No. _____

*IN THE*

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 2024

**STEVE DISMORE**, *Petitioner*

v.

**KENTUCKY PAROLE BOARD**
**and LADIEDRA JONES, CHAIR, KENTUCKY PAROLE BOARD**, *Respondents*

# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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March 12, 2025

## QUESTIONS PRESENTED

I. Does the fact that Kentucky treats parole as "a matter of grace or gift to persons deemed eligible" exempt rules relating to the timing of Kentucky parole hearings from ex post facto challenges under *Garner v. Jones*, 529 U.S. 244 (2000)?

II. If not, did the Ex Post Facto Clause prohibit the Kentucky parole board from terminating parole eligibility for an inmate with more than sixty years remaining on his sentence, when the law at the time of his offense required the Board to consider the inmate for parole no less frequently every eight years?

## LIST OF PARTIES

1. Steve Dismore is represented by Hon. Timothy G. Arnold, Department of Public Advocacy, 5 Mill Creek Park, Frankfort, Kentucky 40601.
2. The Kentucky Parole Board is represented by Hon. Seth Fawns, Hon. Angela Dunham, and Hon. Ed Baylous, Justice and Public Safety Cabinet, 125 Holmes St, Second Floor, Frankfort, KY 40601.
3. LaDeidra Jones, Chair, Kentucky Parole Board, is represented by Hon. Seth Fawns, Hon. Angela Dunham, and Hon. Ed Baylous, Justice and Public Safety Cabinet, 125 Holmes St, Second Floor, Frankfort, KY 40601.

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# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Steve Dismore Petitioner, respectfully petitions for a writ of certiorari to review the order of the Kentucky Supreme Court, affirming a finding that the retroactive application of a rule allowing the Board to serve out his 109-year sentence did not violate the Ex Post Facto Clause.

## OPINIONS BELOW

The December 12, 2025 unpublished order of the Kentucky Supreme Court denying review and ordering the Court of Appeals decision depublished, is attached at Appendix A. The May 3, 2024 opinion of the Kentucky Court of Appeals in *Dismore v. Kentucky Parole Board et al* is attached at Appendix B. The June 20, 2023 unpublished ruling of the trial court is attached at Appendix C.

## JURISDICTION

Petitioner filed the current action in the Franklin Circuit Court in Frankfort, Kentucky in 2022. Relief was denied in the trial court on June 20, 2023 (Appendix C). On appeal, the Kentucky Court of Appeals denied relief on all federal claims in an opinion designated "to be published" on May 3, 2024. *Dismore v. Kentucky Parole Board*, 2023-CA-0835-MR, 2024 WL 1945193 (Ky. App. May 3, 2024), *review denied and ordered depublished* (Dec. 12, 2024)(Appendix B). The Kentucky Supreme Court denied review of the claim on December 12, 2024, in a summary order which also ordered that the Court of Appeals opinion not be published (Appendix A). This Petition is filed within the time allotted for a Petition for Certiorari, as calculated under this Court's rules.

Throughout this case, the Petitioner has consistently asserted the federal questions now presented by this Petition. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the final decision of the Kentucky Supreme Court on a matter of federal law.

## PROVISIONS INVOLVED

United States Constitution Article I, Section 10, provides in relevant part that "No state shall. . . pass any . . . ex post facto law . . .."

The law which governed parole eligibility at the time of Mr. Dismore's crime, conviction and sentence, provided in pertinent part that "After the initial review of parole, subsequent reviews, so long as confinement continues, shall be at the discretion of the board; except that the maximum deferment given at any one time

shall be eight (8) years." 501 KAR 1:011, Section 2 (1980).

The law which governed parole eligibility in effect at the time of Mr. Dismore's parole hearing, provided in pertinent part that "After the initial review of parole, subsequent review, so long as confinement continues, shall be at the discretion of the board; except maximum deferment given at any one time shall not exceed the minimum parole eligibility for a life sentence as established by statute. The board reserves the right to order a serve-out on any sentence." 501 KAR 1:030 Section 4(d) (1995).

## STATEMENT OF THE CASE

Mr. Dismore was convicted in 1987 of murder and sentenced to 99 years of incarceration for murder, which was enhanced to 125 years upon a finding that he was a Persistent Felony Offender in the First Degree. The enhancement was later found to be illegal, and his sentence was returned to 99 years, where it remains today. *Dismore v. Commonwealth*, 2001-CA-001771-MR, 2003 WL 1225160 (Ky. App. Jan. 10, 2003). With meritorious service and other credits, Mr. Dismore is presently expected to serve out his sentence in December, 2055, when he will be 94 years of age.

Like many jurisdictions, Kentucky has a system of discretionary parole which provides the most common form of release from prison. At the time of Mr. Dismore's crime, conviction, and sentence, Kentucky law provided that if the Kentucky Parole Board did not grant parole at the initial parole hearing, "subsequent reviews, so long as confinement continues, shall be at the discretion of the board; except that the maximum deferment given at any one time shall be eight (8) years." 501 KAR 1:011

Section 2 (1980). Prior to Mr. Dismore's first parole hearing in 1995, Kentucky law changed to provide that "[t]he board reserves the right to order a serve out on any sentence." 501 KAR 1:030 Section 4(d) (1995). Mr. Dismore's first and only parole hearing occurred after that change, at which time the Kentucky Parole Board ordered that Mr. Dismore serve out his sentence. The Board's stated basis for this decision was related to the seriousness of Mr. Dismore's offense, and his prior record. Had the Board continued to follow the rules that controlled at the time of his offense, Mr. Dismore would have been entitled to seven more parole hearings before his minimum expiration date (2003, 2011, 2019, 2027, 2035, 2043, and 2051).

Mr. Dismore filed this action in Franklin Circuit Court, arguing, in pertinent part, that the Board's retroactive application of the 1995 law violated the Ex Post Facto clause, because given his exemplary record and the fact that the Board had paroled similar offenders, there was a substantial likelihood that he would be paroled before the end of his sentence. In support of this claim Mr. Dismore noted that he has always been designated a low-risk inmate, who on May 20, 2023, when he filed the summary judgment motion in this case, had received 2605 days of meritorious good time, very nearly the maximum amount allowed, due to his excellent conduct. Mr. Dismore has not received a disciplinary write up of any kind for nearly 40 years. While Kentucky's Department of Corrections no longer permits staff to write letters of recommendation, when they were permitted to do so, Mr. Dismore received strong letters of recommendation for release from the Kentucky Department of Corrections

staff that he worked with.

Mr. Dismore also presented data showing that the Kentucky Parole Board's past decisions demonstrate a willingness to parole individuals with serious offenses like his. Specifically, Mr. Dismore included in his evidence a spreadsheet of current cases involving the same offense pattern as Mr. Dismore's – a homicide committed while on parole for another offense. Of the 49 people who have seen the Kentucky Parole Board for a homicide committed while on parole, 23 (47%) have been paroled. In that regard, Dismore pointed to several individual case where the Kentucky Parole Board had paroled individuals with offenses that are very similar to Mr. Dismore's, generally after serving between 28-33 years on their sentence. Dismore had been in custody for more than 40 years at the time his action was filed, longer than any of the paroled inmates he identified.

The case came before the trial court on cross motions for summary judgment. The Parole Board did not dispute the facts asserted by Dismore, but instead argued that ex post facto principles do not apply to discretionary parole decisions, because there is no right to parole and Mr. Dismore's judicially imposed sentence for the offense had not increased. Mr. Dismore disputed this argument, asserting that under this Court's opinions in *Garner v. Jones*, 529 U.S. 244 (2000) and *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995) the Ex Post Facto Clause applied to discretionary parole decisions, and prohibited retroactive changes to parole policy where doing so created a "significant risk" of increasing the amount of time before an

prisoner is released on parole. Dismore argued that the facts alleged in his complaint and summary judgment motion more than crossed the threshold of "significant risk", requiring that relief be granted.

The trial court granted summary judgment in favor of the Board, finding that because "[p]arole is a privilege, not a right", and as the serve out decision "does not increase a sentence imposed by the judiciary", the Ex Post Facto Clause did not apply. Though this Court's opinion in *Garner* was the main point of Mr. Dismore's argument, it is not mentioned in the trial court's ruling.

Dismore appealed that decision to the Court of Appeals, who affirmed. Relying primarily on *Simmons v. Commonwealth*, 232 S.W.3d 531 (Ky. App. 2007), and its unpublished decision in *Dunn v. Commonwealth*, No. 2020-CA-1430-MR, 2022 WL 2898323 (Ky. App. Jul. 22, 2022), the Court of Appeals found that Dismore's "sentence, imposed by the judiciary, was not made more onerous by the Board's ruling within its discretion to order a serve-out", and therefore the Ex Post Facto Clause was not violated. *Dismore v. Kentucky Parole Board*, 2023-CA-0835-MR, 2024 WL 1945193 (Ky. App. May 3, 2024), *review denied and ordered depublished* (Dec. 12, 2024), Appendix B, pp. 8-12, at 12. Quoting *Dunn*, the Court explained its view that the Ex Post Facto Clause does not apply to parole decisions:

> So, the gist of something being ex post facto is that it is an act, such as a new law, which reaches backwards in time to impact something which already occurred. The most classic example of an ex post facto violation is enacting a new law which makes illegal already performed conduct which was not illegal at the time it was performed.

> So, what did the Board do to reach back in time and change [the appellant's] sentence? Nothing.
>
> In the law, the "appropriate inquiry" to determine whether an ex post facto problem exists is whether the change "results in increased punishment . . . ." *Martin v. Chandler*, 122 S.W.3d 540, 547 (Ky. 2003). [The appellant's] punishment was not increased. . . . [T]he Board dutifully considered whether to grant [the appellant's] parole after he had served roughly twenty-five years. That was all that was required. His sentence was not changed.
>
> First, parole is always a matter of grace, not a matter of right or entitlement. *Garland*, 997 S.W.2d at 490 ("As we have stated previously, the appellant does not have a right to parole, and the Parole Board can never be required to release the appellant before the completion of his maximum sentence.") (citations omitted). . . .
>
> And we have held that even applying a 2003 version of that administrative regulation (which expressly permitted the Board to issue a serve-out mandate) to an inmate who was sentenced in 1983 (when the regulation did not expressly permit the Board to issue a serve-out) was not an ex post facto violation because the serve-out was not an "enhancement of punishment" or an "elongation" of the inmate's sentence so "the retroactive application of this revised regulation does not create an unconstitutional ex post facto violation." *Simmons v. Commonwealth*, 232 S.W.3d 531, 534 (Ky. App. 2007). Instead, we held that the inmate's sentence "remained at a fixed term" so "[t]he imposition of a serve-out is not punishment. It is merely a ruling by the Parole Board which is within its sound discretion" because it did not make the inmate's sentence "more onerous for crimes committed before the revised regulation was issued." *Id*. at 534-35.

Appendix B, 10-11 (footnotes omitted). Once again, this Court's opinion in *Garner* was the heart of Mr. Dismore's ex post facto argument, and once again the Kentucky Court of Appeals opinion made no mention of it, or any other opinion of this Court.

Dismore filed a Motion for Discretionary Review with the Kentucky Supreme Court, arguing that the Kentucky law relied upon in the lower courts could not be squared with this Court's opinion in *Garner*. The Kentucky Supreme Court denied review in a summary opinion, which also ordered that the Court of Appeals opinion be depublished.

This petition follows.

## REASONS FOR GRANTING THE WRIT

### THIS COURT SHOULD GRANT THE WRIT TO CLARIFY THE APPLICATION OF THE EX POST FACTO CLAUSE TO PAROLE RELEASE DECISIONS, AND TO CORRECT KENTUCKY'S DEPARTURE FROM THIS COURT'S OPINION IN *GARNER V. JONES*, 529 U.S. 244 (2000).

This Court has long recognized that action by the state which takes away an inmate's ability to reduce time in prison through release on parole violated the Ex Post Facto Clause. In *Weaver v. Graham*, 450 U.S. 24, 33–34 (1981), this Court found an ex post facto violation occurs when the prisoner was "disadvantaged by the reduced opportunity to shorten his time in prison simply through good conduct." This was true whether the reduction was a result of reducing the prisoner's access to good time credits, or interference with the prisoner's access to parole. *Id*., at 34 (Finding "no distinction between depriving a prisoner of the right to earn good conduct deductions and the right to qualify for, and hence earn, parole. Each . . . materially alters the situation of the accused to his disadvantage.")(quotations omitted).

In *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995), this Court

once again recognized that changes to access to parole could be an ex post facto violation, but found that the changes at issue in *Morales* did not violate that rule because they only created "the most speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes." *Id*., at 514. The changes at issue were a provision that permitted California parole authorities to defer inmates serving time for multiple murders from one year to three years, if certain findings were made. Rather than finding that this kind of legislative change did not implicate the ex post facto clause – a holding that would have contradicted *Weaver* and other cases – the Supreme Court instead found that "[i]n evaluating the constitutionality of the 1981 amendment, we must determine whether it produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Morales*, *supra* at 509. Finding that "[t]he amendment creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes", because parole was extremely unlikely during the period when hearings were required under the old law but not the new one, the Court found that there was no ex post facto violation. *Id*. at 509.

This Court reaffirmed that changes in parole hearings can constitute an ex post facto violation again in *Garner v. Jones*, 529 U.S. 244, 253 (2000), holding that the danger of increasing the punishment after the fact ". . . is present even in the parole context, and the Court has stated that the Ex Post Facto Clause guards against such abuse." "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 application will result in a longer period of incarceration than under the earlier rule." *Id.*, at 255. This Court remanded the matter to the district court to conduct discovery to determine whether the change in the rule materially affected his likely release date. *Id.*

Mr. Dismore claimed both that the retroactive application of a rule that in his case changed parole consideration from every eight years, to never again for the sixty year remainder of his sentence, was the kind of change that violated the Ex Post Facto Clause. However, even if it did not establish a violation on its own, Mr. Dismore offered evidence to show that if he had been reviewed under the rules at the time of his offense, he did have a significant chance of being paroled prior to the expiration of his sentence, meeting the requirements of *Garner*. Specifically, Mr. Dismore offered evidence of his exemplary conduct in prison, which established that he was classified as a low risk inmate who had no disciplinary infractions in nearly 40 years, had received almost the maximum available amount of meritorious good time awarded, and had received commendations from Kentucky Department of Corrections staff when available. To the objection that his offense alone would warrant denying parole, Mr. Dismore offered evidence that since the Board made its decision it had paroled approximately 50% of the individuals who were in the same cohort of offense (a homicide committed on parole), including several who had offenses

which were either factually identical or worse that his offense.

As discussed below, Kentucky rejected these claims not because Kentucky's parole system is uniquely exempt from the considerations that gave rise to *Garner*, but because of a longstanding history of rejecting ex post facto challenges to the timing of parole hearings. Kentucky's position is well established, plain (and plainly erroneous) as a matter of law, and unlikely to change without intervention from this Court, warranting summary reversal.

### A. Kentucky has Long Rejected Application of *Garner* and *Morales* to Kentucky Parole.

Kentucky recognizes that elongating the period before one is eligible for parole, or between parole hearings, "is a punitive measure meant to enhance the punishment of the serious offenses listed in the statute by ensuring that persons convicted of those offenses serve the lion's share of their sentences in prison and not on parole." *Commonwealth v. Pridham*, 394 S.W.3d 867, 878 (Ky. 2012). However, it has nevertheless concluded that when it comes to claims under the Ex Post Facto Clause "parole eligibility is of no consequence." *Simmons*, *supra* at 534-35. That is due to Kentucky's longstanding opposition to applying ex post facto principles to parole. *See Lynch v. Wingo*, 425 S.W.2d 573, 574 (Ky. 1968)("The grant of parole is not a right. It is a matter of grace or gift to persons deemed eligible for good behavior or for other reasons fixed by the parole board. . . . Under the statutes which make an allowance for good conduct an act of grace, there is no question of infringement of constitutional rights by subsequent legislation restricting the granting of the favor."*)*; *Morris v.*

*Wingo*, 428 S.W.2d 765, 765 (Ky. 1968)(Noting that "parole is not a right, but a privilege to be granted or withheld within the discretion of the board of charities and corrections. . . . Modification of the procedure with respect to the privilege did not violate the constitutional prohibitions against enactment of ex post facto laws.")

Decisions like *Morales* and *Garner* have done nothing to change Kentucky's position on this issue. In *Garland v. Commonwealth*, 997 S.W.2d 487, 489. (Ky. App. 1999), decided after *Morales* but before *Garner*, the Kentucky Court of Appeals rejected an ex post facto challenge to a law that would delay an inmates first parole hearing from one year to three years, because "[t]he appellant misunderstands the nature of parole." As the court noted:

> [A] grant of parole is not a right but is a matter of grace or gift to persons deemed eligible. Thus, the appellant still faces a maximum five-year sentence; no more and no less. When he becomes eligible for parole is largely irrelevant. Although the appellant complains he would be eligible for parole in just one year were it not for the treatment program, he fails to realize that he does not have to be granted parole at all. Finding that relevant criteria have been met does not require the parole board to release an inmate prior to the expiration of sentence; nothing in the parole statutes or regulations mandates the granting of parole or diminishes the discretionary nature of the Parole Board's authority.

*Id.*, citations and quotations omitted. Even after *Garner*, Kentucky courts have not backed off of their position that retroactive changes to initial parole eligibility is not an ex post facto violation. *See, e.g., Pate v. Department of Corrections,* 466 S.W.3d 480, 487 (Ky. 2015), overruled on other grounds by *Lee v. Kentucky Department of Corrections,* 610 S.W.3d 254 (Ky. 2020)(Noting that a "twelve-year increase in time

Appellant must serve before becoming eligible for parole is significant, we agree with the Court of Appeals that it does not necessarily elongate Appellant's sentence", quoting *Garland, supra*, and finding no ex post facto issue.)

Kentucky has reached the same conclusion with challenges to elongating the time between the first and second hearings. In *Simmons v. Commonwealth*, *supra,* the court rejected the retroactive imposition of essentially the same rule at issue in this case, which allowed the Board to serve out a life sentence, saying "[t]he imposition of a serve-out is not punishment. It is merely a ruling by the Parole Board which is within its sound discretion. Requiring Simmons to serve out his life sentence does not make his punishment more onerous for crimes committed before the revised regulation was issued." *Id*, at 535.

While discussions of this Court's opinions in *Morales* and *Garner* are uncommon in these cases, where *Morales* and *Garner* are discussed, Kentucky courts have been clear that they believe that those cases simply have no application at all to Kentucky's parole system. In *Stewart v. Commonwealth*, 153 S.W.3d 789 (Ky. 2005), the Kentucky Supreme Court, quoting both *Morales* and *Garner*, correctly noted that an ex post facto violation occurs if a rules "retroactive application will result in a longer period of incarceration than under the earlier rule." *Id.*, at 739 (quoting *Garner*). The Kentucky Supreme Court then categorically rejected the application of those principles to Kentucky parole, stating that "[n]one of these elements are present in this case." *Id.* The Kentucky Supreme Court found that

"there is no enhancement of punishment or elongation of a sentence" due to increasing the time before the prisoner could be parole eligible, because "the sentence remains at a fixed term and parole eligibility is of no consequence." *Id*. In reaching this conclusion, the Court emphasized that "parole is a privilege and not a right. It is considered on a case-by-case basis." Therefore, in the Kentucky Supreme Court's view, any elongation on the period before parole consideration "not make the punishment more onerous for crimes committed before its enactment", or create any legally cognizable disadvantage sufficient to raise a claim under *Morales* and *Garner*. *Id*.

### B. There is Nothing Distinctive About Kentucky Parole that Would Distinguish it from *Garner*.

In Kentucky, parole "shall be ordered only for the best interest of society and not as an award of clemency, and it shall not be considered a reduction of sentence or pardon." Ky.Rev.St. 439.340. Prior to considering an inmate for parole, the Board is required to consider "the results of his or her most recent risk and needs assessment, his or her criminal record, his or her conduct, employment, and the reports of physical and mental examinations that have been made." Ky.Rev.St. 439.340(1). If parole is denied, the Board is required to keep a record of "the reasons for denying parole to inmates." Kentucky's parole does not have rules that differentiate one inmate from another – if one is eligible for parole, either for an original parole hearing, or reconsideration after a deferment, the requirements and considerations are identical.

This system is not meaningfully distinguishable from the systems at issue in

*Morales* or *Garner.* In *Garner,* this Court reviewed the differences between the California system in *Morales* and the Georgia system in *Garner*, and found "[t]hese differences are not dispositive." *Garner, supra*, at 251. Kentucky's system and Georgia's system are similar in their approach to parole. Both require a board to consider certain "pertinent information" about the inmate prior to making a decision. *Compare* Ga. Code Ann. § 42-9-43 (a)(requiring the Board to obtain and review "all pertinent information" related to the inmate, and listing specific information to be considered); with Ky.Rev.St. 439.340(1) (requiring the board to obtain certain "pertinent information"), and (2) (requiring the Board to "consider the pertinent information regarding the prisoner"). Both Georgia and Kentucky direct that parole is not to be granted unless the Board believes it is in the interest of society to do so. Compare Ga. Code Ann. § 42-9-42(c)(Directing that prisoner should not be granted parole unless the Board believes that "his or her release will be compatible with his or her own welfare and the welfare of society"), with Ky.Rev.St. 439.340(2)(Directing that parole "shall be ordered only for the best interest of society").

There is one difference between Kentucky and Georgia which weighs in favor of finding an ex post facto problem with Kentucky's system. In *Garner*, this Court relied in part on Georgia's policy only to grant a maximum eight year deferment "when, in the Board's determination, it is not reasonable to expect that parole would be granted during the intervening years", as well as a provision which permits "expedited parole reviews in the event of a change in their circumstance or where the

Board receives new information that would warrant a sooner review." *Garner, supra* at 254. Neither of those features are present in Kentucky. Kentucky was not required to make any assessment of the likelihood of Mr. Dismore's parole before serving out his sentence, nor is there any firmly established process for obtaining review, once he was served out.

There is also no distinction between Kentucky and other states which would suggest that Kentucky parole is so infrequent or abnormal as to fall outside the protections of the Ex Post Facto Clause. The Robina Institute describes Kentucky as a state whose sentencing practices rely on "high indeterminacy", meaning that "[t]he Kentucky prison-sentencing system cedes a great deal of power to the parole board over actual time served by individuals and overall prison population size." Reitz, Kevin, Crye, Bree, and Rhine, Edward, *Prison-Release Discretion and Prison Population Size, State Report: Kentucky*, (Robina Institute, May 2023) at pg. 1.[1] Consistent with that finding, a Bureau of Justice Assistance report concluded that in 2022, 69 percent of Kentucky inmates were released on some kind of parole, making it the principal means by which an inmate is released from prison. *Kentucky Criminal Justice Data Snapshot*, Bureau of Justice Assistance, December 2023, pg. 24. [2]

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[1] https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2023-05/kentucky_doi_report_05_17_23.pdf (Last Checked 3/10/2025)

[2] https://justicereinvestmentinitiative.org/wp-content/uploads/2024/01/Kentucky-Criminal-Justice-Data-Snapshot_accessible.pdf , pg. 24 (Last checked 3/10/2025).

This is reflected in Kentucky law, which permits the jury to be informed of parole eligibility prior to deciding on a sentence. Ky.Rev.St. 532.055(2)(a)1. Likewise, a Kentucky litigant is entitled to have a judgment set aside when he is misinformed by the trial court and prosecutor of the parole eligibility associated with the offense, and that alters his decision to plead guilty. *Pate, supra*, at 491. And, an attorney who incorrectly advises his client about parole eligibility has rendered deficient performance for the purposes of establishing ineffective assistance of counsel. *Pridham*, *supra* at 878.

In short, there is nothing in Kentucky's system that justifies its departure from *Garner*.

### C. This Case is Appropriate for Summary Reversal, Which Can Resolve Important Questions About How to Implement *Garner*.

There is no ambiguity in the Kentucky state court's position rejecting the application of the Ex Post Facto Clause to changes in the timing of parole. There is also no reasonable probability that Kentucky will modify its position in the absence of an opinion from this Court pointing out their error. After all, if Kentucky's position was to change, this would have been the case to do it. Mr. Dismore's case rings every bell under *Garner*. If any retroactive application of a rule related to parole eligibility would "by its own terms show a significant risk" of prolonged time in prison, *see Garner, supra*, at 255, it would be one which changes parole eligibility from every eight years, to never again in the sixty remaining years of Mr. Dismore's sentence. And, even if that rule change is not considered per se violative of the Ex Post Facto

Clause, Mr. Dismore has demonstrated "by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule." *Id*. Mr. Dismore's behavior in custody has been exemplary, such that the only reasonable objection to his release would be the seriousness of his offense. To meet that objection, Mr. Dismore has shown that since he was served out, the Board has paroled many people within the same cohort as he is, many of which with more severe crimes than his own. Specifically, of the 49 people who have seen the Kentucky Parole Board for a homicide committed while on parole in the years following this decision, nearly half (23) have been paroled.

In short, Mr. Dismore's situation is an *in extremis* case of an ex post facto violation. If Kentucky is not changing its ways in this case, it never will. In order to address this issue this court must intervene. The facts and history of this case are well developed enough to permit a summary reversal. As noted above, Kentucky's ruling comes out of a long line of similar rulings, leaving no doubt about where Kentucky stands on the issue. And, this ruling denied relief as a matter of law, meaning this Court is not being asked to decide preliminary factual questions. This Court need do no more than simply remand the case with finding that *Garner* applies to this case, to have resolved Kentucky's error.

An opinion endorsing that conclusion could do more than merely correct Kentucky's error, however. It has been twenty-five years since *Garner* was decided,

and in the interim courts and parole boards have struggled to define when a board exceeds its authority to retroactively change a rule. For the most part, courts seem to have interpreted *Garner* to prevent a claim based solely on how the language of the rule has changed, instead requiring inmates to offer some kind evidence of how the Board implemented the change in order to show that a violation has been committed. *Burnette v. Fahey*, 687 F.3d 171, 184 (4th Cir. 2012); *Dyer v. Bowlen*, 465 F.3d 280 (6th Cir. 2006); *Fletcher v. Reilly,* 433 F.3d 867, 879 (D.C. Cir. 2006); *Richardson v. Pa. Bd. of Prob. & Parole*, 423 F.3d 282 (3d Cir. 2005); *Powell v. Ray*, 301 F.3d 1200, 1203 (10th Cir. 2002). This is not necessarily a correct interpretation of *Garner*, which acknowledged that a parole rule may "by its own terms show a significant risk" of increased punishment. *Garner, supra*, at 255. The retroactive rule in this case, which permitted the Kentucky Parole Board to remove Mr. Dismore from parole consideration entirely with roughly sixty years remaining on his sentence, would certainly seem to ring the bell of "significant risk" of increased punishment, and a finding by this Court that it does would therefore clarify matters for the lower courts on that point.

However, even if this Court believes a showing is or may be necesssary, courts are split on what that showing entails. Some courts have required a case specific showing that the inmate would have been paroled under the prior rule. *See, e.g., Burnette, supra* ("Causal link" between change and adverse parole decision required); *Richardson, supra* (Case specific harm required to establish violation). Others have

rejected that requirement and instead of required a showing that the general application was likely to have harmed the inmate. *Dyer, supra* (rejecting state decision that case specific harm was required, remanding for evidence on how the Board exercised discretion); *Fletcher, supra* (Requiring analysis about differences between D.C. parole and Federal parole).

Mr. Dismore believes that no matter what showing is required, he has made it. As noted, this Court need not make that determination for itself, it need only decide whether Mr. Dismore has stated a claim on which relief can be granted, and if so, what showing was he required to make. Rendering such an opinion will not only address Kentucky's failure to adopt *Garner*, but it may also resolve some uncertainty remaining after *Garner* about how this issue is to be resolved, that will help both courts and parole boards decide how to approach claims of this nature going forward.

## CONCLUSION

**WHEREFORE**, for the reasons set forth above, Petitioner Steve Dismore respectfully requests that this Petition be granted, and the judgment herein either summarily reversed, or the matter set for plenary review.

Respectfully submitted,

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