No. 13-12738

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BEN E. JONES,

Plaintiff-Appellant,

v.

STATE OF FLORIDA PAROLE COMMISSION, ET AL.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
NO. 6:13-CV-00745-PCF-DAB

APPELLANT'S SUPPLEMENTAL BRIEF

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**CERTIFICATE OF INTERESTED PARTIES
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to 11th Cir. R. 26.1-1, below is a list of persons and entities who may be interested in the outcome of this case:

1. Ben E. Jones, Appellant.
2. Meghan Greenfield, Attorney for Appellant.
3. Shay Dvoretzky, Attorney for Appellant.
4. Sarah J. Rumph, General Counsel, Florida Commission on Offender Review.
5. Jennifer Parker, General Counsel, Florida Department of Corrections.
6. Patricia C. Fawsett, U.S. District Court Judge, Middle District of Florida.

July 30, 2014

Respectfully submitted,

/s/ Meghan E. Greenfield
Counsel for Plaintiff-Appellant

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 11th Cir. R. 28-1(c), Plaintiff-Appellant Ben E. Jones requests oral argument.

In 2010, Florida amended its parole law to reduce the required frequency of parole interviews. When Mr. Jones was sentenced, Florida law entitled him to a parole interview once every two years. The current law requires the state to provide prisoners convicted of certain offenses like Mr. Jones with a parole interview only once every seven years. This case addresses whether the 2010 amendment, which applies retroactively to all prisoners convicted of the identified offenses, violates the Ex Post Facto Clause of the U.S. Constitution.

No published cases in the Eleventh Circuit address this important and recurring issue. The Court appointed pro bono counsel to represent Mr. Jones pursuant to Addendum Five of the Regulations of the United States Court of Appeals for the Eleventh Circuit. The Court directed counsel to file a supplemental brief addressing *Garner v. Jones*, 529 U.S. 244 (2000), and *Ca. Dep't of Corrs. v. Morales*, 514 U.S. 499 (1995). Oral argument will help the Court to resolve these issues of first impression within this Circuit.

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STATEMENT OF JURISDICTION

Ben E. Jones brought an action under 42 U.S.C. § 1983. (ECF No. 1.) The district court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331. On May 15, 2013, the district court entered final judgment dismissing the case. (ECF No. 5.) Mr. Jones filed a timely notice of appeal on June 10, 2013. (ECF No. 8.) This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

In 2010, Florida amended its parole statute to reduce the required frequency of parole interviews. At the time Plaintiff-Appellant Jones was sentenced, parole interviews were required once every two years. Now, the parole statute requires that prisoners like Mr. Jones receive a parole interview only once every seven years. This case presents two issues:

1. Whether this reduction in the required frequency of parole interviews facially violates the Ex Post Facto Clause of the U.S. Constitution where there are no established procedures allowing a prisoner to seek an earlier interview in the event of changed circumstances.

2. Whether, at a minimum, Mr. Jones is entitled to discovery to demonstrate that, as applied to him, this reduction in the required frequency of parole interviews puts him at a significant risk of increased punishment and thus violates the Ex Post Facto Clause.

STATEMENT OF THE CASE

In 1979, Mr. Jones was convicted of two counts of sexual battery and sentenced to life in prison with the possibility of parole.[1] Mr. Jones began serving his sentence that same year. *Id*.

On May 10, 2013, Mr. Jones filed a complaint in the Middle District of Florida pursuant to 42 U.S.C. § 1983 alleging, among other things, that Florida's statutory amendment reducing the frequency of required parole interviews violated the Ex Post Facto clause of the U.S. Constitution. (ECF No. 1.) Four days later, on May 14, 2013, the district court dismissed Mr. Jones's complaint, without leave to amend, for failure to state a claim, and entered final judgment. (ECF No. 4, 5.) Mr. Jones filed a motion for reconsideration on June 3, 2014, seeking leave to amend his complaint. (ECF No. 6.) The district court denied the motion for reconsideration three days later, on June 6, 2013, without addressing Mr. Jones's request to amend. (ECF No. 7.) Mr. Jones filed a timely notice of appeal on June 10, 2014. (ECF No. 8.)

[1] *See* Fla. Dep't of Corr. Offender Info. Search, http://www.dc.state.fl.us/AppCommon/ (search DC No. 071075) (hereinafter Corr. Website). This record is properly the subject of judicial notice. *See United States v. Glover*, 179 F.3d 1300, 1302 n. 5 (11th Cir. 1999) ("A court may take judicial notice of its own records and the records of inferior courts."); Case No. 13-cv-00745 (M.D. Fla.), ECF No. 1 at 6.)

After briefing was completed, this Court appointed pro bono counsel pursuant to Addendum Five of the Regulations of the United States Court of Appeals for the Eleventh Circuit. (Case No. 13-12738 (11th Cir.), ECF No. 24 at 1.) The Court instructed counsel "to file substitute briefs discussing *Garner v. Jones*, 529 U.S. 244, 255, 120 S. Ct. 1362, 1370, 146 L. Ed. 2d 236 (2000), and *Cal. Dep't of Corrs. v. Morales*, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 558 (1995)." (*Id*. at 2.)[2]

STATEMENT OF THE FACTS AND STATUTORY BACKGROUND

A. Mr. Jones Has Been Incarcerated for Nearly 35 Years.

In October of 1979, Mr. Jones was convicted of two counts of sexual battery in the circuit court for St. Lucie, County, Florida, and was sentenced to life in prison with the possibility of parole. (Corr. Website; Case No. 13-cv-00745 (M.D. Fla.), ECF No. 1 at 6.) Mr. Jones was taken into custody on November 9, 1979. (*See* Corr. Website.) Now, nearly 35 years later, and at age 70, Mr. Jones remains incarcerated. (*Id*.)

[2] Pursuant to this instruction, this supplemental brief addresses only the Ex Post Facto Clause issue. Mr. Jones continues to assert the other issues raised in his opening brief that he drafted pro se. (*See* ECF No. 12.)

B. The Parole Law in Effect In 1979 Required that Mr. Jones Receive Parole Interviews Every Two Years.

When Mr. Jones was sentenced, Florida's parole law provided that prisoners must receive an initial parole interview "within 1 year after the initial date of confinement in execution of the judgment" to establish a "presumptive parole release date." Fla. Stat. § 947.16(1) (1979). This presumptive parole release date was "binding on the commission," § 947.172(3) (1979), and could be postponed "only for good cause in exceptional circumstances," § 947.173(3). The law further provided that prisoners convicted of non-capital crimes shall receive "subsequent hearings" to reassess the appropriateness of the presumptive parole release date "within 2 years after the initial hearing and every 2 years thereafter." § 947.174(1). The Commission retained discretion to hold a hearing at an earlier time "for good cause." § 947.174(2).

C. Florida's Parole Law was Amended in 2010 and Now Requires Parole Interviews Only Once Every Seven Years.

In 2010, Florida substantially amended its parole law to reduce the frequency of required parole interviews. Instead of requiring interviews every two years, prisoners convicted of sexual battery are entitled to a parole interview "once within 7 years after the initial interview and once every 7 years thereafter if the Commission finds that it is not reasonable to expect that parole will be granted at a hearing during the following years and states the bases for the finding in writing."

Fla. Stat. § 947.174(1)(b) (2013); 2010 Fla. Laws ch. 95, *2. This provision was amended again in 2013 to apply the seven-year interview schedule to prisoners who had been convicted of a wider range of offenses including "kidnapping or attempted kidnapping; or robbery, burglary of a dwelling, burglary of a structure of conveyance, or breaking and entering, or the attempt thereof of any of these crimes, in which a human being is present and a sexual act is attempted or completed." § 947.174(1)(b); 2013 Fla. Laws ch. 119, *2.

Once an interview date is set, the Commission may modify its schedule and hold an earlier interview only in very limited circumstances. Specifically, a prisoner "may be considered" for an earlier, "special interview" at the recommendation of the Commission if he saves the life of a Department of Corrections employee or protects such an employee from "assault or injury," "assists in preventing an escape or results in the recapture of an escaped inmate," "provid[es] relevant information for investigations … that may result in arrest or prosecution," or "for good cause in *exceptional* circumstances." Fla. Admin. Code Ann. § 23-21.014(1)-(4) (2014) (emphasis added). There are no statutory or regulatory procedures that allow a prisoner himself, rather than the Commission, to petition for an earlier interview.

D. In Practice, Parole is No Longer a Realistic Possibility for Parole-Eligible Prisoners.

The Commission's application of the amended parole law has, practically speaking, essentially eliminated the possibility of parole for parole-eligible prisoners. At the time Mr. Jones was sentenced, a large number of prisoners were paroled annually by the Florida Parole Commission (now called the Florida Commission on Offender Review). In the fiscal year 1979-80, 5,891 prisoners were paroled, out of a total prison population of 19,722. *See* Fla. Dep't of Corr., Ann. Rep. FY 1980-81, at 70 (1981). In 2013, by contrast, only *twenty-two* prisoners were paroled (more than *five times* the prison population in 1979), Fla. Parole Comm'n, 2013 Ann. Rep., at 10 (2013), out of a prison population of 100,884, Fla. Dep't of Corr., Office of the Inspector Gen., Ann. Rep. FY 2012-13, at 18 (2013).[3]

[3] This dramatic decline in the number of prisoners paroled is not typical of other states. Other states still regularly parole prisoners. For example, more than 10,000 prisoners in Georgia state prisons were released on parole in 2013, Ga. Dep't of Corr., Inmate Statistical Profile, Inmates Released During CY2013, at 40 (Jan. 2, 2014), out of a prison population of approximately 39,000 prisoners, Ga. Dep't of Corr., Average Counts-Summary (July 3, 2013). And, in California, more than 300 prisoners serving life sentences were released on parole in the first four months of this year alone, Calif. Bd. of Parole H'rgs, Lifer Scheduling and Tracking System 2014 (2014), out of a prison population of approximately 133,000 inmates, Calif. Dep't of Corr. and Rehab., Office of Public & Emp. Commc'ns, at 6 (2013). Texas also routinely paroles prisoners, releasing more than 24,000 prisoners on parole in 2013, out of a total prison population of 150,000. *See* Tex. Dep't of Criminal Justice, Statistical Rep. FY 2013, at 34, 1 (2013).

Indeed, the Florida Senate recognized that its amendments to the parole interview schedule would prolong the incarceration of some prisoners. The legislative history to Senate Bill 742, the bill that extended the seven-year parole interview schedule to prisoners convicted of additional offenses, noted that reducing the frequency of parole interviews would not reduce costs because any savings from holding fewer interviews would be offset by the "additional cost to incarcerate an inmate whose interview schedule is extended from two years to seven years if he or she is paroled at the seven year interview interval and would also have been paroled if the interview had been conducted earlier." S. 2013, Bill Analysis and Fiscal Impact Statement S.B. 742, at 3 (Fla. 2013).

E. The Amended Parole Law Has Prevented Mr. Jones From Becoming Eligible for Parole.

Mr. Jones is currently incarcerated at the Central Florida Reception Center in Orlando. (ECF No. 1 at 12.) He was last interviewed by the Commission in 2012. (*Id*. at 7.) Under amended parole law, his next required interview is not until 2019.

To be released on parole, Mr. Jones must complete certain "transitional goals." (*Id*. at 8.) One of his transitional goals is to attend Florida International University's "Lifer's Program" held at Everglades Correctional Institution. (*Id*. at 7-8.) Because Mr. Jones's next parole interview is not scheduled until 2019, he is

not eligible to attend the program and, thus, cannot become eligible for parole. (*Id*. at 8.)

F. The District Court Summarily Dismissed Mr. Jones's Ex Post Facto Claim Based on Unpublished Case Law and With No Analysis.

On May 10, 2013, Mr. Jones filed a complaint in the Middle District of Florida. He asserted a claim against the State of Florida Parole Commission under 42 U.S.C. § 1983 alleging, among other things, that Florida's amendment to its parole procedures which extended the period of time between required parole interviews violated the Ex Post Facto Clause of the U.S. Constitution. (*Id*.) He claimed that, as applied to him, the new law prolonged his incarceration because it prevented him from meeting his transitional goals and becoming eligible for release. (*Id*.)

Only four days after Mr. Jones filed his complaint, the district court dismissed the complaint sua sponte under the Prison Litigation Reform Act's ("PLRA") screening provision, 28 U.S.C. §1915A(b). (ECF No. 4.) The entirety of the court's reasoning as to Mr. Jones's ex post facto claim was as follows:

> [T]he application of parole guidelines not in effect at the time Plaintiff was sentenced does not amount to an ex post facto violation, nor does it amount to a violation of the separation of powers clause.

(*Id*. at 3.) The court cited two unpublished decisions in support of its conclusion, *Thorne v. Chairperson Fla. Parole Comm'n*, 427 F. App'x 765 (11th Cir. 2011), and *Penoyer v. Briggs*, 206 F. App'x 962 (11th Cir. 2006).[4]

Mr. Jones filed a motion for reconsideration of the decision. He asserted that the district court erred in dismissing his complaint for failure to state a claim "without giving [him] an opportunity to amend." (ECF No. 6 at 1.) The district court denied the motion for reconsideration without addressing Mr. Jones's request to amend his complaint. (ECF No. 7 at 1.)

Mr. Jones timely appealed, (ECF No. 8), and moved to proceed in forma pauperis ("IFP") on appeal, (ECF No. 9). The district court held that Mr. Jones's "appeal is not taken in good faith," and thus that he "is not entitled to appeal as a pauper." (ECF No. 10.)

Mr. Jones then sought leave to proceed IFP in this Court. (Case No. 13-12738 (11th Cir.), ECF No. 3.) Contrary to the district court, this Court held that "Jones's complaint presented a non-frivolous issue" and, accordingly, granted him

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[4] The district court also cited *Schmidt v. Crews*, No. 5:12cv226, 2013 WL 1729110 (N.D. Fla. Mar. 5, 2013). (ECF No. 4 at 3.) This case pertained only to Mr. Jones's separation of powers claim. *See* 2013 WL 1729110, at *4.

IFP status. (ECF No. 9.) Mr. Jones also moved for appointment of counsel, stating that the legal issues presented in his appeal were complex and that he is an elderly male "with a pacemaker, stents," and only limited access to the law library in the medical detention unit where he is housed. (ECF No. 10.) The Court granted this request as well, acknowledging that "appointment of counsel in a civil case is a privilege that requires exceptional circumstances." (ECF No. 24 at 1.) The Court instructed counsel "to file substitute briefs discussing *Garner v. Jones*, 529 U.S. 244, 255, 120 S. Ct. 1362, 1370, 146 L. Ed. 2d 236 (2000), and *Cal. Dep't of Corrs. v. Morales*, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 558 (1995)." (ECF No. 24 at 2.)

STANDARD OF REVIEW

This Court reviews "de novo" a district court's "sua sponte dismissal for failure to state a claim" under 28 U.S.C. § 1915A(b)(1). *Leal v. Ga.Dep't of Corrs.*, 254 F.3d 1276, 1284 (11th Cir. 2001). "A dismissal under § 1915A is governed by the same standards as a dismissal under Rule 12(b)(6)." *Watkins v. Hudson*, Case No. 13-3761, 2014 U.S. App. LEXIS 5386, at *5 (11th Cir. Mar. 24, 2014) (citing *Jones v. Bock*, 549 U.S. 199, 215-16 (2007)); *see also Leal v. Ga. Dep't of Corr.*, 254 F.3d 1276, 1278-79 (11th Cir. 2001) (same). That is, the complaint "need not provide detailed factual allegations" and must only "contain 'sufficient factual matter' to state a claim that is 'plausible on its face.'" *Id.* (citing

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). This standard is "hostile to summary dismissal based on the face of a complaint, and becomes more so when a pro se complaint from a prisoner is considered, because such complaints are to be read very liberally." *Wallace v. Smith*, 145 F. App'x 300, 301 (11th Cir. 2005); *see also Boxer X v. Harris*, 437 F.3d 1107, 1110 (11th Cir. 2006) ("Pro se pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed.").

A district court's decision to grant or deny leave to amend is reviewed for abuse of discretion. *Watkins*, 2014 U.S. App. LEXIS 5386, at *5 (citing *Forbus v. Sears Roebuck & Co.*, 30 F.3d 1402, 1404 (11th Cir. 1994)). A district court abuses its discretion in denying amendment where a "pro se plaintiff's complaint, if more carefully drafted, might state a claim." *Watkins*, 2014 U.S. App. LEXIS 5386, at *5 (citing *Bank v. Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991)).

SUMMARY OF ARGUMENT

The Ex Post Facto Clause of the U.S. Constitution prohibits a state from passing a retroactive law that creates a significant risk that a prisoner will face increased punishment. The 2010 amendments to the Florida parole law (the "amended parole law"), which reduce the frequency of required parole interviews from once every two years to once every seven years, run afoul of this simple prohibition both on their face and as applied to Mr. Jones.

First, the amended parole law is facially invalid because it allows prisoners fewer opportunities to shorten their time in prison and, in the time between required interviews, functionally makes them ineligible for early release. The law broadly applies to prisoners convicted of various offenses including many prisoners who are currently eligible for parole. Moreover, the law lacks any "safety valve" provision to allow these prisoners to seek an expedited interview in the event of changed circumstances.

Second, even if the amended parole law survives a facial challenge, Mr. Jones may prevail by showing that, as applied to him, the law creates a significant risk that he will face a longer prison term. The district court prevented Mr. Jones from making this showing when it dismissed his complaint under the Prison Litigation Reform Act without allowing him discovery. At a minimum, Mr. Jones is entitled to discovery to show that he is at a significant risk of increased

punishment because, along with other reasons, the amended law has made him ineligible to participate in transitional programs that would allow him to be paroled.

ARGUMENT

The district court erred in dismissing Mr. Jones's claim that Florida's amendment to its parole law reducing the frequency of required parole interviews violated the Ex Post Facto Clause of the U.S. Constitution.

Article I, section 10, of the Constitution prohibits the states from passing any "ex post facto Law." The Ex Post Facto Clause "bar[s] enactments which, by retroactive operation, increase the punishment for a crime after its commission." *Garner v. Jones*, 529 U.S. 244, 249, 251-52 (2000). "Retroactive alteration of parole or early release provisions … implicates the Ex Post Facto Clause because such [provisions] are one determinant of petitioner's prison term and the petitioner's effective sentence is altered once this determinant is changed." *Lynce v. Mathis*, 519 U.S. 433, 445 (1997) (citation omitted).

In the parole context, a retroactive change to a law violates the Ex Post Facto Clause, if it creates "a significant *risk* of prolonging [a prisoner's] incarceration," considered "within the whole context of [the] parole system." *Garner*, 529 U.S. at 251-52 (emphasis added); *Dyer v. Bowlen*, 465 F.3d 280, 288 (6th Cir. 2006)

(holding that a prisoner need not "show an *actual* increase in punishment" to prove an ex post facto violation) (emphasis added).

Specifically, a prisoner may prove that an amendment to a parole law violates the Ex Post Facto Clause in two ways. He can show that the amendment is facially invalid because "the framework of the law" creates a "significant risk" of prolonged incarceration for prisoners covered by the law. *Garner*, 529 U.S. at 252. Or, in the alternative, he can show that, "as applied to his own sentence," based on the prisoner's record and the practice of the parole board, "the law created a significant risk of increasing his punishment." *Id.* at 255.

Florida's amendment to its parole law violates the Ex Post Facto Clause both facially and as applied to Mr. Jones.

I. DECREASING THE FREQUENCY OF PAROLE INTERVIEWS WITHOUT ALLOWING A PRISONER TO SEEK EARLIER REVIEW IN ANY CIRCUMSTANCE FACIALLY VIOLATES THE EX POST FACTO CLAUSE.

As discussed above, an amendment to a parole law facially violates the Ex Post Facto Clause where "the framework of the law," as compared to the prior law, creates a "sufficient *risk* of increasing the punishment attached to the covered crimes." *Cal. Dep't of Corrs. v. Morales*, 514 U.S. 499, 509 (1995) (emphasis added). "Whether an individual can show definitively that *he* would have received a lesser sentence is not determinative." *Himes v. Thompson*, 336 F.3d 848, 855 (9th Cir. 2003) (citation omitted). Rather, the facial inquiry "looks to the

challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual," *Weaver v. Graham*, 450 U.S. 24, 33 (1981), to determine whether the law creates a significant risk that prisoners in the class affected by the law will face prolonged incarceration, *see Morales*, 514 U.S. at 508 (analyzing whether "the amendment will have *any* effect on *any* prisoner's actual term of confinement").

A. The Florida Law, On its Face, Plainly Puts Covered Prisoners at a Significant Risk of Increased Punishment.

A law governing the early release of prisoners creates a significant risk of increased punishment where it results in "reduced opportunity [for prisoners] to shorten [their] time in prison," *Weaver v. Graham*, 450 U.S. 24, 33-34 (1981), or, where it makes "ineligible for early release a class of prisoners who were previously eligible," *Lynce*, 519 U.S. at 447. *Weaver* considered a Florida law that reduced the number of "gain time" deductions a prisoner could prospectively earn for good behavior. 450 U.S. at 26. The Supreme Court invalidated the law because it "constricts the inmate's opportunity to earn early release," as compared to the opportunity at the time of sentencing "and thereby makes more onerous the punishment for crimes committed before its enactment." *Id*. at 35-36. Similarly, in *Lynce*, the Supreme Court invalidated another Florida law which cancelled prisoners' accrued provisional early release credits. 519 U.S. at 438-39. The

Court explained that the law "unquestionably disadvantaged" a class of prisoners by making them ineligible for obtaining early release. *Id*. at 446-47.

Florida's amended parole law in this case, like the Florida laws that *Weaver* and *Lynce* invalidated, on its face creates a significant risk that covered prisoners will face increased punishment.

The Florida law applies to a broad class of prisoners, many of whom are parole-eligible. The law, as it stands today, applies to *any* prisoner convicted of the following offenses:

> murder or attempted murder; sexual battery or attempted sexual battery; kidnapping or attempted kidnapping; or robbery, burglary of a dwelling, burglary of a structure of conveyance, or breaking and entering, or the attempt thereof of any of these crimes, in which a human being is present and a sexual act is attempted or completed, or any inmate who has been sentenced to a 25-year mandatory minimum sentence

§ 947.174(1)(b). The law provides that covered prisoners are required to receive a parole interview only once every seven years regardless of the amount of time that they have served or the amount of time remaining in their sentence. During the seven year interval between interviews, there is no realistic possibility that prisoners will be released on parole. It is more likely that covered prisoners would be released on parole if interviews were required every two years, as under the statute in effect at the time Mr. Jones was sentenced.

This delay between required interviews is particularly problematic because the amended parole law lacks any "safety valve" provision to allow prisoners to seek an expedited interview in the event of changed circumstances. Rather, only the Commission *itself* can request an interview before the prisoner's next scheduled interview date, and it may do so in extremely limited circumstances. The law provides that "the commission, for good cause, may at any time request that a hearing examiner conduct a subsequent hearing according to the procedures outlined in this section." Fla. Stat. § 947.174. The Florida Administrative Code, in turn, defines eligibility for an earlier, "special interview" narrowly. Fla. Admin. Code Ann. § 23-21.014(1) (2014). Good cause exists for an earlier interview only where a prisoner (a) saves the life or protects a Department of Corrections employee from "assault or injury," (b) "assists in preventing an escape or results in the recapture of an escaped inmate," (c) "provid[es] relevant information for investigations … that may result in arrest or prosecution," or (d) "for good cause in *exceptional* circumstances." *Id*. (emphasis added).

The absence of a meaningful safety valve substantially increases the risk that the reduced frequency of required parole interviews will result in covered prisoners serving longer prison terms. Among the factors that the Commission considers in determining whether parole is warranted is whether the prisoner has available "extremely strong community resources," whether he has "made restitution to the

victim of this crime," whether he has a "poor medical prognosis," and whether he has a "record of clearly exceptional program achievement." Fla. Admin. Code Ann. § 23-21.010(5)(2)(b), (c), (d), & (h) (2014). These factors are subject to change during the time a prisoner is incarcerated. But, under the Florida parole scheme, prisoners lack the ability to petition for earlier review even if an extraordinary event occurs that would make them a good candidate for release. *See* § 23-21.014(1). Thus, it is a near certainty that some prisoners who would have been paroled if interviews were required every two years will face longer prison terms.

Like the laws at issue in *Weaver* and *Lynce*, the Florida amendment reduces the opportunity for covered prisoners to shorten their time in prison and functionally makes these prisoners ineligible for early release during the time between required parole interviews. *See Lynce*, 529 U.S. at 438-39; *Weaver*, 450 U.S. at 33-34. Thus, the amended parole law, on its face, creates a significant risk that covered prisoners will face increased punishment and thus violates the Ex Post Facto Clause.

B. The Risk of Increased Punishment Created by the Florida Law is Much More Substantial than the Risk Posed by the Parole Laws at Issue in *Morales* and *Garner*.

In *Morales* and in *Garner*, the Supreme Court rejected ex post facto challenges to two laws reducing the frequency of required parole hearings. Unlike

the Florida law at issue here, however, the laws in *Morales* and in *Garner* applied to a narrow class of prisoners for whom parole was unlikely at any time, and provided "safety valves" to allow for prisoners to petition for earlier interviews in changed circumstances.

Specifically, the California law in *Morales* applied only to multiple murderers, 514 U.S. at 503, and allowed the Commission to hold "expedited hearing[s]" based on changed circumstances, *id*. at 513. Likewise, in *Garner*, the Georgia regulation applied only to prisoners serving life sentences, 529 U.S. at 247, and again allowed such prisoners to seek earlier review "in the event of a change in circumstances," *id*. at 256. These factors were essential to the Court's holdings that neither law affected a prisoner's ultimate date of release. *See Garner*, 529 U.S. at 256 (stating that "our analysis rests upon the premise" and that parole board exercises discretion in setting interview dates and that, if the board's assessment of a prisoner's likelihood of parole is incorrect, prisoners "may invoke the policy the Parole Board has adopted to permit expedited consideration in the event of a change in circumstances"); *Morales*, 514 U.S. at 513-14 (stating that an "expedited hearing … would remove any possibility of harm" and thus risk was only "speculative").

Conversely, the amended parole law at issue here applies to a much broader group of prisoners including many who are serving sentences shorter than five

years. *See* Fla. Stat. § 947.174 (providing that the seven-year parole interview schedule applies to prisoners convicted of sexual battery, burglary, and the attempt of these offenses); § 794.011 (defining sexual battery to include second and third degree felonies); § 810.02 (defining certain types of burglary as a second degree felony); § 777.04(4)(d) (providing attempt of a second degree felony is punishable as a third degree felony); § 775.082(3)(d) (providing that imprisonment for a third degree felony may not exceed 5 years). For these prisoners, the amended parole law eliminates any requirement that they be reconsidered for parole during their prison term.

Moreover, as discussed above, the law does not include a meaningful "safety valve" provision to allow a prisoner to seek expedited consideration before his next required hearing. Accordingly, the law here creates a significant risk—not a merely speculative one as in *Garner* and *Morales*—that the delay between required parole interviews will result in increased punishment for prisoners.

II. MR. JONES IS ENTITLED TO DISCOVERY TO SHOW THAT THE AMENDED PAROLE LAW, AS APPLIED TO HIM, VIOLATES THE EX POST FACTO CLAUSE.

At a minimum, the district court's dismissal of Mr. Jones's complaint should be reversed because Mr. Jones was entitled to discovery to show that, as applied to him, the amended parole law put him at "a significant risk of increased punishment." *Garner*, 529 U.S. at 257.

A. A Prisoner is Entitled to Discovery When He Makes Specific Allegations that the Amended Law Potentially Puts Him at Risk of a Longer Prison Term.

As the Supreme Court explained in *Garner*, even if a change to a parole law does not facially create a "significant risk of increased punishment," a prisoner can show an ex post facto violation "as applied to his own sentence." *Id*. at 255-57. Thus, this Court has held that a district court must undertake a "case-by-case" evaluation and "consider evidence of the general operation of the [ ] parole system" as well as "any other evidence a prisoner challenging the regulation may produce that the amended parole regulation … created a significant risk of increasing his punishment." *Harris v. Hammonds*, 217 F.3d 1346, 1349-50 (11th Cir. 2000) (remanding to district court to allow prisoner opportunity to make this showing) (citation omitted). This "individualized assessment" is fact intensive. *See Smith v. Ga. Bd. of Pardons & Paroles*, 160 F. App'x 836, 838 (11th Cir. 2005) (citing *Harris*, 217 F.3d at 1350). Accordingly, it is improper for a district court to dismiss a complaint without permitting discovery where the prisoner has pled specific facts showing that a change to a parole law could potentially lead to a longer prison term. *See Smith*, 160 F. App'x at 839.

For example, in *Smith*, a prisoner argued that a Georgia regulation reducing the frequency of required parole hearings from once every year to once every eight years violated the Ex Post Facto Clause as applied to him because his "bad health

and age, currently 60 years, may lead him to expire in prison before the next scheduled hearing," in effect imposing on him a more severe sentence of life without parole. *Id*. at 837-38. Reversing the district court's dismissal of the complaint, this Court held that these "specific allegations which may or may not be significant to show a violation of the Ex Post Facto clause … are sufficient for an individualized inquiry into the [prisoner's] case" as set forth in *Harris* and remanded the case to the district court. *Id*. at 839.

Numerous other circuits have likewise required discovery where the prisoner has alleged specific facts showing that a change to a parole law could potentially prolong his incarceration. The Fifth Circuit routinely reverses summary PLRA dismissals and remands cases for discovery where, "construed liberally," the complaint alleges a change to a parole law that "could *potentially* create a significant risk of increasing the length of [the prisoner's] prison term to be actually served." *Sears v. Blanco*, 267 F. App'x 393, 395 (5th Cir. 2008) (emphasis added). When a prisoner makes such allegations, the district court has an affirmative obligation to "develop the case and to sift the claims and known facts thoroughly until completely satisfied of either [the claim's] merit or lack of the same." *Olstad v. Collier*, 205 F. App'x 308, 311 (5th Cir. 2006) (reversing PLRA dismissal and remanding case where prisoner alleged that cumulative changes to the Texas parole law put him at risk of a longer prison term).

Sears involved a prisoner's allegation that a Louisiana amendment violated the Ex Post Facto Clause because it "limited the frequency with which he can apply for a commutation or pardon or commutation." *Id*. The Fifth Circuit reversed the district court's PLRA dismissal of the complaint and remanded for "further proceedings" to determine whether, based on the practice of the Louisiana system, this change "created a significant risk of increasing the punishment [that the prisoner] actually will suffer had the previous system remained in effect." *Id*. *See also Howard v. Blanco*, 267 F. App'x 313, 314 (5th Cir. 2008) (reversing PLRA dismissal because prisoner stated a claim based on ex post facto challenge to same Louisiana amendment and remanding for further proceedings); *Robinson v. Blanco*, 307 F. App'x 807, 809 (5th Cir. 2009) (same).

The Sixth Circuit has also held that discovery is typically necessary to evaluate a prisoner's "as applied" ex post facto challenge. *Dyer*, 465 F.3d at 289. 2006). *Dyer* involved a change to a parole law that eliminated mandatory parole when identified criteria were met and granted the parole commission discretion to grant or deny parole when the criteria were satisfied. *Id*. at 282-83. The Sixth Circuit held that discovery was required to allow the prisoner "an opportunity to access data pertaining to the effect of the retroactive application of the parole laws on his own prison term." *Id*. at 290. The court reasoned that discovery is particularly necessary where the parole law at issue allows the parole commission

to exercise discretion. In that situation, the effect of the law on the prisoner will turn on "how the parole board has actually exercised its discretion" in practice. *Dyer*, 465 F.3d at 288. For similar reasons, the Tenth Circuit concluded that a prisoner was entitled to discovery to "determine how the Department [of Corrections] applied the various regulations at issue" to the prisoner so that he could show that Oklahoma's changes to the allocation of "good time credits" put him at risk of a longer prison term. *Henderson v. Sirmons*, 285 F. App'x 558, 562 (10th Cir. 2008).

B. Mr. Jones Has Alleged with Specificity that the Amended Parole Law has Affected His Eligibility for Parole and, thus, Prolonged His Incarceration.

In this case, Mr. Jones alleged that the amended parole law prolonged his incarceration because it has made him ineligible to attend an institutional program that he must complete to "gain parole." (ECF No. 1 at 7-8.) Specifically, Mr. Jones asserts that his eligibility to enroll in the "Lifer's Program" is dependent on the timing of his next parole interview. Because his next parole interview is in 2019, he cannot complete the program, which is required by his "transitional goals," and he therefore cannot become eligible for parole. (*Id.*)

This allegation is consistent with Florida's parole scheme, which considers a prisoner's progress reports and program achievement in determining whether he is eligible for parole. *See* Fla. Stat. § 947.174 (stating that the Commission shall

consider at subsequent interviews "information as is deemed important to the review of the presumptive parole release date, including, but not limited to, current progress reports ...."); Fla. Admin. Code Ann. § 23-21.010(5)(b)h (providing that whether the "inmate has made a record of clearly exceptional program achievement" is a factor in determining whether parole is warranted).

Mr. Jones's allegation that the amended parole law will prolong his incarceration is also supported by broader trends in the practice of the Florida Commission on Offender Review. At the time Mr. Jones was sentenced, the Commission paroled a large number of prisoners annually. In the fiscal year 1979-80, 5,891 prisoners were paroled, out of a total prison population of 19,722 prisoners. *See* Ann. Rep. FY 1980-81, at 70. Since the legislature enacted the amendments at issue here, however, the possibility of parole has become virtually non-existent. In 2013, only *twenty-two* prisoners were paroled, out of a prison population of 100,884, 2013 Ann. Rep., at 10 (number paroled); Ann. Rep. FY 2012-13, at 18 (prison population).

Further showing that discovery is necessary, the Florida parole scheme gives the Commission discretion to grant or deny parole. *See Fla. Parole & Probation Com. v. Paige*, 462 So. 2d 817, 820 (Fla. 1985). Accordingly, discovery is required to allow Mr. Jones to explore "how the parole board has actually exercised its discretion" in practice and whether reducing the frequency of required

parole hearings put him at a significant risk of a longer prison term. *Dyer*, 465 F.3d at 288.

C. The District Court Erred in Summarily Dismissing Mr. Jones Complaint Without Allowing Him Discovery.

The district court's dismissal of Mr. Jones's complaint under the PLRA was improper because the court did not allow him the opportunity to conduct this needed discovery. The district court did not even evaluate whether discovery was appropriate, or undertake any "individualized assessment" of Mr. Jones's allegations. *Smith*, 160 F. App'x at 838 (citing *Harris*, 217 F.3d at 1350); (ECF No. 4 at 3). Instead, it summarily dismissed his claim. The court's analysis in full was as follows:

> [T]he application of parole guidelines not in effect at the time Plaintiff was sentenced does not amount to an ex post facto violation, nor does it amount to a violation of the separation of powers clause.

(*Id.*) In support of this conclusion, the court cited two unpublished decisions, *Thorne v. Chairperson Florida Parole Commision*, 427 F. App'x 765 (11th Cir. 2011) and *Penoyer v. Briggs*, 206 F. App'x 962 (11th Cir. 2006). Both cases are inapposite.

In *Thorne*, the prisoner alleged facts showing that the change in the parole law plainly *did not* create a significant risk that the prisoner would face increased punishment. 427 F. App'x at 768. The prisoner attached to his complaint a

"document showing how [his] presumptive parole release date was calculated" which made clear that he would not have been paroled if his hearing was held at an earlier date because, among other things, he violated parole in the past and posed a risk if released. *Id*. *Penoyer* is also inapposite because it considered only whether a different amendment to the Florida parole law *facially* violated the Ex Post Facto Clause. 206 F. App'x at 966-67.

Mr. Jones alleges that the amended parole law makes him ineligible to participate in a program that he must complete to gain parole. At a minimum, this specific allegation entitles him to discovery to demonstrate that, as applied to him, this amendment has in fact created a significant risk that he will serve a longer prison term. *See Harris*, 217 F.3d at 1350; *Smith*, 160 F. App'x at 839.[5]

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[5] Mr. Jones's complaint, which he drafted pro se, lacks some details regarding the terms of his confinement and his prior parole interviews. (*See* ECF No. 1.) After the district court dismissed his complaint under the PLRA, (ECF No. 4), Mr. Jones sought leave to amend in a motion for reconsideration, (ECF No. 6). The district court rejected this request without analysis. (*See* ECF No. 7.) This rejection was an abuse of discretion. *Watkins*, 2014 U.S. App. LEXIS 5386, at *7 (reviewing dismissal without leave to amend for abuse of discretion and concluding that district court abused discretion because "we cannot say with certainty that allowing [the prisoner] to amend his complaint would be futile."). In the event that this Court concludes Mr. Jones's complaint is not sufficiently detailed, it should remand with instructions to allow Mr. Jones leave to amend. Because a prisoner can demonstrate an ex post facto violation based on the effect of the amended parole law *as applied to him*, and there is no published authority foreclosing Mr. Jones from making this argument, it is far from certain that he would not be able to state a claim if permitted the opportunity to amend. *See Smith*,

CONCLUSION

For the reasons stated above, the decision of the district court should be reversed.

(continued…)

160 F. App'x at 839 (reversing dismissal and remanding case where prisoner alleged on appeal specific facts showing a potential risk of increased punishment).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(A), because it does not exceed 30 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4. I further certify that the brief complies with the typeface and typestyle requirements of Fed. R. App. P. 32(a)(5), (a)(6), because it has been prepared in proportionally spaced typeface using Times New Roman, font size 14.

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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2014, I filed the foregoing Appellant's Supplemental Brief with this Court, by causing a copy to be electronically uploaded and by causing seven paper copies to be delivered by UPS. I further certify that I caused two paper copies of the brief to be served, via UPS on the following counsel:

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