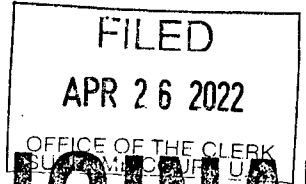


21-7897

No. _____



ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

BARRY SLAKMAN — PETITIONER
(Your Name)

vs.

TERRY E. BARNARD, — RESPONDENT(S)
Chairman - State Board of Pardons & Poles
ON PETITION FOR A WRIT OF CERTIORARI TO

Eleventh Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Barry Slakman / EDC 188860
(Your Name)

Wheeler Correctional P.O. Box 466
(Address)

Alema, Georgia 30411
(City, State, Zip Code)

(912) 568-1731 (Warden)
(Phone Number)

QUESTION(S) PRESENTED

1. Has the 11th Circuit been authorized by the Court to change the interpretation and application of an ex post facto violation within the context of parole by limiting such violation to statutory changes such as in initial parole eligibility, but now to exclude the practices and rules used by the state agency to actually determine parole although those practices/rules have significantly increased petitioner's ~~years~~ incarceration when they were retroactively applied to him as compared to its practices in effect at the time of petitioner's crime and sentencing.
2. Has the Court redefined its requirements for filing a Complaint under the F.R.Civ.P. and effectively reversed the burden of proof required to overcome a defense under F.R.Civ.P. 12(b)(6) such that
 - (a) plaintiff no longer has an assumption of correctness in his factual allegations, and
 - (b) a Complaint must effectively become a summary judgment motion in its details.

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

☒ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

- 1) Terry E. Barnard, Chairman - State Board of Pardons & Paroles
- a) State Board of Pardons & Paroles

Note: Petitioner has previously accepted in his Rebuttal Brief in the 11th Circuit that, under the Eleventh Amendment to Constitution, on Terry Barnard remains a viable Respondent

RELATED CASES

None

TABLE OF AUTHORITIES CITED

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Ashcroft v. Iqbal, 556 US 662 (2009)	10, 11, 13
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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished. *may be found in Lexis.*

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished. *may be found in Lexis.*

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 11/02/2021.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 12/30/2021, and a copy of the order denying rehearing appears at Appendix D.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including 4/27/2022 (date) on 3/24/2022 (date) in Application No. 21 A 542. (Appendix E)

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- U.S. Constitution, Art. I, §9, Cl. 3: No Bill of Attainder or Ex Post Facto law shall be passed.
- U.S. Constitution, 14th Amend., §1: No State shall make or... without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.
- Ga. Constitution, 1983, Art. I, §1, Para. x: No bill of attainder, ex post facto law, retroactive law... shall be passed.
- OCGA 17-10-6.1: Effective for crimes committed on or after 11/1/1995, provides "for a 1st conviction of a serious violent felony in which defendant has been sentenced to life imprisonment, that shall not be eligible for any form of parole or early release administered by State Board of Pardons & Paroles until that person has served a minimum of 14 years in prison."
 - As amended in 2006, effective for crimes committed on or after 11/1/2006, the "14 years" above was revised to be "30 years".
- OCGA 42-9-40 (a) Inmates with life sentences are statutorily eligible for parole consideration.
- OCGA 42-9-45: "... Except as otherwise provided in Codes 17-10-6.1 or 17-10-7, inmates serving sentence(s) aggregating 21 years or more shall be eligible for consideration for parole upon completion of service of 7 years.
- OCGA 42-9-20.1: Notwithstanding provision of Art. 4, Ch. 18, Title 50 or of this chapter relating to confidentiality of records, ~~as~~ the State Board of Pardons & Paroles shall be developed and implemented a system whereby any interested citizen of this State shall be permitted to contact the Board and receive information relating to persons convicted of a felony, who have been paroled.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED, cont'd.

With respect to each parolee, the Board shall provide parolee's name, sex, date of birth, current address, crime for which parolee convicted, and begin/end dates of incarceration and parole.

STATEMENT OF THE CASE

Petitioner Slakman was convicted in Apr. 1994 in the Superior Court of Fulton County, Ga. of a murder that occurred on July 6, 1993. He was sentenced to life with parole. Slakman's parole has been denied several times, the latest occurring on Aug. 3, 2019 because "he had served insufficient time based on nature and circumstances of offense." (App. F, last page). Slakman's 2019 set-off was for 3 years, dictating he served at least 30 years before parole. As a result of his 2019 parole denial, Slakman has averred his rights under the U.S. Constitution have been violated, and he filed a 42 USC 1983 in the U.S. District Court, N. District of Ga. seeking relief from same.

Summarily, Slakman asserted:

- (1) he had been denied parole because Respondent retroactively applied the actual practice used by Respondent since 1995 to determine parole for lifers instead of the corresponding actual practice used for murders occurring before 1995, and
- (2) he had, as a class-of-one, been discriminated against compared with similarly-situated prisoners re time served before parole for no rational reason although the comparators were less advantageously positioned than Slakman.

At no time has Slakman averred his statutory initial parole eligibility has been taken from him. His §1983 complaint has focused solely on the actual parole practice utilized by Respondent to determine parole.

Ex Post Facto Violation

Under the Ga. statutes in force at the time of Slakman's 1993 crime, OCSA 42-9-40 and 42-9-45, Slakman's initial parole eligibility required a minimum 7 years incarceration. Subsequently, for murder committed on or after 1/1/1995, Ga. statute was amended to require 14 years incarceration for initial parole eligibility, and amended again in 1/1/2006 ~~to~~ to require 30 years for initial parole eligibility (for murders committed after that date. Since Slakman's crime occurred before 1995, he remained under 7 year initial parole eligibility.

At the time of Slakman's 1993 crime, the practice used by Respondent to assess and actually parole persons having life-with-parole for murder is shown in Appendix F (Complaint, Exhibit 1 and enhanced readability Ex. 1). That practice would require a person having committed a Class II (less severe circumstances) with an average parole risk score to serve 11-12 years, and with an excellent parole risk to serve 7-8 years. Slakman has asserted that based on Respondent's practice's rating system he would be classified as an excellent risk, i.e., 7-8 years to serve.

When the Ga. statute for initial parole eligibility was amended in 1995 to extend initial parole eligibility for subsequent murders, Respondent adopted a changed internal practice to grant parole for affected persons which began to slowly increase the actual time served ("creep"). The impact of the change in Respondent's practice was calculated by Slakman and is shown in the Complaint, paras. 13. and 14.¹¹ Slakman has recently obtained similar data from Ga. Dept. of Corrections

policy statements along with his (Board of Pardons & Paroles) actual practices provide important instruction as to how the Board interprets its regulatory practices and whether, as a matter of fact, an amendment thereto creates an increased risk of punishment, Garner v. Jones at 256, *supra*.

Slakman asserts the lower court's total focus, and its error, has been on the statutory initial parole eligibility. Nowhere has Slakman asserted that he doesn't still have parole eligibility, only that the actual practice used by Respondent to determine actual time-to-serve has been retroactively applied to him instead of the actual practice in effect at the time of commission his crime in 1993.³¹

EQUAL PROTECTION VIOLATION

Slakman has also asserted Respondent violated his equal protection rights when Respondent denied him parole in 2019. An inmate can challenge parole denial on this ground. Fuller v. Ga. State Parole Board, 851 F.2d 1307, 1310 (11th Cir. 1998). Further, Slakman challenged his denial as a class-of-1. Such claim is implicated where plaintiff's alleged treatment different from similarly-situated persons, and there is no rational basis for the difference in treatment. Village of Willowbrook v. Oltch, 508 U.S. 560 (2000); Taylor v. Nix, 240 Fed Appx 83 (11th Cir. 2007). In support Slakman provided an initial listing of 8 felons who he

³¹ Respondent has not challenged Slakman's data on the 2 issues, nor the actual time-to-serve practice used before 1995/1996 as incorrect.

averred were similarly-situated and paroled substantially earlier than he. Complaint, para. 19. To be considered similarly-situated, comparators should be *prima facie* identical. *Taylor v. Nex*, *supra*. Slakman's comparators were all men with a murder conviction sentenced to life-with-parole before 1993. *Pitts v. Ga.*, 293 Ga. 511 (2013); *Fair v. State*, 288 Ga. 244, 246 (2010). Totally overlooked or disregarded by the lower courts, Slakman made the factual assertions that "the other comparators were not as advantageously positioned [for parole] as he." Complaint, para. 19.

Slakman provided data in the Complaint showing his comparators were paroled from 6-11 years earlier had he been paroled in 2019 (avg 8 years) and an average of almost 30% earlier. His closest comparator, considering such factors as disciplinary reports/criminal history/education/substance abuse history, R. Strickland was paroled 10.3 years (38%) earlier.

The lower courts erred significantly in several ways. Those courts totally failed to accept as true Slakman's factual assertion that he was at least, if not more, advantageously positioned. This was a factual assertion and based on personal knowledge of the comparators. It was not a legal assertion of violation re discrimination which he addressed with differential years and percentage of time served.

The lower courts also failed to address that Slakman selected comparators based on Ga. courts' criteria -- same offense, same sentence, same law under which sentenced. See *Pitts* and *Fair*, *supra*. The lower courts also failed to recognize in the record that the district court had stayed all discovery as requested by Respondent almost immediately

immediately after the Complaint was filed which precluded Slakman from expanding the number of comparators and details of Respondent's changed actual time to serve practice in order to buttress his Complaint. The district court granted the stay despite OCSA 42-9-141 which would have enabled most info needed to have been legally accessible regardless of Respondent averring it was a "state secret."

Slakman avers the lower courts' decisions on this issue eviscerates this Court's ~~dec~~ precedents in *Bell Atlantic v Twombly*, 550 US 544 (2006) and *Ashcroft v Iqbal*, 556 US 662 (2009) by requiring far more details in a Complaint than accepted today as legally sufficient and by disregarding his factual assertion "as more advantageously positioned" as true.

Slakman was aware of factors illustrated in *Fuller v. Ga. Board of Pardons & Poles*, 831 F.2d 1307, 1310 (11th Cir. 1987) re comparators, such as criminal history, prison disciplinary records, education, etc. For example, by having no prior criminal history, no disciplinary records in 15+ years, no substance abuse, post-graduate degree, Slakman could have detailed further his factual assertion of "more advantageously." However, such details were more appropriate for an intended summary judgment motion than simple plain assertions appropriate for a Complaint.

Slakman is also aware that to prevail on an equal protection claim using statistical analysis, *McCleskey v Kemp*, 481 US 279 (1987) and

Fuller, *supra*, would be controlling. But if the 11th Circuit decision re a Complainant's factual details to withstand a FRCP 12(b)(6) defense were to prevail, the population of comparators similarly-situated would be reduced to extent that a valid statistical analysis would be unlikely.

The lower courts also failed to posit a rational explanation for the discrimination imposed on Slakman. Not only has "due to insufficient time served based on circumstances" been the standard litany for set-offs in last several years for lifers with homicide convictions, but Slakman noted in his reconsideration motion to 11th Circuit (Appx G) that the State of Ga. never sought enhanced punishment because of aggravating circumstances surrounding his crime.

Slakman's Complaint as filed meets the Bell Atlantic and Ashcroft criteria for legal acceptability and was sufficient to overcome Respondent's motion under F.R.Cv.P. 12(b)(6).

REASONS FOR GRANTING THE PETITION

The issues raised by Slakman in his Petition should be accepted on certiorari by the Court for several important reasons.

First, the decision by the 11th Circuit being appealed squarely contradicts existing Court precedent. The existing precedents severely cabined in their scope re *ex post facto* violations are *Calif. Dept. of Corrections v. Morales*, 514 U.S. 449 (1995) and *Garner v. Jones*, 529 U.S. 244 (2000). Were the 11th Circuit decision allowed to stand, then *ex post facto* violations within the context of parole would be limited to retroactively-applied changes in critical parole eligibility or timing of parole consideration through statutory amendment. But retroactive changes in an agency's practices and rules, even those that determine actual parole (vs. eligibility for), could be ignored by state agencies regardless of how significantly they might increase prior sentencing punishment.

Allowing a state agency under its discretionary authority to use its actual practices/internal rules to impose increased punishment by retroactive application of amended practices/rules subverts the constitutional separation of authority in government branches AND the need for the legislative process to dictate the regulatory structure for and, in conjunction with the judiciary, maintain the safety of society.

Second, today's legal acceptance of a Complaint within the framework of Federal Rules of Civil Procedure would be totally upended. Current Court

precedents of *Bell Atlantic v. Twombly*, 550 US 544 (2006) and *Ashcroft v. Iqbal*, 556 US 662 (2009) would be eviscerated by the 11th Circuit decision and its trickle-through to other circuits. The 11th Circuit's logic would dictate additional and far more detailed facts to be asserted to survive a F.R.Civ.P. Rule 12(b)(6) defense, motion precluding many claims which now could be potentially meritorious, under *Bell Atlantic*, *supra* and *Ashcroft*, *supra*. Most significantly, the change in scope of a legally-acceptable claim under the 11th Circuit decision would effectively shift the assumption of factual correctness from plaintiff to defendant, hence change the initial "burden of proof." Moreover, ~~the increased~~^{as} increased details required for an assumption of factual correctness will go a long way towards making a complaint into an early summary judgment motion. It could prematurely force a plaintiff to reveal his/her case before discovery.

Finally, the 11th Circuit decision has so far departed from the accepted and usual course of judiciary proceeding as to call for the Court's exercise of the Court's supervisory power on both of Shlakman's issues. Certainly, it may dictate a change in F.R.Civ.P. and raise questions as to which set of pleading requirements could control ongoing claims.

The Court should accept Petitioner Shlakman's and grant certiorari to the instant petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Barry Stakman
Barry Stakman, pro se

Date: 4/25/2022