

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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

CASE NO: 99-137 e.2

PLACE: Washington, D.C.

DATE: Tuesday, January 11, 2000

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IN THE SUPREME COURT OF THE UNITED STATES

J. WAYNE GARNER, FORMER :
CHAIRMAN OF THE STATE BOARD :
OF PARDONS AND PAROLES OF :
GEORGIA, ET AL., :
Petitioners :

v. : No. 99-137

ROBERT L. JONES.

Washington, D.C.

Tuesday, January 11, 2000

The above-entitled matter came on for oral
before the Supreme Court of the United States at

APPEARANCES:

CHRISTOPHER S. BRASHER, ESQ., Senior Assistant Attorney
General, Atlanta, Georgia; on behalf of the
Petitioners

ELIZABETH S. KERTSCHER, ESQ., Atlanta, Georgia; on behalf
of the Respondent.

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PROCEEDINGS

(11:16 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 99-137, J. Wayne Garner v. Robert Jones.

Mr. Brasher.

ORAL ARGUMENT OF CHRISTOPHER S. BRASHER
ON BEHALF OF THE PETITIONERS

MR. BRASHER: Mr. Chief Justice, and may it
be Court:

21 Both the Federal courts and Georgia's courts
22 have agreed that because of its discretion, Georgia's
23 parole system creates no legitimate expectation of parole.

24 QUESTION: Well that's -- that's fine for
25 Fourteenth Amendment purposes, but that's not the test

1 under -- under the Ex Post Facto Clause.

2 MR. BRASHER: That's correct, Your Honor.

3 QUESTION: All right.

4 MR. BRASHER: However, this Court in Morales
5 reviewed the -- what -- what has been later called the
6 procedural safeguards inherent in California's system to
7 determine if that system, which does create an expectation
8 of parole, changing the parole reconsideration dates had
9 the effect of increasing the measure of punishment.

10 However --

11 QUESTION: Well, isn't the -- the test is
12 whether -- whether there is a so-called sufficient risk
13 that sentences will, in fact, be increased in duration by
14 the change. Do you agree that's the test?

15 MR. BRASHER: Yes, Your Honor, that's correct.
16 That's this -- this Court's test in Morales.

17 QUESTION: Well, as I understand it -- you
18 correct me on the facts if I'm wrong, but as I understand
19 it, before the statutory change here, the average sentence
20 served by someone under a life sentence was something in
21 the neighborhood of 12 years, 12 years and some months.

22 MR. BRASHER: Your Honor, I -- I take issue with
23 that statistic. That statistic is misleading. It comes
24 from statistics in 1992, and it deals only with inmates
25 who were actually released on parole. In 1992, less than

1 50 inmates out of a population of 4,000 life-sentenced
2 inmates were actually released on parole. And of those -
3 -

4 QUESTION: Okay. Well, let's -- let's take the
5 narrower -- let's take the narrower figure, as -- as you
6 describe it.

7 I also understand that, in fact, following the
8 -- the change in the statute, somewhere in the
9 neighborhood of about 70 percent of those who are given
10 ultimate reconsideration for parole are not given it until
11 after 8 years, so that we're talking about a period of 8
12 years that follows the initial 7-year period. And,
13 therefore, if anyone in Georgia, subject to parole
14 reconsideration, is going to be paroled -- and -- and I
15 guess we can assume some will be -- those people at least
16 are not going to be considered for 15 years as against the
17 12-year sentence for those who go -- who got parole on
18 some reconsideration theory under the old law. Isn't that
19 enough to say, yes, the risk of -- of a longer sentence is
20 present here?

21 MR. BRASHER: No, Your Honor. First of all,
22 that presumes that the board does not -- well, first of
23 all, it presumes that the board does not know and does not
24 have the power to decide ultimately whether any inmate is
25 ever released on parole. It's the board that makes that

1 determination.

2 QUESTION: Well, I don't -- I don't think -- I
3 don't think that matters one way or the other. The -- the
4 question under the test is -- is whether there is a risk
5 of an increased sentence, the sentence actually served.
6 And it seems to me to follow -- I think it follows from
7 those numbers that there is such a risk.

8 MR. BRASHER: Well, Your Honor --

9 QUESTION: Regardless of what the board can do,
10 what in fact is going to happen is that if those who will
11 be released on -- following a first reconsideration, 70
12 percent of those are -- are, in fact, going to wait for 15
13 years as against a -- a prior scheme in which there was an
14 average of 12 years. Now, that doesn't, by any means,
15 demonstrate just how many are going to get longer
16 sentences, but it does demonstrate, it seems to me, a -- a
17 risk.

18 MR. BRASHER: But, Your Honor, that again
19 presumes that the board does not have the ability nor the
20 knowledge to determine which inmates it's going to release
21 because these statistics are merely an accumulation of
22 individualized determinations by the board. The board
23 ultimately has the -- the discretion to determine whether
24 any inmate is released and, more importantly --

25 QUESTION: But how does that -- how does that

1 affect the fact that there is a -- a demonstration of some
2 increased risk or -- or some risk of an increased
3 sentence?

4 MR. BRASHER: Your Honor, I don't believe there
5 is --

6 QUESTION: Regardless -- I mean, the board --
7 sure, the board might act differently. The board might
8 reduce that risk. But all we've got are gross numbers,
9 and the gross numbers seem to support the inference that
10 there is an increased risk.

11 MR. BRASHER: But, Your Honor, that assumes that
12 those inmates would have gotten out during that interim,
13 but it's the board that makes the determination when they
14 deny parole and set it off.

15 QUESTION: It assumes -- it assumes -- yes. It
16 assumes that some would have gotten out because of the
17 average that existed before.

18 MR. BRASHER: But that average is fallacious,
19 Your Honor.

20 QUESTION: And the -- no. The -- you corrected
21 the average. We're taking the average subject to the
22 limitation that -- that you just told us we -- we should
23 in order to be accurate.

24 MR. BRASHER: But, Your Honor, with all due
25 respect, I believe that the average only applies to

1 inmates that are actually released. It takes -- it does
2 not take account of the other inmates, the other 99
3 percent of those --

4 QUESTION: And what the numbers -- and what the
5 new numbers show is that of those who are released on
6 reconsideration, there is a 70 percent chance that they
7 will be released only after 15 years.

8 MR. BRASHER: Well, Your Honor, and also that
9 ignores the fact that -- that in fact the board does have
10 the ability to -- to extraordinarily reconsider inmates
11 and the lodged documents, the first set of lodged
12 documents, demonstrates that, in fact, the board is
13 exercising their discretion to review inmates
14 extraordinarily.

15 QUESTION: It -- it may well do so, and in point
16 of fact, it may do a very good job of it. But the
17 question under the Ex Post Facto Clause is whether there
18 is in fact a risk of a longer sentence, and it seems to me
19 that those numbers demonstrate that there is some risk.

20 MR. BRASHER: Well, Your Honor, again I think
21 that assumes that the inmates would have gotten out and
22 that the parole board doesn't know --

23 QUESTION: No, it doesn't assume -- it -- it
24 assumes necessarily, from the fact that there was an
25 average release date of 12-some-odd years for those who

1 are released, that -- that, of course, some will have
2 gotten out. That's what the average figure shows. Some
3 did.

4 MR. BRASHER: Your Honor, again that average is
5 only of the inmates that were released and not of the
6 inmates that were denied parole. That -- in order to get
7 a true picture of how long inmates serve in prison, you
8 have to consider three numbers. You have to consider,
9 first of all, how many inmates of the -- of the -- the
10 inmates that are quoted in the misleading 12-year figure,
11 how many of those inmates were released at their initial
12 consideration date, which is not indicated, which would
13 have been 7 years. So, for every inmate that's released
14 at 7 years, we have an inmate that's serving 19 years in
15 incarceration. That -- that demonstrates the fallacy of
16 that 12-year number.

17 In addition to that number, you also have to
18 have how many inmates died in prison and ultimately served
19 their life sentence.

20 And then finally, you have to know how many of
21 those inmates are still in prison. That -- that number is
22 -- is fallacious because it leads one to believe --

23 QUESTION: Have you -- have you given us -- has
24 the State given us any of those numbers that you feel we
. 25 should look at?

1 MR. BRASHER: Your Honor, I believe that the
2 numbers ultimately do not matter, and the reason is
3 because again this is an accumulation of individualized
4 determinations by the board. Each inmate is reviewed
5 individually.

6 QUESTION: Well, that's true -- that's true of
7 -- of every application of the Ex Post Facto Clause to a
8 parole eligibility scheme. So, if that were going to be
9 the answer, we'd never even be applying the Ex Post Facto
10 Clause to parole eligibility.

11 MR. BRASHER: Well, Your Honor, I believe that
12 in -- in Morales this Court looked at the system that was
13 in place in -- in California and determined whether there
14 was a sufficient likelihood that it would have the impact
15 of increasing the sentences. In Georgia what the
16 respondents want is an overlay of the Morales factors that
17 were determined to be important for California onto
18 Georgia's system.

19 QUESTION: But in any case, with respect to the
20 numbers, your position is the numbers are really
21 irrelevant.

22 MR. BRASHER: That's correct, Your Honor. And,
23 in fact, this Court in Connecticut Board of Pardons v.
24 Dumschat said that no matter how frequently a form of
25 executive clemency is exercised, that does not give rise

1 to a constitutional protection. And in that case, 75
2 percent of inmates --

3 QUESTION: But we -- we have -- but we have a -
4 - we have an ex post facto standard that relies upon risk
5 of increased sentence. And your position is that the
6 numbers are irrelevant.

7 MR. BRASHER: Your Honor, my position is that
8 there -- there are no numbers that can give rise to --
9 under this system because the board retains the ultimate
10 discretion to determine whether the inmate gets out, that
11 any accumulation of numbers is fallacious because --

12 QUESTION: Mr. Brasher, let -- let me try it
13 another way. The California statute, as the Court pointed
14 out, dealt with a very small category of people, double
15 murderers, and the interval was 1 year to 3 years. Here
16 it's a much larger group. It's anyone who gets life.

17 MR. BRASHER: Well, Your Honor, I take issue
18 with that, first of all. And that was -- that was a point
19 that the Eleventh Circuit got wrong, and that is they said
20 that it -- it includes people that must necessarily expect
21 to be paroled. Well, of course, inmates in California
22 have a legal expectation of parole.

23 QUESTION: But let's just take it with people
24 who -- it does cover people who get life sentences.
25 Right?

1 MR. BRASHER: It -- it -- yes, the -- the --

2 QUESTION: And -- and that is a much broader
3 class than people who commit double murders.

4 MR. BRASHER: Correct.

5 QUESTION: And --

6 MR. BRASHER: It includes life-sentenced inmates
7 who have been denied parole.

8 QUESTION: It -- we're dealing with a much
9 larger population and a much longer interval. Doesn't it
10 just stand to reason that there are going to be people who
11 would have gotten out if it were only 3 years who won't
12 get out if it's 8?

13 MR. BRASHER: No, Your Honor, because the -- the
14 idea of the 8-year rule that's been -- that's been
15 advanced by respondents is again fallacious because the
16 rule is only what it is to each individual inmate. As the
17 numbers that Justice Souter referred to demonstrate, the
18 rule is not an 8-year rule because then 100 percent of the
19 inmates would be set off for 8 years. In fact, it's --
20 it's a rule that applies an 8-year cap to the
21 reconsideration interval and allows the board, the same
22 board that makes the determination if that inmate ever
23 gets out, to determine how frequently they should consider
24 it.

25 Under that theory, what we're -- ultimately what

1 we're doing is the board has made a -- this -- made a
2 determination that this person is not getting out of
3 prison, but yet, the -- to read it this way, it's going to
4 force the board to reconsider that inmate unnecessarily
5 for three times when the board has already made the
6 determination that they're not going to get out.

7 QUESTION: May I ask just one question on your
8 view? Am I correct in understanding that you would say it
9 would be perfectly all right if, instead of changing the
10 system which had an initial hearing after 7 years and
11 subsequent hearings every 3 years -- now they changed it
12 to an 8-year interval. It would have been okay simply to
13 say after your first hearing, no more hearings?

14 MR. BRASHER: No, Your Honor, because that would
15 foreclose the exercise of the board's discretion, and
16 ultimately that's --

17 QUESTION: No more hearings unless the board
18 decides to -- of its own motion, no -- no more routine
19 hearings.

20 MR. BRASHER: Your Honor, I believe that the --
21 that the board --

22 QUESTION: That's my -- my example. Would that
23 be okay?

24 MR. BRASHER: Well, Your Honor, I believe that
25 the board could extend the reconsideration time table as

1 long as it wants to because --

2 QUESTION: No, not -- not the board. I'm asking
3 you about a rule. The new rule is just like the one we've
4 got except and instead of saying they're entitled to a
5 hearing every 8 years, they say they're not entitled to
6 any hearing unless the board decides to grant them one.

7 MR. BRASHER: Well, Your Honor, I said the board
8 because this is the board's rule. This is a -- a rule
9 that's promulgated by the board.

10 QUESTION: Right.

11 MR. BRASHER: Yes, I believe that's -- I believe
12 that's perfectly appropriate. And the reason is because
13 ultimately, it's the discretion of the board that -- that
14 this relies upon, unlike in California where these rules
15 were statutes imposed upon the board by the -- by the
16 legislature in California. Here, obviously the difference
17 between the two systems is that --

18 QUESTION: Well, under that view, since it's a
19 board-imposed rule, they could simply say, we'll give you
20 one hearing and that's the end of the ball game.

21 MR. BRASHER: No, Your Honor, I don't believe
22 that's so because, again, that would foreclose the board's
23 opportunity to exercise its discretion.

24 QUESTION: They could always change their mind
25 and adopt a new rule.

1 MR. BRASHER: Your Honor, I -- I'm not saying
2 that the -- that the rule doesn't have the force and
3 effect of law. Of course, it does. However, I think that
4 under your hypothetical, Your Honor, that is foreclosing
5 the discretion of the board, unlike here where the board's
6 discretion is not foreclosed. And in -- and in Morales,
7 this Court --

8 QUESTION: Well, what was accomplished by the
9 change to 8 years then? Did they accomplish anything?

10 MR. BRASHER: Yes, Your Honor. The board freed
11 itself to review inmates that in its determination --
12 since it makes the decision as to whether these inmates
13 are ever released, it freed the board to review those
14 inmates that do have a near-term likelihood for success
15 unlike inmates like Respondent Jones who doesn't.

16 QUESTION: Why couldn't they do that -- why
17 couldn't they do that under my hypothetical? No more
18 automatic review. No review unless we decide in a
19 particular case we want to have it.

20 MR. BRASHER: Your Honor, I do believe that's
21 correct, but I -- I understood -- I understood Your Honor
22 to amend the hypothetical to say that they wouldn't
23 review, and that would foreclose discretion. In this
24 particular circumstance, under the rule as it exists,
25 their discretion is not foreclosed.

1 QUESTION: No, it would never foreclose
2 discretion because if you -- you've explained -- the very
3 heart of your argument I think is that the board has
4 ultimate discretion. It made the rules. Therefore, it
5 could change the rule tomorrow.

6 MR. BRASHER: Yes, Your Honor, it could but if
7 it foreclosed discretion, it -- it could only apply that
8 prospectively. It could not apply that retrospectively
9 because that would change the availability of the
10 discretion and that would impact the Ex Post Facto Clause,
11 as opposed to here where ultimately any inmate that's
12 sentenced to life sentence, the only thing that will ever
13 get that inmate out of prison is a decision by the parole
14 board that he should be paroled.

15 And in Morales, this Court said that it was the
16 fact that -- that extraordinary reconsideration was not
17 foreclosed by the statute that saved it and not the fact
18 that it was specifically provided for, as it is here. It
19 is explicit in the -- in the procedure that the board can
20 do that, and in fact the lodged documents demonstrate that
21 they are doing that in fact.

22 Furthermore, that procedure is merely a
23 reflection --

24 QUESTION: Are you relying on the policy
25 statement that was issued in 1996?

1 MR. BRASHER: Your Honor, that policy statement
2 was, in fact, issued at the time that the board began to
3 apply those retroactively. That's been --

4 QUESTION: First answer my question. Are you
5 relying on that policy statement?

6 MR. BRASHER: Yes, I am.

7 QUESTION: Now, my second question is, was it in
8 effect at the time he had his first parole hearing?

9 MR. BRASHER: Yes, it was. And, Your Honor,
10 that was addressed in the --

11 QUESTION: So, the -- the respondent has
12 misrepresented the facts on page 2 and 3 of his brief.

13 MR. BRASHER: Your Honor, the -- the fact of the
14 matter is that that policy was in place. The one that was
15 presented in our motion for summary judgment --

16 QUESTION: Well, wait a minute.

17 MR. BRASHER: -- had a date on it of 1996.

18 QUESTION: You're going pretty fast and I'm kind
19 of slow.

20 MR. BRASHER: I'm sorry.

21 QUESTION: The 1996 policy didn't change
22 anything?

23 MR. BRASHER: Correct. The 1996 policy did not
24 change anything. The same substantive policy was in
25 effect when Mr. Jones was set off in 1995. And that was

1 explained in our briefs before the Eleventh Circuit. What
2 -- what occurred was that the board, when they produced a
3 copy, a -- a verified copy, produced the most recent one
4 which had a 1996 date on it. In fact, I represent to the
5 Court that -- that that, as we represented to the Eleventh
6 Circuit, was in effect at the time.

7 However, that policy is merely a reflection of
8 the board's previously existing discretion to review any
9 inmate at any time.

10 QUESTION: Why did they issue the 1996 statement
11 if it didn't change anything?

12 MR. BRASHER: Your Honor, I -- I don't know why
13 they -- why they -- perhaps it changed some irrelevant
14 verbiage in -- in the policy, but the fact of the matter
15 is that the policy regarding the ability and the
16 availability of reconsideration, extraordinary
17 reconsideration, was in effect at that time.

18 QUESTION: And what is that policy of
19 extraordinary reconsideration? Does that mean that any
20 time a prisoner says I'd like a hearing, he'll get it?

21 MR. BRASHER: No. What it means is that the
22 board, which ultimately has the discretion to determine
23 whether they get out, can determine whether the facts and
24 circumstances which they present --

25 QUESTION: Well, what triggers -- what triggers

1 that kind of a decision by the board? It can't be
2 triggered by an application by the inmate. What else
3 would trigger it?

4 MR. BRASHER: Well, it can be -- it can be
5 triggered by an application of the inmate, but perhaps --
6 perhaps I haven't made myself clear.

7 QUESTION: You haven't.

8 MR. BRASHER: The -- the fact of the matter is
9 that the board makes the determination whether the inmate
10 has demonstrated the -- the kind of -- of change in
11 circumstances particular to that inmate.

12 QUESTION: But does it do it on its own
13 initiative? The board goes out and examines what's going
14 on in the prison population and --

15 MR. BRASHER: Certainly, it could do that as
16 well based on --

17 QUESTION: Does it in fact do that? Is that
18 what you're telling me?

19 MR. BRASHER: Yes, it does, because the --
20 because the board has parole officers at many of the
21 prisons throughout the State, in addition to the fact that
22 the -- that the parole board constantly receives
23 information from the Department of Corrections.

24 QUESTION: Well, does the board -- under the
25 procedure you describe, does it on its own motion bring up

1 cases and say, well, the -- we'll move this guy ahead or
2 we'll hold this guy back?

3 MR. BRASHER: Yes, Your Honor, based upon
4 information that they might receive from someone other
5 than -- than the inmate. Perhaps the Department of
6 Corrections might communicate to the board that an inmate
7 -- his circumstances have changed. Now, that can be a lot
8 of different things, and whether it's important enough --
9

10 QUESTION: I don't know if I'd want to wait too
11 long, if I were the inmate, for -- for the guard to tell
12 them that my circumstances had changed.

13 MR. BRASHER: Well, Your Honor, I believe that
14 that ignores the fact that -- that the inmate is always
15 free to bring to the -- bring to the board's attention any
16 change in circumstances which he or she feels are
17 sufficient to warrant reconsideration.

18 QUESTION: So, the -- the inmate on his own can
19 make an application.

20 MR. BRASHER: Yes, most assuredly, Your Honor.
21 And in fact, that happens constantly. Inmates are
22 bringing information to the board's attention. However -
23 -

24 QUESTION: Is there anything in the record to
25 show that any inmate has been released at one of these

1 intermediate inmate-requested hearings?

2 MR. BRASHER: Yes, Your Honor. In fact, the
3 first set of lodged documents demonstrates that 10 inmates
4 were extraordinarily reconsidered -- excuse me -- during
5 fiscal year 1999 and 5 of those inmates were actually
6 released based upon that extraordinary reconsideration.
7 That's exactly -- that's exactly the scenario --

8 QUESTION: On the prisoner's petition?

9 QUESTION: 1999, which was after the decision of
10 the court of appeals -- the court of appeals?

11 MR. BRASHER: Pardon me, Your Honor?

12 QUESTION: In 1999, after the decision of the
13 court of appeals, that happened?

14 MR. BRASHER: Your Honor, I believe that the
15 decision of the court of appeals was rendered in January
16 of '99 and --

17 QUESTION: Later on they -- there are some of
18 these. But before the decision of the court of appeals,
19 is there anything in the record to show that any inmate
20 had been released pursuant to an inmate-requested
21 interview that was not on the automatic date?

22 MR. BRASHER: No, Your Honor. And the reason is
23 because the case was decided on summary judgment. Summary
24 judgment motions were filed by both the plaintiff, Mr.
25 Jones, and by the board. Cross motions for summary

1 judgment is the basis upon which this was decided.

2 QUESTION: Did that prevent you from putting in
3 such evidence, if it existed?

4 MR. BRASHER: No, Your Honor, it did not because
5 as the court -- as the district court below found and as
6 the Eleventh Circuit below found that the case could be
7 decided as a matter of law.

8 We put this -- we put this before the Court
9 because of the information that respondents put in their
10 brief trying to indicate that this was a mere pipe dream,
11 that in fact it never happened. In fact, it does happen,
12 and these numbers are not intended, by any stretch of the
13 imagination, to demonstrate how it always happens because
14 these are merely anecdotal -- anecdotal examples that were
15 recalled by the staff because they don't keep the numbers
16 to determine on an annual basis how many extraordinary
17 reconsideration inmates are released because, again, we go
18 back to the central point, and that is these are
19 individual determinations.

20 QUESTION: Just a minute, Mr. Brasher.

21 MR. BRASHER: Yes, Your Honor.

22 QUESTION: To what extent are we dealing here
23 with information that has been supplied in briefs by the
24 -- either your side or the other side that wasn't before
25 the district court or the court of appeals?

1 MR. BRASHER: Well, Your Honor, I think that
2 there -- there is information that's before this Court
3 that wasn't before the court of appeals or the district
4 court. But ultimately none of that information matters
5 because we have to go back to the fact that the law
6 requires the board to engage in individualized
7 determinations as to each inmate. And any accumulation or
8 agglomeration of statistics is merely that.

9 QUESTION: Just -- as to the material that you
10 say is before us what wasn't before the district court or
11 the court of appeals, is there disagreement between you
12 and your opponent as to any of the facts in -- in that
13 material?

14 MR. BRASHER: Your Honor, that issue hasn't
15 specifically been addressed, but I would assume that --

16 QUESTION: But so, you --

17 MR. BRASHER: Yes --

18 QUESTION: I take it you're familiar with your
19 brief.

20 MR. BRASHER: Yes, I am.

21 QUESTION: And you're familiar with your
22 opponent's brief --

23 MR. BRASHER: I am, Your Honor.

24 QUESTION: -- and all the filings.

25 MR. BRASHER: Yes.

1 QUESTION: Is there any disagreement between you
2 and your opponent as to any factual matters that are in
3 that classification?

4 MR. BRASHER: I do not disagree with the facts
5 included in the 12-year average, for instance. What I
6 disagree with is the manner in which it's -- it has been
7 represented to this Court, that that actually represents
8 anything more than a snapshot from one group of -- group
9 of inmates that were actually released when they
10 represented only 1 percent of the life-sentenced inmate
11 population.

12 So, yes, I -- to answer the Court's question, I
13 don't disagree with the facts, but that's like saying,
14 well, I may -- may or may not disagree with a particular
15 fact, but I do disagree with the way it has been
16 portrayed. And I think that's where the -- that's where
17 the fallacy is.

18 QUESTION: You disagree with the inferences to
19 be drawn from the facts.

20 MR. BRASHER: Correct. And the inference that
21 should be drawn from the fact is that it doesn't matter
22 because it doesn't tell us anything. As I -- as I was --
23 as I was answering previously, for every inmate that was
24 released at the 7-year initial consideration date, another
25 inmate had to have served 12 years to make an average of

1 -- excuse me -- had to have served 19 years to make an
2 average of 12 years. And the -- again, those numbers
3 don't tell us anything. It -- it would be possible for 50
4 inmates to be paroled in a single year with an average of
5 12 years served and not a one of them would have served 12
6 years.

7 So, what does that tell us? That tells us that
8 the board ultimately is making individualized
9 determinations based upon the individual facts and
10 circumstances of the inmates to determine whether they
11 should be paroled.

12 QUESTION: Did I understand you to say a second
13 ago that those who are -- the figures from which the 12-
14 year average was computed showed that only 1 percent of
15 the total prison population is -- of the total life
16 sentence prison population is, in fact, released before
17 the expiration of their lives?

18 MR. BRASHER: Before the expiration of -- of
19 what --

20 QUESTION: Their lives.

21 MR. BRASHER: Their lives? No, Your Honor.

22 QUESTION: You referred to 1 percent. What does
23 the 1 percent refer to?

24 MR. BRASHER: Your Honor, the -- the numbers --
25 the number that has been put in respondent's brief, the

1 12-year average number --

2 QUESTION: Yes.

3 MR. BRASHER: Less than 50 inmates were paroled
4 in 1992 where these numbers came from. In 1992, there
5 were approximately 4,000 life-sentenced inmates in
6 Georgia. So, therefore, it was approximately 1 percent of
7 the life-sentenced inmates that were released on parole
8 that year.

9 QUESTION: During that year.

10 MR. BRASHER: During that year.

11 QUESTION: During that one year.

12 MR. BRASHER: That particular year. I apologize
13 if I -- if I misrepresented that.

14 QUESTION: You've stressed -- it's really the
15 core of your argument -- that the board has discretion.

16 MR. BRASHER: Yes, Your Honor.

17 QUESTION: When you look at this case, initially
18 you think, well, of course, the inmate is better off if
19 the board must exercise its discretion every 3 years than
20 every 8. But then your answer to that is, well, what
21 we're looking at is risk. There's just no -- very slight
22 probability that there's going to be any difference.

23 MR. BRASHER: In addition --

24 QUESTION: And --

25 MR. BRASHER: Sorry, Your Honor.

1 QUESTION: But -- but then you tell us that
2 statistics are unimportant. And it -- it seems to me that
3 -- that that's inconsistent with the defense that you must
4 make, that what we're talking about here is a matter of
5 risk. And then you say, we're talking about a matter of
6 risk, but statistics aren't important. I don't understand
7 that.

8 MR. BRASHER: Well, Your Honor, I think that --
9 that the -- the key issue here is that it's the board's
10 discretion exercised on an individual basis that leads to
11 the determinations made by the board. And in fact --

12 QUESTION: But under the old rule, that
13 discretion had to be exercised every 3 years.

14 MR. BRASHER: But doesn't that reduce --

15 QUESTION: And then your -- but -- and so the -
16 - the way you get out of that is to say, well, it's not
17 going to make any difference. But you give us no
18 statistics.

19 MR. BRASHER: But, Your Honor, doesn't that
20 reduce parole reconsideration to a war of attrition and
21 assume that the board is -- board's will is going to be
22 overborne merely by having to reconsider someone more
23 frequently when they themselves had made the determination
24 that that inmate is not going to get out and doesn't have
25 a legitimate expectation of parole at any time during the

1 set-off period, whether that set-off period is 2 years, 7
2 years, or as in Mr. Jones' case, 8 years?

3 That presupposes that the board doesn't know
4 what it's doing with -- with the cases. And in fact, it
5 does because the board is making that individualized
6 determination. It's looking at Mr. Jones alone and
7 saying --

8 QUESTION: No, but the way we know what the
9 board is going to do is to see how -- A, how it exercises
10 its discretion or, B, the statistical risk of its not
11 granting parole during the extended period. And you say
12 that the latter is completely irrelevant. I don't
13 understand that.

14 MR. BRASHER: Well, Your Honor, again that
15 trivializes the fact that the board makes individualized
16 determinations. The board --

17 QUESTION: I am really -- I'm getting impatient
18 with hearing that response, individualized -- it seems to
19 me, you know, the science of statistics is based upon the
20 proposition that you could look at a series of
21 individualized determinations and draw a -- a general
22 conclusion from the agglomeration of those individualized
23 determinations. Now, do you disagree with the science of
24 statistics?

25 MR. BRASHER: I do not, Your Honor, but --

1 QUESTION: Well, then it -- then it does no good
2 to keep responding these are all individualized
3 determinations. We know that. But the fact is, when you
4 look at -- at the span of them over a number of years, you
5 can draw some generalized conclusions. And if, before
6 this change was put into effect, the individualized
7 determinations let out 50 percent of the lifers before
8 their term was up and afterwards it let out only 5 percent
9 of the lifers before their term was up, that would be
10 significant despite the fact that they're all individual
11 determinations.

12 MR. BRASHER: But, Your Honor, because of the
13 individualized determination, there is no way to know that
14 it was the change that had anything to do with that.

15 QUESTION: But there were individualized
16 determinations in Morales too, and we paid attention to
17 the statistics there I think.

18 MR. BRASHER: Well, Your Honor, I think that --
19 I don't recall the particular statistics that this Court
20 paid attention to except that the -- the key in Morales
21 was that the burden was placed on the inmate to
22 demonstrate that there had been an increase in the measure
23 of punishment. And that's why this Court was careful to
24 say that it was the availability, for instance, of -- it
25 was the fact that extraordinary reconsideration was not

1 foreclosed which allowed that -- allowed that statute to
2 be okay.

3 Again, if we compare California's statute with
4 Georgia's statute, we're comparing a system that creates
5 an expectation of parole with one that does not. And
6 there -- that is important not because it's a due process
7 case but because in California's system something was
8 being taken away. Something that was protected by the
9 Constitution was being taken away, and that is the
10 expectation of parole by possibly delaying a
11 reconsideration. However, in Georgia's that is not being
12 taken away. So, therefore, the existence of the same
13 safeguards in Georgia, of course, militates toward finding
14 that Georgia's statute is -- passes muster on the -- under
15 the Ex Post Facto Clause just like California's did.

16 Your Honor, ultimately the only change that has
17 taken place in this case is how frequently the -- the
18 board must reconsider Mr. Jones after denying him parole
19 and determining that it is not reasonable to conclude that
20 he will be paroled in the interim of the set-off. Any
21 conclusion that this change increases the quantum of
22 punishment is merely speculative.

23 We would ask this Court to reverse the decision
24 of the Eleventh Circuit.

25 I'd ask that I -- that I could keep the

1 remainder of my time for rebuttal.

2 QUESTION: Very well, Mr. Brasher.

3 Ms. Kertscher, we'll hear from you.

4 ORAL ARGUMENT OF ELIZABETH S. KERTSCHER

5 ON BEHALF OF THE RESPONDENT

6 MS. KERTSCHER: Mr. Chief Justice, and may it
7 please the Court:

8 In order to understand why the retroactive
9 application of Georgia's 8-year rule does pose a
10 significant risk to inmates of increased confinement, I
11 think it is important to first focus on the facts of the
12 system. And there are a number of facts about this
13 system, none of which are disputed by petitioners, that
14 really illustrate where the risk is inherent in the
15 system.

16 First of all, we know that in Georgia
17 consideration is an absolute prerequisite to -- to parole
18 release. If an inmate is not considered for parole or
19 reconsidered for parole, that inmate will not be released
20 on parole.

21 Second of all, we know that in Georgia when the
22 board considers or reconsiders an inmate for parole, the
23 board makes not one but two determinations. The first
24 determination is whether that inmate is entitled to parole
25 today, and the board is correct, that over that

1 determination they have broad discretion.

2 But the board also makes a second determination
3 that's the determination that we're talking about today,
4 and that is what is the maximum possible interval that
5 should take place between the present consideration and
6 the next one. And it is that determination that is the
7 problem here.

8 In Georgia, these --

9 QUESTION: But the board surely has a good deal
10 of discretion in making that judgment too, does it not?

11 MS. KERTSCHER: Mr. Chief Justice, you're
12 correct that they do have discretion over the number of
13 years, but that discretion is limited by the maximum
14 number of years that they can defer the decision. Under
15 the 3-year rule, they can set the next consideration any
16 time during that 3 years, but must set it at least within
17 the next 3 years. Under the 8-year rule, they have
18 discretion to add an additional 5 years onto --

19 QUESTION: You said they have discretion. Who
20 created these rules?

21 MS. KERTSCHER: Your Honor, the board created
22 the rules.

23 QUESTION: The board itself, right?

24 MS. KERTSCHER: That's correct.

25 QUESTION: So, this is unlike a system in which

1 you have a board that's operating under a -- under a
2 prescribed rule that's established by the legislature.
3 Presumably the same board that said we're not going to
4 consider these things automatically except at 8-years
5 intervals could have said, yes, we'll -- we'll let them
6 apply every 8 years, but you know, we've been too lenient
7 and we are not -- we're just not going to allow paroles as
8 readily as we have allowed them in the past. Would --
9 would that have violated your -- your client's
10 constitutional rights?

11 MS. KERTSCHER: I believe so if that's applied
12 retroactively --

13 QUESTION: Really.

14 MS. KERTSCHER: -- as opposed to prospectively.

15 QUESTION: So, I mean, who appoints the board?
16 Who appoints the board?

17 MS. KERTSCHER: The board -- I believe the --
18 the Governor appoints the board members to serve 7-year
19 terms.

20 QUESTION: Suppose the Governor -- you have a
21 law and order Governor, and he says, we have a board of
22 paroles under my predecessor that was just letting -- it
23 was just -- you know, the jail -- the jail gates were open
24 for life-termers to get out. I'm a law and order
25 Governor, and when I get in, I'm going to appoint a tough

1 parole board. And he does that. He appoints a tough
2 parole board. That violates a prisoner's constitutional
3 rights?

4 MS. KERTSCHER: No, not to appoint a tough
5 parole board, but to change the policies retroactively in
6 a way that would pose an increased risk of confinement --
7

8 QUESTION: It isn't retroactively. It's -- it's
9 just in the future. I mean, from now on, we're just not
10 going to listen to you every 8 years. Why is that any
11 different from saying from now on we're going to be
12 tougher? We're not going to let lifers out as -- as much
13 as we did in the past.

14 MS. KERTSCHER: There is a distinction, Your
15 Honor. That -- that distinction is under the hypothetical
16 you proposed, you may have a less receptive board, but you
17 still have a board that is going to consider you.

18 QUESTION: No. I would say my -- mine is even
19 worse. You know for sure. I mean, you're just saying,
20 well, there's less of a chance that you'll get out. But
21 under my hypothetical, it's for sure that -- that you're
22 not going to get out as readily as you did before. We are
23 going to be tougher. This board has just said, well, you
24 know, we're going to let you come and bring things to us.
25 We're just not going to automatically reconsider it as

1 often as we used to.

2 I -- I fail to see how the one does not
3 constitute a violation and the other one does. And -- and
4 I certainly don't think the former does. I think if you
5 want a tough parole board, that's up to the people.

6 MS. KERTSCHER: Well, Your Honor, I think there
7 is a distinction, and the distinction is in this case the
8 board is depriving the inmates of the ability to present
9 their case to the board altogether, and that's a very
10 different situation.

11 QUESTION: Well, but that's -- that's not true.
12 He can -- as we've heard, he can present the fact that he
13 has changed circumstances and say on the basis of that,
14 please reconsider him.

15 MS. KERTSCHER: I think there's -- I don't
16 believe that that's a meaningful process that's an
17 adequate substitute for an automatic consideration. And
18 -- and there are a number of things that I'd like to say
19 about this exceptional review process that the board
20 relies so heavily on.

21 First of all, that process is not in the rules.
22 It's only in a policy statement.

23 QUESTION: Well, so what.

24 QUESTION: What difference -- what difference
25 does it make?

1 MS. KERTSCHER: The Eleventh Circuit found that
2 it made a very significant --

3 QUESTION: But I'm not asking the Eleventh
4 Circuit. I'm asking you.

5 MS. KERTSCHER: That's correct, Your Honor. I
6 -- I apologize.

7 The difference is that the board is bound to
8 follow its rules. It's not bound to follow its policy
9 statements and, in fact, has argued in cases such as
10 Sultenfuss that the policy statements are completely
11 unenforceable.

12 QUESTION: What has that to do with us?

13 QUESTION: What difference does it make?

14 MS. KERTSCHER: I -- I think it makes a
15 significant difference because, first of all, inmates can
16 enforce the rules. Second of all, the rule itself tells
17 the inmates what's going to happen. The existence of a
18 policy statement that's not published with the rules, that
19 can only be obtained by going through the board and asking
20 for it, really shows that inmates are not going to have a
21 good opportunity to --

22 QUESTION: Well, does -- does bear on the ex
23 post facto claim?

24 MS. KERTSCHER: I think it does because the
25 petitioners have relied so heavily on this as a substitute

1 for automatic consideration. We know that inmates are
2 entitled to automatic consideration under the 3- and 8-
3 year rules. Providing a substitute of exceptional
4 reconsideration changes the equation dramatically. It
5 puts a burden on the -- on -- on the prisoners to
6 articulate persuasively to the board why they think they
7 should get the consideration that they would have been --
8

9 QUESTION: Well, no. That certainly can be a
10 part of your ex post facto argument, but I thought you
11 were arguing because the policy statement wasn't readily
12 available, that makes it less, somehow, of a policy
13 statement. I -- I don't see why that has any bearing on
14 the ex post facto argument.

15 MS. KERTSCHER: I -- I think it's important
16 because I think we need to consider whether or not that
17 inmates will be able to take meaningful advantage of this
18 process.

19 QUESTION: Where do we find in our ex post facto
20 jurisprudence any statement like that?

21 MS. KERTSCHER: Well, I'm not sure the Court has
22 specifically addressed anything like --

23 QUESTION: I'm quite sure it hasn't.

24 MS. KERTSCHER: Well, I still think it's
25 relevant to the determination. We need to look at whether

1 or not this system provides inmates with a way of
2 minimizing the risk that if they're deprived of their 3-
3 year considerations, that they'll --

4 QUESTION: Is -- is it a risk or is it an
5 opportunity of -- of grace? This is a board not just of
6 paroles, but it's a board of pardons and paroles. Isn't
7 it?

8 MS. KERTSCHER: That's correct, Your Honor.

9 QUESTION: And it has entire discretion to
10 pardon or to parole. Right?

11 MS. KERTSCHER: That's correct.

12 QUESTION: Now, when your client committed a
13 crime, he knew he was going to get life, that -- that that
14 was, you know, the -- the sentence for it. It seems to me
15 he goes to jail knowing, you know, I -- I did the crime, I
16 -- I do the time. If I get lucky, someone will be
17 generous and give me the grace of a pardon or, if less
18 than that, the grace of a parole.

19 But, you know, many States -- the -- the pardon
20 power resides with the Governor. And I ask you the same
21 kind of a question. If -- if the people elect a -- a
22 hard-nosed Governor who says he's not going to give any -
23 - any pardons in the future, can someone who -- who
24 committed a crime under the previous bleeding heart
25 Governor come in and say, ah, constitutional violation

1 because all of a sudden my chances of getting a pardon are
2 less?

3 MS. KERTSCHER: Your Honor, again, I -- I think
4 that that's a very different question --

5 QUESTION: Why is it different? Parole is a
6 matter of grace. Nobody is entitled to any parole just as
7 nobody is entitled to any pardon under this system, and
8 it's the very same board that gives the pardon and that
9 gives the paroles.

10 MS. KERTSCHER: Well, it's true --

11 QUESTION: What is your client entitled to? I
12 -- I don't understand --

13 MS. KERTSCHER: My client -- my client is
14 entitled to be considered. And parole -- it may be an act
15 of grace and it may be a decision over which this board
16 has a lot of discretion, but parole is no less a part of
17 the inmate's sentence because there's discretion inherent
18 in that decision.

19 This Court has --

20 QUESTION: May I -- may I interrupt you there
21 and just follow up on that? Why is your client -- why is
22 the inmate entitled to be considered? What is the source
23 of that entitlement?

24 MS. KERTSCHER: Your Honor, I -- I think the
25 source of that entitlement is because my client's sentence

1 carries with it the right to be considered for parole.

2 There's a --

3 QUESTION: How? How?

4 MS. KERTSCHER: Well, we can start from the
5 proposition that there's a very big difference between a
6 life sentence and a life sentence without possibility of
7 parole. If you accept that those two sentences are
8 different and that the board could not retroactively
9 change a life sentence into one without possibility of
10 parole --

11 QUESTION: What do -- what do the statutes of
12 Georgia say about entitlement to consideration for parole
13 if one has a life sentence subject to parole?

14 MS. KERTSCHER: That the inmate is entitled to
15 have his first consideration after 7 years and is entitled
16 to automatic reconsiderations thereafter at a period of
17 time that the board shall define.

18 QUESTION: Okay.

19 MS. KERTSCHER: The board defined it prior to
20 1985 as 3 years. After 1985, it changed it to 8.

21 QUESTION: So, in -- in effect, the legislature
22 sets a kind of minimal scheme and -- and then it -- I
23 guess it's fair to say, it mandates that the board set the
24 terms of the scheme beyond that 7 -- beyond the period of
25 that first 7-year consideration.

1 MS. KERTSCHER: That's correct. And -- and the
2 -- the legislature does tell the board that it has to have
3 periodic reconsiderations after an initial -- initial
4 denial of parole.

5 QUESTION: So, then I think Mr. Brasher was not
6 correct in saying that under the legislation the board can
7 simply say we won't -- our rule is that after the initial
8 7 years, which we must do by legislation, then the rest is
9 up to us and we can have a rule that says no automatic
10 periods. You say under the statute they couldn't do that.

11 MS. KERTSCHER: That's correct. The statute
12 does require the board to set reconsiderations at
13 intervals that it -- it can determine. So --

14 QUESTION: So, it's a kind of delegation to fill
15 in the detail to the -- which is quite different from
16 saying, board, you have discretion to either have
17 intervals or not have intervals.

18 MS. KERTSCHER: That's correct, Your Honor.

19 The board's discretion is significantly more
20 limited than they have portrayed it to this Court. They
21 do have discretion over the ultimate determination of
22 whether an inmate should be paroled, but --

23 QUESTION: Well, they also have determination, I
24 take it from your answer to Justice Ginsburg, to decide
25 the intervals after the 7 years.

1 MS. KERTSCHER: Right. That's correct, Your
2 Honor. And the -- the issue is what -- is not whether
3 they can prospectively change those intervals. It's going
4 back to retrospectively whether or not by changing those
5 intervals, the statutes pose an increased risk of
6 confinement.

7 QUESTION: Why is that element of discretion any
8 more subject to control by the prisoner than is the more
9 significant element of discretion, namely, whether to be
10 lenient or strict in the substantive decision of parole or
11 not? You -- you can't seriously argue -- I don't think
12 you can -- that -- that if you get a tougher parole board,
13 your client has suddenly been -- been subjected to an ex
14 post facto law. That's just the luck of the draw, you
15 know. Some people happen to be sentenced with a lenient
16 parole board. I have a tough one. Too bad.

17 MS. KERTSCHER: That's correct, Your Honor.

18 QUESTION: And because that's within the
19 discretion of the board, the substantive decision whether
20 to release or not.

21 Here, it's a much less significant thing subject
22 to the discretion of the board. How often are we going to
23 automatically reconsider this -- this person? I mean,
24 gee, compared to the other one, this is insignificant.

25 MS. KERTSCHER: I -- I think it's very

1 significant, Your Honor. It's -- it's certainly
2 significant to my client and to the other 70 percent of
3 inmates who are being deferred over such a long period of
4 time on a very cursory review. What the board is doing
5 here is -- is predicting over an 8-year span of time,
6 based solely on a review of the inmate's files, that
7 there's no way that the inmate will become suitable for
8 parole in the meantime.

9 QUESTION: But --

10 QUESTION: Isn't -- isn't your -- your -- isn't
11 your argument that the Ex Post Facto Clause comes into it
12 because there is a change in the rule and the rule, in
13 effect, is what the Ex Post Facto Clause means by law?

14 MS. KERTSCHER: That's correct, Your Honor.

15 QUESTION: I mean, that -- that's what I was
16 sort of getting at by my earlier question. And I -- I
17 understood your -- your answer to be that -- or at least I
18 took the significance of your answer to be that because
19 the legislature mandates the board to set these rules, I
20 presume these rules have, in effect, the significance of
21 law for purposes of the Ex Post Facto Clause.

22 MS. KERTSCHER: That's correct, Your Honor. And
23 the Eleventh Circuit, in a separate case, had already
24 addressed that issue and it found that these rules do have
25 the force of law in the State of Georgia.

1 QUESTION: Well, that being so, I mean, I -- I
2 didn't understand the Eleventh Circuit at all, that part
3 of their opinion dealing with the rule. I didn't
4 understand it because I've never heard of a constitutional
5 principle that says that it's unconstitutional to have a
6 constitutional rule because maybe you'd change it.

7 I mean, that -- that -- so -- so I take it that
8 the issue in front of us is the old policy was the policy,
9 every 3 years no matter what. The new law or rule or
10 policy or reg is that you don't get considered for 8 years
11 automatically but we postpone it only if we decide that
12 earlier consideration would do you no good, and if there's
13 either a change in circumstance or any new information,
14 tell us and we will decide whether to give you the hearing
15 sooner. Okay? Now, that is what, I take it, we're trying
16 to decide.

17 Now, you -- now, the question is why is that
18 harsher?

19 And number one, you say maybe the person won't
20 know about it. Well, I haven't found anything in the
21 record here that suggests anybody doesn't know about it.

22 Number two, because there's a burden of inertia.
23 I agree with you on that. You're right.

24 Now, is there a number three, a number four, a
25 number five, and are there any statistics? Because

1 despite the theory of it, I would be impressed if
2 previously half the people got out and now only 5 percent
3 get out. So, what's the situation? What's argument
4 three, four, and five?

5 I mean, frankly, number two by itself doesn't
6 seem that strong because --

7 MS. KERTSCHER: Certainly.

8 QUESTION: -- you know, they're -- they're going
9 to make a conscious determination to -- so, I want to get
10 your other points.

11 MS. KERTSCHER: All right. We'll start with
12 argument number three. Argument number three involves
13 some of this new evidence that the board has submitted in
14 connection with its reply brief.

15 And I do need to remind the Court that my client
16 was pro se at the court below, moved for leave to conduct
17 discovery, and was denied. The board filed an early
18 motion for summary judgment. So, my client has never had
19 the opportunity to conduct discovery from the board and to
20 get the kind of statistical evidence that Justice Breyer
21 is talking about. But --

22 QUESTION: If there's no statistical evidence, I
23 think that would be the end of it for your client for the
24 reason that common sense suggests it doesn't make that
25 much difference whether you get a hearing every 3 or 8

1 years as long as there's a clear determination that a
2 hearing wouldn't do you any good.

3 MS. KERTSCHER: Well, I think -- I think we have
4 got some very good and -- and concrete evidence of why
5 these determinations are important, and I'd like to draw
6 the Court's attention to the case of Gary Newberry.

7 You'll find a summary of his case at the appendix page 4
8 to the petitioner's reply brief in this case.

9 Mr. Newberry is 1 of these 10 inmates who
10 somehow secured this exceptional reconsideration process
11 that the board relies so heavily on. We --

12 QUESTION: Where -- where is this information
13 coming from, Ms. Kertscher?

14 MS. KERTSCHER: It's -- it's attached to the
15 petitioner's reply brief at appendix page 4.

16 We don't know why Mr. Newberry got this
17 exceptional consideration.

18 QUESTION: Is this record information or is
19 this --

20 MS. KERTSCHER: It's not in the record below.
21 It's -- it's something -- it's new evidence that the board
22 has gotten from its own files that we've never had the --
23 the opportunity to review. But I think it -- it
24 illustrates exactly why this system does pose a risk to
25 inmates.

1 We don't know why Mr. Inmate got this
2 exceptional review, but what we know about him is he was
3 first considered for parole in January 1996. At that time
4 the 8-year rule was applied to him. His next year -- his
5 next reconsideration was set a full 8 years later for
6 January of 2004. Something happened to Mr. Newberry, and
7 3 and a half years later, he somehow managed to secure
8 this exceptional reconsideration.

9 He was reconsidered in July of 1999, and at that
10 point the board found that he was suitable for parole and
11 released him at that time.

12 And what I see in the case of Mr. Newberry is a
13 situation in which if Mr. Newberry was suitable for parole
14 in July of 1999, he might very well have also been
15 suitable for parole in January 1999, which is when the
16 reconsideration would have automatically taken place if
17 the 3-year rule had been applied to him, a full 6 months
18 earlier.

19 QUESTION: The Eleventh Circuit in this case
20 reversed the judgment of -- of the district court. The
21 district court had ruled against you and the Eleventh
22 Circuit ruled in your favor. And it -- it remanded the
23 case to the district court for further proceedings, but it
24 -- it decided, did it not, that -- that the Georgia parole
25 system was violating the Ex Post Facto Clause?

1 MS. KERTSCHER: That's correct.

2 QUESTION: So, what were the -- what was the
3 purpose of the remand rather than entry of judgment
4 outright?

5 MS. KERTSCHER: My client had also brought
6 damages claims.

7 QUESTION: Ah.

8 MS. KERTSCHER: And I believe that was the
9 purpose of the remand, to determine whether or not those
10 were appropriate.

11 QUESTION: I -- I take it then that the court of
12 appeals thought it could decide the ex post facto question
13 without any more statistics than it had. And I don't
14 believe it had much of anything.

15 MS. KERTSCHER: That's correct, that it did not
16 have statistics. I think the Eleventh Circuit thought
17 that it could look at the system and see risk inherent in
18 the system. And I -- I think that that's entirely
19 appropriate here. The -- the Court has always said that
20 in ex post facto cases, you know, we don't -- the Court
21 has never required statistical proof.

22 In the latest case, Martin v. Haddox, this
23 Court's opinion authored by -- by Justice O'Connor said
24 that when we're trying to figure out whether or not the
25 law should be applied retroactively, we're supposed to

1 make a common sense, functional judgment. And I think
2 that's exactly what the Eleventh Circuit did here. They
3 looked at the rules, used the common sense to see that
4 there was risk inherent in these rules --

5 QUESTION: Well, there's going to be risk --
6 what's actually bothering me that I haven't worked out is
7 that if I agreed with you on this and if the only reason
8 would be because instead of you getting it automatically,
9 they say -- they say, look, we're only not going to give
10 it to people we'll never let out, and we have this system
11 where we get new information. If I were to agree with you
12 on that, then would we start having to go into all kinds
13 of procedural rule changes?

14 I mean, suppose for example, they say summary
15 judgment now is going to be possible, and somebody would
16 argue, oh, you know, if you didn't have a summary judgment
17 rule, then we would have presented the evidence more
18 thoroughly at the parole hearing. Or if they say certain
19 witnesses couldn't come in. I mean, once we get into
20 these procedural businesses, are we going to have to start
21 looking at every one and working out just how -- is there
22 some conceivable disadvantage or -- do you see my problem?

23 MS. KERTSCHER: I think the Court --

24 QUESTION: I'd like you to address it.

25 MS. KERTSCHER: -- addressed that when it

1 decided the Morales case, and it said there are a lot of
2 -- of little rules that we could invalidate under the same
3 theory if we agree with the respondent in that case who
4 was trying to -- to advocate the Court to say that -- that
5 there was -- that any conceivable risk, no matter how
6 attenuated, would be an ex post facto violation.

7 The Court in Morales was not willing to go that
8 far, and instead, the Court said, we're going to look at
9 see whether there's something more than that, whether
10 there's a -- a sufficient risk, you know, a meaningful
11 risk. And -- and I think that -- that that provides a
12 basis to distinguish those types of procedural cases.

13 Looking at what the Court considered in Morales
14 I think provides us with a very clear contrast that can
15 really help us see why there is risk inherent in the
16 system. In Morales, the Court was looking at a case that,
17 because of the procedural way these statute operated --
18 the statutes operated and because of the protections that
19 were given to the inmates under that system, both before
20 the initial determination was made and after, the Court
21 was able to say, with a very high level of confidence,
22 that it was -- that there was no reason to conclude that
23 the amendment would have any effect on any prisoner's term
24 of confinement.

25 QUESTION: May I ask you one question about the

1 -- you called our attention to the material at the
2 appendix to their reply brief. I notice that the court of
3 appeals decision was in January of 1999. And I notice
4 that every one, if I read it correctly, of these
5 reconsiderations was after January of 1999, each of those
6 in the appendix. Do you think there's any causal
7 connection between the decision of the court of appeals
8 and those statistics?

9 MS. KERTSCHER: Your Honor, I don't know the
10 answer to that question.

11 QUESTION: Do you know if there are any
12 reconsiderations comparable to these before January 1999?

13 MS. KERTSCHER: I don't know the answer to that
14 question because we were never able to conduct discovery
15 to try to look and -- and see whether or not any
16 reconsiderations were -- were being given prior to the
17 Eleventh Circuit's opinion in this case.

18 But I think we can look at the way the system
19 operates, and we can see the risk inherent in it. And we
20 can contrast the -- the way this statute operates to the
21 ones that the -- the Court was considering in Morales.

22 First of all, when this board is trying to
23 predict over an 8-year period of time whether or not an
24 inmate is going to become suitable for parole in the
25 intervening years, it's doing so on a very scant review.

1 It's only looking at the inmate's file. The inmate does
2 not get a hearing, does not get counsel. And based solely
3 on that limited review, the board decides -- you know,
4 makes an individualized determination -- that the prisoner
5 will not become suitable for parole during the intervening
6 8 years. That --

7 QUESTION: Was that what was -- was that
8 procedure different when it was a 3-year -- I mean, did
9 the inmate get counsel then?

10 MS. KERTSCHER: No, Your Honor. It did not.

11 QUESTION: So, that hasn't changed.

12 MS. KERTSCHER: That has not changed, but it's
13 still important because when you consider what the board
14 is trying to do here, it's trying to predict basically an
15 inmate's future, and the longer the period of time that
16 the -- the board has to do this over, you know, the --
17 when you're talking about a period of time as long as 8
18 years, then I think it's a harder question and I think
19 that the board might have to do a little bit more in order
20 to accurately predict the consequences to an inmate over
21 an 8-year period of time.

22 QUESTION: Suppose they say, which is also true,
23 time is limited, resources are limited, there are a lot of
24 prisoners, and we want to allocate our time better. We
25 want to spend more time with the people who really have a

1 chance of getting out and less time with those who have no
2 chance.

3 MS. KERTSCHER: Well, Your Honor, there -- the
4 Court has considered and rejected a number of attempts to
5 do the same thing under other scenarios. The Court has
6 never held that you can violate the Constitution just
7 because it's going to be less expensive to do so.

8 In this case the petitioners have not given us
9 any information about --

10 QUESTION: Well, I'm not -- I'm not sure that
11 meets the gravamen of the question, which also concerns
12 me. The board has serious responsibilities and it says
13 we'd rather have a system in which we take the most likely
14 candidates and look at them and rather than be required to
15 sit in routine hearings that are going to amount to
16 nothing. So, we're going to go to an individualized
17 determination in which we'll see whether there is some
18 information that comes up to us that makes these people
19 look like they're really eligible for parole. That --
20 that's sensible to me, and that has to do with risk. With
21 risk.

22 MS. KERTSCHER: Your Honor, that is sensible,
23 and that's why it's appropriate for the board to do this
24 on a prospective basis. But the Court -- the board cannot
25 sacrifice other inmates in order to focus better

1 attention --

2 QUESTION: No, but the argument is that it's not
3 sacrificing them. The argument is that everybody knows
4 what it is if we have to consider it every 3 years. We'll
5 consider it. I considered it. Denied. Okay? Next one.
6 Denied. Next one. Denied. And we can do better for each
7 individual, rather than going through that pro forma
8 basis, to really take the ones that do have some chance,
9 not zero chance, and looking at them carefully. We all
10 know what it is to say no, no, no, no, no in 2 seconds.
11 But also when you really consider something, a guy who has
12 a chance to get out sometimes will get out where he
13 wouldn't have with pro forma consideration. So, they're
14 saying we're doing it for everybody.

15 MS. KERTSCHER: Well, Your Honor, and again
16 prospectively I think that might very well make sense.
17 But when you're talking about retrospective application of
18 this rule, by depriving these inmates of -- of
19 consideration over a period of up to 5 years, that does
20 pose a risk to these inmates that if their circumstances
21 change and if during that 5-year period, if somebody were
22 to look at them and -- and consider the facts of their
23 case, that that board might very well vote to release
24 them. By depriving them of that consideration, then you
25 have harmed the inmate, you have extended the time period

1 in jail. And that's -- for that reason, even if it would
2 be cost effective to do that, we can't go back
3 retrospectively and implement this rule in such a way that
4 inmates will be harmed in the process.

5 Going back to --

6 QUESTION: But the policy does say that in the
7 event of a change in circumstance, the information can be
8 given to the board and they say they consider it.

9 MS. KERTSCHER: The policy does say that they'll
10 consider it. However, as we see in the case of Gary
11 Newberry, that doesn't necessarily mean that you're going
12 to get the consideration and that you're going to get out
13 at the same time that you would have had the review been
14 conducted at the -- the 3-year interval.

15 QUESTION: Was that policy statement in effect
16 at the time of the decision in this case?

17 MS. KERTSCHER: Your Honor --

18 QUESTION: The decision concerning this -- this
19 inmate.

20 MS. KERTSCHER: The date of that policy is 1996.
21 My client's decision -- my client was considered in 1994
22 -- 5. The board tells us today that there was a previous
23 version of this policy statement in effect. Whether or
24 not that's the case or what that --

25 QUESTION: Before the -- you heard your opponent

1 argue today, were you aware of the fact that there was a
2 -- the 1996 policy statement was -- really repeated
3 something that had been long in effect?

4 MS. KERTSCHER: No, Your Honor, and although
5 counsel for petitioners said that came up at the Eleventh
6 Circuit, that -- that never was addressed at the Eleventh
7 Circuit level.

8 I'm willing to -- to accept counsel's
9 representations that there was such a rule in 1995 because
10 this policy statement and -- and the ability of inmates to
11 request this expedited consideration has been shown not to
12 be a sufficient safeguard to really prevent these inmates
13 from spending longer times in jail under the 8-year rule
14 than they would under the 3-year rule.

15 What's also noticeably absent in this system is
16 a safeguard that this Court relied on very heavily in the
17 Morales case, and that was the ability of the California
18 board, after the fact, to go back and advance the ultimate
19 release date in the event that there had been an error or
20 some unforeseen change in circumstances. And it -- that
21 finding allowed this Court to find that there was
22 basically no way an inmate in the California system was
23 going to slip through the cracks and wind up spending more
24 time in jail as a result.

25 We don't have anything like this here. If the

1 -- if the inmate is considered and found appropriate --
2 found to be an appropriate candidate for release, then the
3 inmate is released at that time. There's no opportunity
4 after the fact to go back and correct for it. And if we
5 have an inmate like we have with Gary Newberry, who's
6 considered 6 months later than he would have been under
7 the 3-year rule, there's no opportunity to go back and
8 give Mr. Newberry or anybody like that the 6 months that
9 he's lost under this -- under the application of the new
10 rule.

11 In conclusion, Your Honor, the Georgia system on
12 its face provides far too great a risk for inmates to
13 serve an increased term of confinement under the 3 --
14 under the 8-year rule than they would under the 3-year
15 rule. We know that in the -- the State of Georgia,
16 regardless of the precise number of years of an average
17 life sentence, we know that inmates are regularly released
18 that are serving life sentences. Last year the board
19 tells us that they released 14.4 percent of the life-
20 sentenced inmates that they considered under this rule.

21 My client, who is 71 years old and has served 22
22 years in prison for his crimes, despite the severity of
23 his crimes, is entitled to the consideration that the
24 legislature provided for and entitled to a full and fair
25 considerations of all the -- all the relevant facts that

1 might bear on a determination of whether or not he's
2 suitable for parole. By -- by pushing his determination
3 back for an 8-year period when he would have been entitled
4 to review every 3 years under the old rule my client and
5 others similarly situated to him are at a very
6 significant, very meaningful level of risk of an increased
7 sentence. And for that reason, the decision of the
8 Eleventh Circuit should be affirmed.

9 Thank you.

10 QUESTION: Thank you, Ms. Kertscher.

11 Mr. Brasher, you have 1 minute left.

12 REBUTTAL ARGUMENT OF CHRISTOPHER S. BRASHER

13 ON BEHALF OF THE PETITIONERS

14 MR. BRASHER: Your Honor, very briefly. The
15 protections in Morales existed only because that system
16 created an expectation of parole. It created a liberty
17 interest.

18 QUESTION: Mr. Brasher, may I ask you -- I
19 wasn't clear on your argument whether you were making a
20 distinction between a statute -- say, a statutory change
21 from 3 years to 8 years and the rule change.

22 MR. BRASHER: I was not, Your Honor. However, I
23 think that it's important to note that contrary to
24 counsel's argument, the board is not required to set
25 periodic reconsiderations by the statute. The statute

1 merely calls on the board, if it adopts rules, to have
2 rules regarding consideration and reconsideration. The
3 board could, therefore --

4 QUESTION: Do we have the text of the statute
5 someplace?

6 MR. BRASHER: Pardon?

7 QUESTION: Do we have the text of the statute
8 someplace?

9 MR. BRASHER: No, Your Honor, I don't believe
10 so, but I believe that the -- that the citation is
11 Official Code of Georgia Annotated, 42-9-42 I believe.
12 But it's very close to that statute that is the rule that
13 -- the law that gives the board the ability to adopt these
14 and promulgate these rules. It doesn't require periodic
15 reconsideration as has been argued by respondents.

16 Finally, as to Mr. Newberry's case, Mr.
17 Newberry's case was well publicized in the news media.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
19 Brasher.

20 The case is submitted.

21 (Whereupon, at 12:15 p.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

J. WAYNE GARNER, FORMER CHAIRMAN OF THE STATE BOARD OF PARDONS AND PAROLES OF GEORGIA, ET AL., Petitioners v. ROBERT L. JONES.
CASE NO: 99-137

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY: Diana M. May
(REPORTER)