SUPREME COURT OF THE UNITED STATES

No. 99–137

J. WAYNE GARNER, FORMER CHAIRMAN OF THE STATE BOARD OF PARDONS AND PAROLES OF GEORGIA, ET AL., PETITIONERS *v.* ROBERT L. JONES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[March 28, 2000]

JUSTICE SCALIA, concurring in part in the judgment.

I would agree with the Court's opinion if we were faced with an amendment to the frequency of parole-eligibility determinations prescribed by the Georgia legislature. Since I do not believe, however, that a change in frequency prescribed by the Georgia State Board of Pardons and Paroles would violate the *Ex Post Facto* Clause even if it did pose a sufficient "risk" of decreasing the likelihood of parole, I would reverse the decision of the Eleventh Circuit without the necessity of remand.

The Court treats this case as a mere variation on the *Morales* theme, whereas in reality it contains a critical difference: In *Morales*, the frequency of parole suitability hearings had been fixed by law, and a legislative change had given California's Board of Prison Terms discretion to decrease the frequency. See *Morales*, 514 U. S., at 503; *ante*, at 5. Here, there has been no such change. Today, as at the time of respondent's offense, the Georgia statute requires only that the Board provide for automatic "periodic reconsideration," Ga. Code Ann. §42–9–45. The length of the period, like the ultimate question of parole, was and is entrusted to the Board's discretion.

Any sensible application of the *Ex Post Facto* Clause,

and any application faithful to its historical meaning, must draw a distinction between the penalty that a person can anticipate for the commission of a particular crime, and opportunities for mercy or clemency that may go to the reduction of the penalty. I know of no precedent for the proposition that a defendant is entitled to the same degree of mercy or clemency that he could have expected at the time he committed his offense. Under the traditional system of minimum-maximum sentences (twenty years to life, for example), it would be absurd to argue that a defendant would have an *ex post facto* claim if the compassionate judge who presided over the district where he committed his crime were replaced, prior to the defendant's trial, by a so-called "hanging judge." Discretion to be compassionate or harsh is inherent in the sentencing scheme, and being denied compassion is one of the risks that the offender knowingly assumes.

At the margins, to be sure, it may be difficult to distinguish between justice and mercy. A statutory parole system that reduces a prisoner's sentence by fixed amounts of time for good behavior during incarceration can realistically be viewed as an entitlement– a reduction of the prescribed penalty– rather than a discretionary grant of leniency. But that is immeasurably far removed from the present case. In Georgia parole, like pardon (which is granted or denied by the same Board), is– and was at the time respondent committed his offense– a matter of grace. It may be denied for any reason (except, of course, an unlawful one such as race), or for no reason. And where, as here, the length of the reconsideration period is entrusted *to the discretion of the same body that has discretion over the ultimate parole determination*, any risk engendered by changes to the length of that period is merely part of the uncertainty which was inherent in the discretionary parole system, and to which respondent subjected himself when he committed his crime.

It makes no more sense to freeze in time the Board's discretion as to procedures than it does to freeze in time the Board's discretion as to substance. Just as the *Ex Post Facto* Clause gives respondent no cause to complain that the Board in place at the time of his offense has been replaced by a new, tough-on-crime Board that is much more parsimonious with parole, it gives him no cause to complain that it has been replaced by a new, big-on-efficiency Board that cuts back on reconsiderations without cause. And the change in policy is irrelevant, in my view, whether or not the pre-existing policy happens to have been embodied in a policy statement or regulation. To make the constitutional prohibition turn upon that feature would be to ignore reality and to discourage measures that promote fairness and consistency. Such a policy statement or regulation, in the context of a system conferring complete discretion as to substance and as to the timing of hearings, upon the Parole Board, simply creates no reasonable expectation of entitlement, except perhaps among prisoners whose parole hearings are held (or are scheduled to be held) while the regulation is in effect. This is not an expectation of the sort that can give rise to *ex post facto* concerns.

In essence, respondent complains that by *exercising* its discretion (as to the frequency of review), the Board of Pardons and Paroles has *deprived* him of the exercise of its discretion (as to the question of his release). In my view, these are two sides of the same coin– two aspects of one and the same discretion– and respondent can have no valid grievance.