Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GARNER, FORMER CHAIRMAN OF THE STATE BOARD OF PARDONS AND PAROLES OF GEORGIA, ET AL. *v.* JONES

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

No. 99–137. Argued January 11, 2000– Decided March 28, 2000

Respondent escaped while serving a life sentence for murder, committed another murder, and was sentenced to a second life term. Georgia law requires the State's Board of Pardons and Paroles (Board) to consider inmates serving life sentences for parole after seven years. At the time respondent committed his second offense, the Board's Rule 475–3–.05(2) required that reconsiderations for parole take place every three years. Acting pursuant to statutory authority, the Board subsequently extended the reconsideration period to at least every eight years. The Board has the discretion to shorten that interval, but declined to do so when it applied the amended Rule in respondent's case, citing his multiple offenses and the circumstances and nature of his second offense. Respondent sued petitioner Board members, claiming that retroactive application of the amended Rule violated the *Ex Post Facto* Clause. The District Court denied respondent's motion for discovery and awarded petitioners summary judgment. The Eleventh Circuit reversed. It found that the amended Rule's retroactive application was necessarily an *ex post facto* violation and that the Rule differed in material respects from the change in California parole law sustained in *California Dept. of Corrections* v. *Morales*, 514 U. S. 499. It did not consider the Board's internal policies regarding its implementation of the Rule, finding, among other things, that such policies were unenforceable and easily changed.

Held:

1. The Court of Appeals' analysis failed to reveal whether retroac-

tive application of the amendment to Rule 475–3–.05(2) violated the *Ex Post Facto* Clause. The controlling inquiry is whether such application creates a sufficient risk of increasing the measure of punishment attached to the covered crimes. *Morales, supra,* at 509. Here, the question is whether amended Rule 475–3–.05(2) creates a significant risk of prolonging respondent's incarceration. That risk is not inherent in the amended Rule's framework, and it has not otherwise been demonstrated on the record. While *Morales* identified several factors convincing this Court that California's law created an insignificant risk of increased punishment for covered inmates, the Court was careful not to adopt a single formula for identifying which parole adjustments would survive an *ex post facto* challenge. States must have due flexibility in formulating parole procedure and addressing problems associated with confinement and release. This case turns on the amended Rule's operation within the whole context of Georgia's parole system. Georgia law gives the Board broad discretion in determining whether an inmate should receive early release. Such discretion does not displace the *Ex Post Facto* Clause's protections, but the idea of discretion is that it has the capacity, and the obligation, to change and adapt based on experience. The statutory structure, its implementing regulations, and the Board's unrefuted representations regarding its operations do not support respondent's conclusion that the Board will not exercise its discretion in the period between parole reviews. The Georgia law is qualified in two important respects. First, it vests the Board with discretion as to how often to set an inmate's date for reconsideration, with an 8-year maximum. Second, the Board's policies permit expedited reviews in the event of a change in circumstance or new information. These qualifications permit the Board to set reconsideration dates according to the likelihood that a review will result in meaningful considerations as to whether an inmate is suitable for release. The Board's policy of providing reconsideration every eight years when it does not expect that parole would be granted during the intervening years enables the Board to ensure that those prisoners who should receive parole come to its attention. Given respondent's criminal history, it is difficult to see how the Board increased his risk of serving a longer time when it set an 8-year, not a 3-year, interval. Yet, even he may seek earlier review upon showing changed circumstances or new information. The Eleventh Circuit's supposition that the Rule seems certain to result in increased incarceration falls short of the rigorous analysis required by the *Morales* standard. When the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive appli-

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cation will result in a longer period of incarceration than under the earlier rule. On the record in this case, it cannot be concluded that the change in Georgia law lengthened respondent's actual imprisonment time. Pp. 5–11.

2. The Eleventh Circuit erred in not considering the Board's internal policy statement regarding how it intends to enforce its rule. At a minimum, such statements, along with the Board's actual practices, provide important instruction as to how the Board interprets its enabling statute and regulations, and therefore whether the amended Rule created a significant risk of increased punishment. Absent a demonstration to the contrary, it is presumed that the Board follows its statutory commands and internal policies. Pp. 11–12.

3. The Eleventh Circuit's analysis failed to reveal whether the amended Rule, in its operation, created a significant risk of increased punishment for respondent. He claims that he has not been permitted sufficient discovery to make this showing. The matter of adequate discovery is one for the Court of Appeals or, as need be, for the District Court in the first instance. P. 12.

164 F. 3d 589, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, THOMAS, and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in part in the judgment. SOUTER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined.