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When Does a Retroactive Decrease in the Frequency of Parole Reconsideration Hearings Violate the Ex Post Facto Clause?

by Rachel A. Van Cleave

CRIMINAL PROCEDURE

Editor's Note: The respondent's brief in this case was not available by PREVIEW's deadline.

ISSUES

Does a retroactive change in the frequency of parole reconsideration hearings "change the punishment, and inflict a greater punishment, than the law annexed to the crime, when committed," and thus constitute a violation of the ex post facto clause? Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798). In addition, did the Eleventh Circuit incorrectly interpret and apply the Supreme Court's decision in California Dep't of Corrections v. Morales, 514 U.S. 499 (1995), which upheld against an ex post facto challenge a similar change in parole reconsideration hearings?

FACTS

Georgia statutory law sets out basic parameters for parole. For example, an inmate serving a life sentence is eligible for an initial consideration for parole after having served seven years. Ga. Code Ann. § 42-9-45(f). However, the Legislature has delegated to the State Board of Pardons and Paroles ("the Board") the authority to enact rules and regulations concerning parole, specifically, when periodic reconsideration of parole denials must take place.

The respondent, Robert L. Jones, was sentenced to life in prison for murder in 1974. He escaped from custody five years later and was subsequently convicted of a separate murder and sentenced to a second term of life imprisonment in 1982. At the time Jones committed both offenses, the Board rules required it to hold hearings every three years to reconsider its initial denial of parole. Ga. Comp. R. & Regs. R. 475-.05(2) (now superseded). However, in 1986, the Board amended this rule to lengthen the time for subsequent reconsideration to every eight years.

Jones was initially considered for parole in 1989, seven years after the

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1982 conviction, and the Board denied parole. The Board scheduled Jones' reconsideration hearing for 1997. In 1991, the Eleventh Circuit found that retroactive application of the Board's rule violated the ex post facto clause of the United States Constitution. Akins v. Snow, 922 F.2d 1558 (11th Cir. 1991). After the Akins ruling, the Board held two reconsideration hearings on Jones at three-year intervals, denying parole on both occasions. Subsequently, the United States Supreme Court decided the Morales case and the Board concluded that Morales overruled Akins, thus the Board resumed its retroactive application of the 1986 version of its rules and scheduled the next reconsideration hearing for Jones in 2003, eight years after his 1995 hearing.

Jones filed an action in federal district court in Georgia, claiming that retroactive application of the 1986 rules were ex post facto laws. The district court granted summary judgment for the Board, holding that Morales overruled Akins. The Eleventh Circuit reversed this decision, distinguishing the parole procedures involved in the Morales case from the Georgia rules. The Board petitioned the Supreme Court, which granted certiorari on Sept. 28, 1999.

CASE ANALYSIS

The Constitution provides that “No state shall ... pass any ... ex post facto law.” Art. I, § 10. In Calder v. Bull, the United States Supreme Court made clear that this provision applied to retroactive criminal legislation only and not to civil statutes. 3 U.S. (3 Dall.) 386 (1798). In addition, the Court set out the following categories of laws that the clause prohibits: (1) laws that criminalize conduct that was innocent when done; (2) laws that make a crime more serious than when it was committed; (3) “every law that changed the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed;” and (4) laws that alter the legal rules of evidence than the law required at the time of the commission of the offense. Calder, 3 U.S. at 390. Jones bases his argument on the third category in Calder.

Strictly construed, the language of the ex post facto clause prohibits only retroactive laws enacted by a state legislature. Thus, as a preliminary matter, the Supreme Court will probably determine whether the ex post facto clause applies to rules promulgated by a state's parole board rather than laws enacted by the state's legislature. While the Eleventh Circuit did not address this issue in this case, and the Board does not directly make this argument, the Board's brief discusses the authority delegated to it by the state. In Atkins v. Snow, 922 F.2d 1558 (11th Cir. 1991), the Eleventh Circuit considered the same Board rule as in the present case and concluded that the “quasi-legislative power” of the Board made their rule “tantamount to a statute.” Id. at 1561. The Supreme Court will likely find that the ex post facto clause applies to the Board's rules.

In applying the third category in Calder, prohibiting an increase in the punishment, the Supreme Court's opinions may be divided into two types. First are cases involving a legislative change in the sentence prescribed for certain offenses. For example, in Lindsey v. Washington, 301 U.S. 397 (1937), the Court held that a retroactive change from a possible sentence of no more than 15 years to a mandatory 15-year sentence constituted an ex post facto law. Similarly, in Miller v. Florida, 482 U.S. 423 (1987), the Court found an ex post facto violation when a law increased the presumptive sentencing range for certain offenses from 3 ½ to 4 ½ years to a range from 5 ½ to seven years. This is not the question raised in the Jones case.

The second type of cases are those concerning retroactive application of laws or rules governing an inmate's opportunity or eligibility for early release from prison. These cases involve changes either to the timing for parole hearings or to the manner by which inmates earn credits toward early release from prison. For example, in Lynce v. Mathis, 519 U.S. 433 (1997), the Supreme Court considered a law that canceled all “provisional credits” previously awarded to inmates due to prison overcrowding. For the prisoner in Lynce, this had the effect of revoking credits he had earned and had used for his early release and resulted in his return to custody. The Court found that this constituted an ex post facto law because it had the effect of “postponing the date when [the prisoner] would become eligible for early release.” Lynce at 442. Similarly, in Weaver v. Graham, 450 U.S. 24 (1981), the Court evaluated a retroactive change in the manner by which an inmate might earn “good-time” credits toward early release. The effect of the change was to decrease the number of credits an inmate could earn for essentially the same conduct of completing tasks and not having any disciplinary problems. The new statutory provisions did not eliminate any of the credits earned by Weaver but only changed how he earned credits in the future. Nonetheless, the Court focused on the fact that the application of the new provisions to one who committed a crime prior to the change altered “the legal consequences of acts completed before its effective date.” Weaver at 31. These four cases applied a standard that examined whether the retroactive
change in the law disadvantaged the offender affected by it.

As to laws changing the timing of parole reconsideration hearings, in 1995, the Supreme Court upheld the retroactive application of a change in the frequency of parole reconsideration hearings. *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995), is quite similar to the present case and, in fact, the Board in *Jones* relies heavily on the *Morales* opinion. When Morales committed his second murder, the law required the parole board to hold annual reconsideration hearings after an initial denial of parole. Subsequently, this law was amended to allow the board to defer such hearings for up to three years upon the board's finding that it was “not reasonable to expect that parole would be granted at a hearing during the following years.” The statute also required the board to state the bases for such a finding. *Morales* at 503.

The Court determined that the change involved only a “speculative and attenuated possibility of ... increasing the measure of punishment.” Id. at 509. The Court relied on three factors for this conclusion. First, the change applied only to a specific class of prisoners, those convicted of more than one offense involving the taking of a life. The parole board rarely finds such prisoners suitable for parole. Second, the Court found it significant that the board's decision to postpone subsequent hearings is subject to administrative appeal. Such an administrative check makes unlikely the board's improper postponement of a hearing.

The Court also pointed to the fact that the statute required the board to make particularized findings to support its decision to postpone a reconsideration hearing. Finally, the Court noted that when the board finds that an inmate is suitable for parole, the prisoner's release date is often several years after such a finding. While this seems to create a danger that an inmate might serve more time than proper, the Court relied on the fact that an inmate has an opportunity to show that he was “suitable” for parole before the board made such a finding, and this could then be taken into account when the board sets the release date and perhaps grants expedited release. The Board in *Jones* argues that the present case falls squarely within the *Morales* opinion.

The Eleventh Circuit rejected the Board's position and distinguished *Morales*. The court found that the factors relied upon by the Court in *Morales* to support its finding that the change made the possibility of increasing the punishment “most speculative” were not present in the Georgia parole scheme. First, the rule considered in *Morales* applied only to prisoners convicted of an offense involving the taking of a life. The Georgia regulation applies to all inmates serving life sentences, which includes those convicted of murder, armed robbery, and more than one offense involving controlled substances, as well as other crimes. Thus, the Eleventh Circuit stated that it could not conclude that the change applied only to “prisoners for whom the likelihood of release on parole is quite remote.” *Morales* at 510.

Second, the court found that the Georgia regulation lacked the safeguards that the Supreme Court relied on to hold that the California statute was “carefully tailored” to ensure that there was no increase in the amount of punishment. Specifically, the Eleventh Circuit pointed to the fact that the Board in Georgia is not required to state findings to support its decision to postpone a reconsideration hearing. In contrast, the California statute requires the parole board to “state the bases for its finding ... that it is not reasonable to expect that parole would be granted at a hearing during the following years.” *Morales* at 511. While the Eleventh Circuit acknowledged that after the *Morales* decision the Board issued a policy statement that essentially tracked the language of the California statute in this regard, the court stated that this was merely a policy and did not cure the ex post facto defect. Furthermore, the Eleventh Circuit determined that the eight-year delay under the Georgia regulation is significantly longer than the three-year delay evaluated in *Morales*, thus increasing the risk that “some number of inmates will find the length of their incarceration extended.” *Jones v. Garner*, 164 F.3d 589, 595 (11th Cir. 1999).

Finally, the court acknowledged that the Fourth Circuit has reached decisions following *Morales* upholding laws that decrease the frequency of reconsideration hearings but noted that the opinions do not contain any analysis of the factors relied upon by the Supreme Court in *Morales*. See *Roller v. Gunn*, 107 F.3d 227 (4th Cir.), cert. denied, 522 U.S. 874 (1997); *Hill v. Jackson*, 64 F.3d 163 (4th Cir. 1995). The Board argues that the Eleventh Circuit's analysis is flawed.

To support its argument that the change in the frequency of reconsideration hearings will not result in an increase in punishment, the Board points to the virtually unfettered discretion of the Board as the only authority to decide whether an inmate is ever released from prison. In fact, this discretion led the Eleventh Circuit, in an earlier case, to state that the Board's "substantial discretion ... belies any claim to a reasonable expectation of parole."

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Sultenfuss v. Snow, 35 F.3d 1494 (11th Cir.), cert. denied, 513 U. S. 1191 (1995). Thus, the Board argues that likelihood of parole is extremely remote and that holding reconsideration hearings less frequently does not make such a possibility any more remote. Interestingly, however, the Board’s emphasis on the fact that it is the ultimate factfinder regarding parole highlights the absence of one of the safeguards relied upon by the Court in Morales: there does not appear to be any form of administrative appeal available to a prisoner whose reconsideration hearing has been postponed.

In addition, the Board argues that the Eleventh Circuit’s opinion rests on an assumed link between more frequent reconsideration hearings and an earlier release date. In effect, the Board argues that the length of time between reconsideration hearings is not relevant to the question of whether an inmate is suitable for parole, unlike the retroactive change in early release credits considered in Lynce. Finally, the Board argues that an inmate may request an expedited hearing upon showing that there has been a change in circumstances or that new information exists requiring an earlier review. This option, similar to the third safeguard relied on in Morales, mitigates against the possibility that an inmate might serve a longer sentence.

**SIGNIFICANCE**

On one level, this case requires merely that the Court correct and reverse the Eleventh Circuit’s application of Morales. However, this would seem to have the effect of making insignificant the factors relied upon by the Court in Morales. Contrary to the Board’s argument, the Court seems to have already accepted a link between the frequency of reconsideration hearings and an early release date. Otherwise, the safeguards considered by the Morales Court are irrelevant. Thus, it is possible that the Court will apply the same factors and determine whether the Eleventh Circuit correctly distinguished Morales.

It will be more interesting to see how certain justices vote in this case. Justice Thomas wrote the Morales majority opinion and in the course of that opinion stated that the standard that examined whether the offender has been disadvantaged by a change in the law, used in Weaver, Miller, and Lindsey, is no longer the focus of an ex post facto inquiry. Rather, the focus is on whether there has been an increase in the “quantum of punishment.” Morales at 506, n.3. Justice Stevens, who wrote the dissenting opinion in Morales, wrote the majority opinion in the 1997 Lynce case. Stevens seemed to resurrect the “disadvantaged” standard used in cases before Morales. In addition, Stevens emphasized that the revocation of provisional credits postponed the inmate’s “opportunity to be released” earlier. Lynce at 443. In his concurring opinion in Lynce, Justice Thomas stated that he agreed with the result only because the inmate had already earned the credits and had used them to gain his early release. However, Thomas emphasized that he did not agree with the Court’s discussion of the Weaver opinion.

Thus, the Court’s opinion in the present case might clarify the precise standard to be used in these types of cases. That is, should the focus be on any disadvantage suffered by the inmate? Or should it be on whether the change in the law or rule has a practical effect on the possibility of an early release?