsideration reform was tailored to eliminate costly full-scale hearings that entailed nothing more than "futility" and "going through the motions." Even faced with such circumstances, the Court perceived itself to be facing a "close question" in *Morales*. *See, e.g., Lynce*, 519 U.S. at 450 (Thomas, J., concurring). The same cannot be said here. Indeed, every element of the reasoning of *Morales* demonstrates why the Court should find an Ex Post Facto Clause violation on the starkly contrasting facts of this case.

III. CONSTITUTIONAL POLICY CONFIRMS THE INVALIDITY OF GEORGIA'S RETROACTIVE IMPOSITION OF ITS EIGHT-YEAR RULE.

The Ex Post Facto Clause was adopted "to protect future Americans against oppressive, retroactively imposed, legislative enactments." Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 Am. Crim. L. Rev. 1261, 1275 (1998). Opposition to ex post facto laws among the framers was strong.[23] As a

Morales. Petitioners argue that "given the paucity of cases that this court can consider each year, its decisions *must* be something more than mere fact-specific rulings." Pet'r Br. at 29 (emphasis in original). Petitioners' you-didn't-really-mean-what-you-said line of reasoning (by which Petitioners mean to say that the Court intended to generally authorize retroactive consideration delays) is particularly ill-suited to *Morales*. In that case, this Court disclaimed in no uncertain terms any intention to uphold reconsideration extensions in cases involving "circumstances different from those present here," *Morales*, 514 U.S. at 509 n.5.

23 It appears that no dissent at all was voiced at the Constitutional Convention as to the wrongfulness of ex post facto laws. Discussion centered instead on whether any textual treatment of the subject was necessary given the general understanding that such laws were so tyrannical that they "were void of themselves." *William Crosskey, The True Meaning of the Constitutional Prohibition of Ex Post Facto Laws*, 14 U. Chi. L. Rev. 539, 540 (1947)

result, they endorsed with no real controversy a prohibition on such laws that was "sweeping" and "absolute."[24]

James Madison described ex post facto laws as "contrary to the first principles of the social compact, and to every principle of sound legislation." He thus deemed the prohibition a "bulwark in favor of personal security and private rights." *The Federalist* No. 44, at 282 (James Madison) (Clinton Rossiter ed. 1961). Alexander Hamilton identified the safeguards against ex post facto laws (along with the protection of habeas corpus and the ban on titles of nobility) as "perhaps greater securities to liberty and republicanism than any [the Constitution] contains." *The Federalist* No. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

This Court's aggressiveness in applying the Constitutional prohibition has sprung in part from its strong textual and historical roots. As observed in *Weaver*, 450 U.S. 39, n.8, "So much importance did the convention attach to [the ex post facto prohibition], that it is found twice in the Constitution."

This Court's watchfulness in guarding against Ex Post Facto Clause violations also comports with its longstanding embrace of a more generalized presumption against retroactive legislation. As this Court recently observed:

> Retroactivity is generally disfavored in the law. . . . "Retroactive legislation," we have explained, "pre-

(quoting Oliver Ellsworth). *See* 2 Max Farrand, *The Records of the Federal Convention* 376 (Yale 1966) (setting forth James Madison's notes of Aug. 22, 1787).

24 On the "absolute" and "sweeping" character of the Ex Post Facto Clause prohibition, *see William W. Crosskey, The True Meaning of the Constitutional Prohibition of Ex Post Facto Laws*, 14 U. Chi. L. Rev. 539 ("thoroughly disapproved"); 549 ("prohibited absolutely," "absolute prohibitions," "sweeping prohibitions").

> sents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions."

Eastern Enterprises v. Apfel, 524 U.S. 498, ——, 118 S.Ct. 2131, 2151 (1998) (plurality opinion; citations omitted).[25]

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; *settled expectations should not be lightly disrupted.*

Landgraf v. United States, 511 U.S. 244, 265 (1994) (emphasis added).

In keeping with these purposes, the Ex Post Facto Clause ensures that "legislative enactments . . . permit individuals to rely on their meaning until explicitly changed." *Miller*, 482 U.S. at 430 (*quoting Weaver*, 450 U.S. at 28-29). By retroactively applying the eight-year rule, however, Georgia's Parole Board has disrupted the expectations of those inmates who entered plea agreements with the expectation that they would have reasonable and regular opportunities for parole, and of any judges who have taken this possibility into account in imposing a life sentence rather than a fixed term of years. *See supra* at pp. 7, 13. No less important, the State has

25 *Accord, id.* at 2158-59 (Kennedy, J., concurring in part and dissenting in part) (ban on retroactive lawmaking fosters "confidence in the constitutional system" and counters the "justified fear that a government once formed to protect expectations now can destroy them"; thus "for centuries our law has harbored a singular distrust of retroactive statutes"); *Id.* at 2163 (Breyer, J., dissenting) (retroactive law "undermines a basic objective of law itself" when it "upsets settled expectations").

profoundly undermined the "settled expectations" of innumerable prisoners who expected, in keeping with then-existing law, to receive parole considerations at regular three-year intervals. *See Greenholtz*, 442 U.S. at 19 (Powell, J., concurring and dissenting) ("when a State adopts a parole system that applies general standards of eligibility, prisoners justifiably expect that parole will be granted fairly and according to law").

Another purpose of the Ex Post Facto Clause is to "guard against the Framers' fears of retroactive penal laws forged by 'hot-blooded' legislatures. . ." Logan, 35 Am. Crim. L. Rev. at 1277. The Ex Post Facto Clause thus protects unpopular groups or individuals from the potentially arbitrary, capricious, and vindictive actions of a powerful state. *See Miller*, 482 U.S. at 429; *Weaver*, 450 U.S. at 29; *see also Landgraf*, 511 U.S. at 266 (noting that government officials, in response to political pressures, "may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.").

If the earmarks of retribution ever are present, it must be where, as here, the government targets what is arguably the most politically and socially outcast of all groups: incarcerated "lifers." And concerns with retroactivity surely are at their highest ebb when government policy concerns not mere financial interests, *compare Eastern Enterprises*, 524 U.S. at 498, but the most basic of all human freedoms—freedom from physical restraint.

Maintaining their own would-be argument of policy, Petitioners assert that an affirmance would embroil the judiciary in the sort of "micromanagement" of "parole" and "sentencing procedures" that the Court in *Morales* foreswore. Pet'r Br. at 20. This micromanagement argument, however, is unpersuasive and, in fact, reflects a

basic misunderstanding of *Morales*. If the Court's micromanagement reasoning in *Morales* was meant to condemn all judicial review of retroactive reconsideration rules, then the Court's analysis in that case would have been entirely different. After all, the Court in *Morales* meticulously examined the particular parole reform in that case; emphasized that judicial rulings in this area turned on matters of degree; and carefully left open for further and contextual judicial consideration other reconfigurations of parole reconsideration rights. In short, the sort of "micromanagement" Petitioners condemn is nothing more than the same kind of principled judicial appraisal engaged in by the Court in *Morales* itself.

In addition, the Court in *Morales* voiced concern about judicial "micromanagement" only in the context of rejecting a principle so "expansive" that it would invalidate "any legislative change that has any conceivable risk of affecting a prisoner's punishment." *Id.* at 508. This case, however, does not involve either the invocation of such a principle or the types of reforms that the Court in *Morales* actually meant to exempt from Ex Post Facto Clause attack. Those reforms were:

> such innocuous adjustments as changes to the memberships of the Board of Prison Terms, restrictions on the hours that prisoners may use the prison law library, reductions in the duration of the parole hearing, restrictions on the time allotted for a convicted defendant's right of allocation before a sentencing judge, and page limitations on a defendant's objections to presentence reports or on documents seeking a pardon from the governor.

Morales, 514 U.S. at 508. There are obvious reasons for not applying the Ex Post Facto Clause to changes of this nature. In particular, "it would create endless confusion in legal proceedings if every case was to be conducted

only in accordance with the rules of practice, and heard only by the courts, in existence when its facts arose." T. Cooley, *Constitutional Limitations* 272 (1868). There is, however, no problem of "confusion" in setting different reconsideration dates for prisoners whose crimes were created before and after the well-known date on which the eight-year rule was adopted. This is so because, under either the three-year rule or the eight-year rule, the Parole Board must and will fix parole reconsideration dates whenever a denial occurs.

No less important, the "mechanical" reforms that concerned the Court in *Morales, id.*, are different in kind from the rule change at issue here because those reforms do not, even remotely, concern the actual "punishment" meted out by the state. In contrast, precisely because Georgia's eight-year rule alters a numerically measurable temporal dimension of the sentence, it is something more than a "minor" adjustment of sentencing "procedures." 514 U.S. at 508. When we think about sentences we think about time—*i.e.*, how long will, or might, a prisoner serve. Thus, as a matter of common understanding, Georgia's retroactive application of the eight-year rule intrinsically entails an alteration of the "amount," *Beazell*, 269 U.S. at 170, and "measure," *Morales*, 514 U.S. at 510, of an inmate's punishment. It follows that, in a very real way, Georgia's eight-year rule produces what this Court consistently has proscribed: a "change in the *quantum* of punishment attached to the crime." *Dobbert*, 432 U.S. at 294.

Contrary to Petitioner's assertions, application of the Ex Post Facto Clause to this case will not jeopardize the purposes of federalism. Each state remains free to serve as a "laboratory" of "experimentation." *Reeves v. State*, 447 U.S. 429, 441 (1980) (*quoting New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J.,

dissenting)), in the areas of timing parole considerations. A state need only conduct its experiments, as fairness suggests it should, on a prospective basis. Similarly, in pursuing the essential government goal of discouraging crime, states are at liberty to dilute parole rights or to eliminate them altogether, so long as they do so on a prospective basis. But a state has no legitimate interest in "discouraging" the crimes of Respondent and other similarly-situated prisoners whose crimes were committed long ago. *See James v. United States*, 366 U.S. 213, 247 n.3 (1961) (Harlan, J., concurring in part and dissenting in part).

To be sure, state officials might assert an interest in incapacitating prisoners because of growing fears about criminal behavior, a lost hope in rehabilitative efforts, or a new "get tough" attitude toward crime. If the Ex Post Facto Clause has any purpose, however, it is to bar the expression of precisely these increased-incapacitation policies in after-the-fact enhancements of criminal penalties. *See Lynce*, 519 U.S. at 445 (condemning "retrospective change . . . intended to prevent the early release of prisoners"); *Lindsey*, 301 U.S. at 401 (the Constitution "forbids the application of any new punitive measure to a crime already consummated.").

In the end, the state can, and does, seek to justify its profound retroactive reformulation of prisoners' parole-consideration rights by arguing that the eight-year rule is "cost-effective and efficient." Pet'r Br. at 15-16. Rights protected by the Ex Post Facto Clause, however, are not subject to being put in a balance where they might be outweighed by some such nebulous government interest. And even if they were, a claimed interest in cost-saving and administrative convenience would provide a poor candidate for overriding the Constitution's textually explicit and unequivocally expressed protections against ex post facto laws. *See Craig v. Boren*, 429 U.S. 190, 197-98 (1976) (rejecting "administrative ease and convenience" as adequate justification even for purposes of intermediate scrutiny under the Equal Protection Clause). This Court has never tolerated trampling on an individual's rights just because it saves a state money to do so.

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. The great constitutional prohibitions against ex post facto laws guard against tyranny by establishing a fixed and workable baseline of punishment that potentially overzealous government officials may not breach. That baseline is fixed and workable because it is identifiable by looking to the past. Departing from that baseline (and markedly so in this case) would abridge this Court's past pronouncements, undermine settled expectations, and facilitate the future retrospective imposition of penalties against unpopular groups. *See Miller v. Florida*, 482 U.S. 423, 429 (1987); *Weaver*, 450 U.S. at 29. Instead of following the Board's overreaching reasoning, this Court should abide by its earlier interpretations of the Ex Post Facto Clause and bar the state from retroactively diminishing prisoners' precious parole eligibility rights.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

ELIZABETH THOMPSON KERTSCHER
Counsel of Record
WILLIAM V. CUSTER
LEEANN JONES
POWELL, GOLDSTEIN, FRAZER
& MURPHY LLP
191 Peachtree Street, N.E.
Sixteenth Floor
Atlanta, GA 30303
(404) 572-6600
Attorneys for Respondent