STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP1724

STATE OF WISCONSIN ex rel.
AMAN SINGH,

Petitioner-Appellant-Petitioner,

v.

PAUL KEMPER, Warden,
Racine Correctional Institution

Respondent-Respondent-Cross-Petitioner.

APPEAL FROM A CIRCUIT COURT ORDER QUASHING A WRIT OF HABEAS CORPUS AND DISMISSING THE PETITION, ENTERED IN RACINE COUNTY, THE HONORABLE GERALD P. PTACEK, PRESIDING

BRIEF AND APPENDIX OF RESPONDENT-RESPONDENT-CROSS-PETITIONER

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ISSUE PRESENTED

Aman Singh committed a crime in October of 2008. The next year, the legislature enacted 2009 Wisconsin Act 28 (the 2009 Act), which allowed for inmates to apply for early release based on positive adjustment time (PAT). Two years later, provisions of 2011 Wisconsin Act 38 (the 2011 Act) repealed the early release provisions established in the 2009

Act. Did the court of appeals err when it determined that the 2011 Act violates the ex post facto clause of the United States and Wisconsin Constitution because it "has resulted in Singh being required to serve the full term of the initial confinement portion of his sentence for these two offenses while the law in effect when he committed *or was convicted and sentenced* on them afforded him the opportunity to be released earlier"? *Singh v. Kemper*, 2014 WI App 43, ¶ 10, 353 Wis. 2d 520, 846 N.W.2d 820 (R-Ap. 148).

Because this Court and the United States Supreme Court has stated that the focus of the ex post facto inquiry is when the crime was *committed* – and not when a defendant "was convicted and sentenced" for the crime – there is no ex post facto violation. The court of appeals' decision should be reversed.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case presents an issue challenging the constitutionality of a state statute, applying both federal and Wisconsin case law to the issue presented. It therefore merits oral argument and publication.

FACTS AND RELEVANT TIMELINE

The facts are undisputed.

On October 16, 2008, Singh committed the crime of obtaining a controlled substance by fraud, in violation of Wis. Stat. § 961.43(1)(a) (8:13-15; R-Ap. 113-15).

In 2009, the legislature enacted the 2009 Act, a statutory scheme that afforded prisoners opportunities for early release, effective October 1, 2009. *See* 2009 Wisconsin Act 28, §§ 9411(2u), 2720-2733.

On March 29, 2010 Singh was convicted (8:13; R-Ap. 113). On April 29, 2010, the circuit court sentenced Singh (*id.*). The court imposed and stayed a three year sentence consisting of a one-and-a-half year term of initial confinement and a one-and-a-half year term of extended supervision (*id.*). The court placed Singh on probation for three years (*id.*). He received six months of jail time as a condition of probation (8:14; R-Ap. 114).

The legislature enacted the 2011 Act, which repealed or modified the early release provisions established in the 2009 Act, effective August 3, 2011.

In December 2011, Singh's probation was revoked, and his stayed prison sentence imposed (8:25; R-Ap. 125). The Department of Corrections gave Singh credit for 259 days of jail time when it revoked his probation (*id.*). Singh's first day in prison was January 4, 2012.

Singh's petition for PAT.

In May 2012, the Department of Corrections (DOC) sent a letter informing the circuit court that Singh had filed a petition for PAT (8:27; R-Ap. 127). The DOC informed the court that because Singh had not served any prison time between October 1, 2009 and August 3, 2011, he was not eligible for PAT (*id.*).

Singh's petition for writ of habeas corpus.

In June 2013, Singh filed a petition for a writ of habeas corpus in circuit court (1). Singh argued that the repeal of 2009 Act constitutes an ex post facto violation as applied to him (*id.*). After a hearing, the circuit court dismissed Singh's petition (10; R-Ap. 141).

Singh appealed.

The court of appeals' decision.

Singh argued that the application of the 2011 Act, which made him ineligible to apply for early release, violates the federal and state ex post facto clauses. The State responded that the change in the law was not relevant to the sentence Singh was serving because it was undisputed that Singh never served any time in prison between October 1, 2009 and August 3, 2011 (State's COA brief at 8). He was therefore never eligible to earn PAT (*id*). The State also argued that the retroactive application of the 2011 Act does not violate the ex post facto clauses as applied to Singh because he failed to demonstrate that the new statute increased the penalty for his crime (State's COA Brief at 11, 13).

The court of appeals concluded that the application of the 2011 Act violated the ex post facto clause of the United States and Wisconsin Constitution because it "has resulted in Singh being required to serve the full term of the initial confinement portion of his sentence for these two offenses while the law in effect when he committed *or was convicted and sentenced* on them afforded him the opportunity to be released earlier" *State ex rel. Singh v. Kemper*, 2014 WI App 43, ¶ 10, 353 Wis. 2d 520, 846 N.W.2d 820 (emphasis added) (R-Ap. 148).

Singh moved for reconsideration, and the court of appeals denied his request (R-Ap. 161-67, 168-70).

Singh's petition for review and the State's cross-petition.

Singh petitioned for review of, *inter alia*, whether Wis. Stat. § 973.198 is unconstitutional. The State filed a cross-petition, seeking review of whether the retroactive application of provisions of the 2011 Act violates the ex post facto clause of the United States and Wisconsin Constitution (R-Ap. 171-75, 176-95).

This Court's order requesting briefing on the issue of mootness.

Before this Court granted the petition and cross petition, in December 2014 this Court entered an order requesting that the parties inform the Court: (1) what impact Singh's release from custody has on the issues in the petition and cross petition, and (2) whether the matter is now moot (R-Ap. 196).

The State responded that because Singh sought relief through a habeas corpus proceeding on the basis that he was unconstitutionally denied early release sentence credit, and because Singh no longer suffers from this alleged violation, the matter is moot (R-Ap. 197-99).[1] However, the State argued, because the issue of whether the retroactive application of provisions of the 2011 Act violates the ex post facto clause could arise again, this Court should exercise its discretion and address the issue (*id.*).

This Court's order granting the petition and cross-petition.

The Court granted Singh's petition in part and the State's cross-petition. The State now addresses the issue it raised in its cross-petition: Whether the court of appeals' erred when it determined that the retroactive application of provisions of the 2011 Act violates the ex post facto clause of the United States and Wisconsin Constitution. Because the

[1] "An issue is moot when its resolution will have no practical effect on the underlying controversy." *PRN Assocs. LLC v. DOA,* 2009 WI 53, ¶ 25, 317 Wis. 2d 656, 766 N.W.2d 559. "[A] moot question is one which circumstances have rendered purely academic." *State ex rel. Olson v. Litscher,* 2000 WI App 61, ¶ 3, 233 Wis. 2d 685, 608 N.W.2d 425. The remedy that Singh seeks in his habeas petition is not available because a primary requirement for a writ of habeas corpus is that the person seeking relief must be in custody. Because a court can no longer issue a writ releasing Singh from custody, the issue is moot. His release from custody prevents this Court from granting effective relief.

court of appeals applied an improper inquiry to arrive at its conclusion, the State seeks reversal.

STANDARD OF REVIEW

Whether a statute violates the ex post facto clauses of the United States and Wisconsin Constitutions is a question of law that this Court reviews de novo. *State v. Elward,* 2015 WI App 51, ¶ 5, 363 Wis. 2d 628, 866 N.W.2d 756. Singh has the burden to establish a violation of the ex post facto clause beyond a reasonable doubt. *Appling v. Walker,* 2014 WI 96, ¶ 17 n.21, 358 Wis. 2d 132, 853 N.W.2d 888; *Elward,* 363 Wis. 2d 628, ¶ 5.

ARGUMENT

This Court has held that proper focus of an ex post facto violation "is concerned with the changes in the law relative to the time the defendant engaged in his allegedly illegal behavior." Singh committed his illegal behavior before the 2009 Act was enacted. There is no ex post facto violation. The provisions of the 2011 Act that do away with the provisions of the 2009 Act regarding PAT do not affect Singh.

In determining whether a violation of the ex post facto clause has occurred, this Court looks to see whether "the application [of an ex post facto law] violates one or more of that clause's recognized protections." *State v. Haines,* 2002 WI App 139, ¶ 6, 256 Wis. 2d 226, 647 N.W.2d 311, *aff'd,* 2003 WI 39, 261 Wis. 2d 139, 661 N.W.2d 72 (internal quotation marks and citation omitted). Specifically, this Court must determine whether application of the new law: (1) criminalizes conduct that was innocent when committed, (2) increases the penalty for conduct after its commission, *or* (3) removes a defense that was available at the time the act was committed. *State v. Barfell*, 2010 WI App 61, ¶ 12, 324 Wis. 2d 374, 383, 782 N.W.2d 437, 442. *State v. Thiel*, 188 Wis. 2d 695, 703, 524 N.W.2d 641, 644 (1994). This case concerns the second inquiry.

A. PAT under the 2009 Act.

Wisconsin Statutes § 304.06(1)(bg) and (1)(bk) (2009-10) were two of the various statutes providing for and regulating PAT that the legislature repealed as of August 3, 2011. *See* 2011 Wisconsin Act 38, §§ 38-41. If an inmate served time in prison between October 1, 2009 and August 3, 2011, the 2009 Act permitted the inmate to petition for release from confinement after serving the initial confinement portion of his bifurcated sentence.[2] Wis. Stat. § 304.06(1)(bg)1. (2009-10) provided in relevant part:

> The person may petition the earned release review commission for release to extended supervision when he or she has served the term of confinement in prison portion of his or her bifurcated sentence, as modified by the sentencing court under s. 302.045 (3m) (b) 1. or 302.05 (3) (c) 2. a., less positive adjustment time he or she has earned.

The circuit court then had the discretion of accepting or rejecting the earned release review commission's determination that an inmate had earned PAT, or the court could order that the inmate remain in prison for a time period that does not exceed his initial confinement period:

> The court may accept the earned release review committee's . . . determination that the inmate has earned positive adjustment time under par. (bg), reject

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[2] Singh's offenses are Class H felonies. The 2009 Act generally afforded certain prisoners convicted of Class H felonies an opportunity to earn early release from confinement at a rate of one day of PAT for every two or three days, respectively, served in prison that the prisoner "does not violate any regulation of the prison or does not refuse or neglect to perform required or assigned duties." Wis. Stat. §§ 302.113(2)(b) and 304.06(1)(bg)1. (2009-10). Under Wis. Stat. § 304.06(1)(bg)3., prisoners sentenced for a Class H felony committed prior to October 1, 2009 could apply for release from confinement when he or she had served at least 75% of the confinement portion of his or her bifurcated sentence. Wis. Stat. §§ 302.113(2)(b) and 304.06(1)(bg)1. (2009-10).

> the . . . determination . . . or order the inmate to remain in prison for a period that does not exceed the time remaining on the inmate's term of confinement.

Wis. Stat. § 304.06(1)(bk)2.b. (2009-10).

B. The repeal of the 2009 statutes providing PAT, the 2011 Act, and Wis. Stat. § 973.198 (2011-12).

The 2011 Act eliminated the PAT provisions of § 302.113(2)(b), precluding prisoners from earning PAT *after* August 3, 2011. *See* 2011 Wisconsin Act 38, § 38. The 2011 Act created Wis. Stat. § 973.198, which preserved prisoners' opportunity to seek release based upon PAT that they had earned between October 1, 2009, and August 3, 2011. *See* 2011 Wisconsin Act 38, § 96.

Wisconsin Statute § 973.198(1) (2011-12) provides in relevant part:

> When an inmate who is serving a sentence imposed under s. 973.01 and who has earned positive adjustment time under s. 302.113[3], 2009 stats., or under s. 304.06, 2009 stats., has served the confinement portion of his or her sentence less positive adjustment time earned between October 1, 2009, and August 3, 2011, he or she may petition the sentencing court to adjust the sentence under this section, based on the number of days of positive adjustment time the inmate claims that he or she has earned.

(Footnote added).

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[3] This statute provides in relevant part that "an inmate subject to this section is entitled to release to extended supervision after he or she has served the term of confinement in prison portion of the sentence imposed under s. 973.01[.]" Wis. Stat. § 302.113(2)(a). (2009-10). It also provides that an inmate sentenced "for a misdemeanor or for a Class F to Class I felony that is not a violent offense . . . may earn one day of [PAT] for every 2 days served[.]" Wis. Stat § 302.113(2)(b) (2009-10).

Therefore, although the Wisconsin Legislature repealed portions of Wis. Stat. § 304.06 (2009-10) that precluded the possibility of earning PAT *after* August 3, 2011, Wis. Stat. § 973.198(1) (2011-12) guaranteed the right of any inmate who had served prison time between October 1, 2009 and August 3, 2011, to apply for PAT potentially earned during that time period.

C. The court of appeals' decision should be reversed because the focus of the ex post facto inquiry is not when a defendant "was convicted and sentenced." Rather, the focus is on changes in the law relative to the time the defendant committed the crimes. And in the case, Singh committed his 2008 crime before the 2009 Act was enacted.

The court of appeals concluded that the 2011 Act violated the ex post fact clause because it "has resulted in Singh being required to serve the full term of the initial confinement portion of his sentence for these two offenses while the law in effect when he committed *or was convicted and sentenced* on them afforded him the opportunity to be released earlier." *Singh*, 353 Wis. 2d 520, ¶10 (emphasis added) (R-Ap. 148). In doing so, the court of appeals did not apply this Court's and the United States Supreme Court's test that the proper focus is not when a defendant was "convicted and sentenced," but when the crimes were committed.

1. *State v. Kurzawa,* 180 Wis. 2d 502, 513, 509 N.W.2d 712 (1984): The ex post facto inquiry "is concerned with changes in the law relative to the time the defendant engaged in his allegedly illegal behavior."

*State v. Kurzaw*a analyzed a defendant's claim that a successive prosecution brought for forgery violated his right against double jeopardy. 180 Wis. 2d 502, 510, 509 N.W.2d

712 (1984). One of Kurzawa's arguments was that the application of *United State's v. Dixon's*[4] double jeopardy analysis to his case violated the ex post facto clause. *Id*. He argued that at the time of his Milwaukee County prosecution, *Grady v. Corbin*[5] was the prevailing law of double jeopardy. According to Kurzawa, the State could not, under *Grady,* prosecute him for that "same conduct" again in Walworth County. *Id*. Kurzawa argued that as of the date of his Milwaukee County acquittal, *Grady* provided him with a double jeopardy defense to the Walworth County forgery charges. *Id*. He conceded that such a defense did not exist under *Dixon*. As a result, *Dixon,* if applied retroactively, exposed him to punishment from which he was previously immune. An "after the fact" increase in punishment, Kurzawa argued, violated ex post facto clause. *Id*.

> This Court explained the law of ex post facto:
>
> > It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, *after its commission*, or which deprives one charged with crime any defense available according to law at the time when the act was committed, is prohibited as ex post facto. *Beazell v. Ohio,* 269 U.S. 167, 169-170, 46 S. Ct. 68, 68, 70 L.Ed 216, 217-218 (1925). *See also, Collins v. Youngblood,* 497 U.S. 37, 42, 110 S. Ct. 2715, 2719, 111 L.Ed.2d 30, 38-39 (1990).

Id. at 511 (emphasis added). This Court again stated that it "must determine whether the new law criminalizes conduct that was innocent *when committed*, increases the penalty for conduct *after its commission*, or removes a defense that was available at the time the act *was committed*." *Id*. at 512-13 (emphasis added).

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[4] 509 U.S. 688 (1993).

[5] 495 U.S. 508 (1990).

This Court noted that the *conduct* for which Kurzawa faced prosecution in Walworth County occurred no later than March of 1986. *Kurzawa*, 180 Wis. 2d at 513-14. *Grady* was not decided until May of 1990. *Id.* This Court rejected Kurzawa's ex post facto claim, providing that "*Grady*, in and of itself cannot support an ex post facto clause defense":

> Kurzawa claims that retroactive application of *Dixon* violates the ex post facto protection against increased punishment because under the double jeopardy analysis of *Grady,* he could not have been prosecuted in Walworth County for the "same conduct." Kurzawa's argument ignores one of the fundamental aspects of ex post facto analysis, that being its focus on changes in the law relative to the time of the defendant's allegedly illegal behavior. That focus arises from the clause's animating principle, namely that "persons have a right to fair warning of that conduct which will give rise to criminal penalties...." *Marks,* 430 U.S. at 191, 97 S. Ct. at 992-993, 51 L.Ed.2d at 265. This principle, "fundamental to our concept of constitutional liberty", *Id.,* is premised on the right to know how to conform one's conduct to the law, and the consequences of not doing so, at the time one engages in that conduct. This explains why ex post facto analysis is concerned with changes in the law relative to the time the defendant engaged in his allegedly illegal behavior.

Id. at 513.

United States Supreme Court cases consistently applies the same analysis as *Kurzawa*: the ex post facto analysis is concerned with changes in the law relative to the time the crime was committed.

2. *Garner v. Jones,* 529 U.S. 244 (2000)

In Singh's case, when the court of appeals concluded that its focus could be on when Singh "was convicted and sentenced[,]" it cited *Garner v. Jones*, 529 U.S. 244, 250 (2000), to support its decision. *Singh*, 353 Wis. 2d 520, ¶ 9 (R-Ap. 147). *Garner* does not provide this.

In *Garner,* the respondent escaped from prison while he was serving a life sentence for murder, subsequently committed another murder, and was sentenced to an additional life term. *At the time the respondent committed the second murder*, the Georgia Board of Pardons was required to reconsider an inmate serving a life sentence for parole every three years after parole was initially denied. 529 U.S. at 247. After the respondent had begun serving his second life sentence, the rule was changed to require reconsideration at the least every eight years, and the new law was applied to the respondent. *Id.* The Eleventh Circuit Court of Appeals found that the application of the new law to the respondent constituted an ex post facto violation.

The Supreme Court disagreed. *Id.* at 246. Relying on *California Dep't. of Corrections v. Morales,* 514 U.S. 499 (1995), (discussed below) the Supreme Court stated that "[t]he controlling inquiry, we determined, was whether retroactive application of the change in . . . [the] law created 'a sufficient risk of increasing the measure of punishment attached to the covered crimes.'" *Garner*, 529 U.S. at 250 (quoting *Morales,* 514 U.S. at 509). The Supreme Court then elaborated further on the test set forth in *Morales*:

> The standard announced in *Morales* requires a more rigorous analysis of the level of risk created by the change in law. . . . 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.... In the case before us, respondent must show that as applied to his own sentence the law created a significant risk of increasing his punishment.

Id. at 255 (emphasis added) (internal citations omitted).

The Supreme Court concluded that the record before the lower court "contained little information bearing on the level of risk created by the change in law" and concluded

that, on the record before it, it could not conclude that the new law increased the respondent's punishment. *Garner,* 529 U.S. at 256. The Supreme Court stated that "[w]ithout knowledge of whether retroactive application of the [amended rule] increases, to a significant degree, the likelihood or probability of prolonging respondent's incarceration, his claim rests upon speculation." *Id.*

Garner's ex post facto inquiry appropriately concerns a change in the law from when the defendant *committed* the crime. 529 U.S. at 256-57. *Garner* does not focus, and it does not hold, that an ex post facto inquiry can concern a change in the law from when a defendant is "convicted and sentenced."

3. *Peugh v. United States,* 133 S. Ct. 2072 (2013)

The court of appeals also cited *Peugh v. United States*, 133 S. Ct. 2072, 2082 (2013) for its proposition that its focus could be on a change in the law from the time when Singh "was convicted and sentenced[.]" *Singh*, 353 Wis. 2d 520, ¶ 9 (R-Ap. 147-48). But the very first sentence of the *Peugh* decision states its focus is whether the law changed from the time of the crime's commission: "The Constitution forbids the passage of *ex post facto* laws, a category that includes '"[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, *when committed*."' *Peugh*, 133 S. Ct. at 2077-78 (emphasis added) (quoted source omitted).

Peugh held that the ex post facto clause was violated when the defendant was sentenced under current guidelines providing a higher sentencing range, rather than guidelines in effect at the time of offense. The *Peugh* Court stated that the ex post facto inquiry does not "hinge on the expectations that prisoners and defendants have about how many days they will spend in prison":

> Under the sufficient risk test, [in *Morales*] we were compelled to speculate about the possible effects of the new law on various individuals' prison terms. Ultimately, we held that the amendment did not violate the *Ex Post Facto* Clause because the "narrow class of prisoners covered by the amendment could not reasonably expect that their prospects for early release on parole would be enhanced by the opportunity of annual hearings." *Morales, supra,* at 512, 115 S. Ct. 1597. But nothing in the text or history of the Ex Post Facto Clause suggests that it should hinge on the expectations that prisoners and defendants have about how many days they will spend in prison.

Id. at 2093-94.

Therefore, the court of appeals' reliance on *Peugh* for its proposition that its focus could be on a change in the law from the time when Singh "was convicted and sentenced" is also misplaced.

4. *Lindsey v. Washington*, 301 U.S. 397 (1937)

The court of appeals also relied on *Lindsey v. Washington*, 301 U.S. 397 (1937), stating its "holding is in according with" *Lindsdey*. *Singh*, 353 Wis. 2d 520, ¶¶ 12-13 (R-Ap. 149-50).

In *Lindsey,* the petitioners had been convicted of grand larceny, and the sentencing provision in effect *at the time they committed their crimes* provided for a maximum sentence of not more than fifteen years. 301 U.S. at 398. The applicable law called for sentencing judges to impose an indeterminate sentence up to whatever maximum they selected, so long as it did not exceed 15 years. *Id.* Before the petitioners were sentenced, however, a new statute was passed that required the judge to sentence the petitioners to the 15-year maximum; under the new statute, the petitioners could secure an earlier release only through the grace of the parole board. *Id.* at 398-399. The Supreme Court held that the application of this statute to petitioners

violated the ex post facto clause because "the measure of punishment prescribed by the later statute is more severe than that of the earlier." *Id.* at 401. It stated that it "is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the fifteen-year term." *Id.* at 401-02.

Lindsey is not in accord with the court of appeals' holding. But *Lindsey is* in accord with this Court's holding in *Kurwaza* because its ex post facto inquiry focused on the "date of the commission of the offense" and the affect of a law "enacted after petitioners' commission of the offense." *Id.* at 398.

5. *California Dep't. of Corrections v. Morales,* 514 U.S. 499 (1995)

Finally, *California Dep't of Corrections v. Morales,* which the court of appeals discusses, presented the Supreme Court with the question whether the application of an amendment involving parole hearings "to prisoners who *committed their crimes* before it was enacted violates the *Ex Post Facto* Clause." 514 U.S. 499, 501-02 (1995). The Supreme Court held it did not. *Id.* The Court held that when examining whether an ex post facto violation occurs, the focus of the inquiry is whether any such change "increases the penalty" by which a crime is punishable:

> [T]he focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of "disadvantage," nor, as the dissent seems to suggest, on whether an amendment affects a prisoner's "*opportunity* to take advantage of provisions for early release," see *post,* at 1607, but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.

Morales, 514 U.S. at 506 n.3 (emphasis in original).

The Court stated 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*, 514 U.S. at 509. It concluded that the amendment created only "the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes," and that "such conjectural effects are insufficient under any threshold we might establish under the *Ex Post Facto* Clause." *Id.*

Morales, like the other ex post facto cases, properly discussed the application of an amendment to prisoners "who committed their crimes before it was enacted." *Id.* at 501-02.

D. *State ex rel. Mueller v. Powers,* 64 Wis. 2d 643, 646, 221 N.W.2d 692 (1974): this Court recognized that the ex post facto inquiry focuses on the time that the crime was committed.

The court of appeals relied upon *State ex rel. Mueller v. Powers*, 64 Wis. 2d 643, 646, 221 N.W.2d 692 (1974), to support its position that the 2011 Act violated the ex post facto clause. *Singh*, 353 Wis. 2d 520, ¶ 11 (R-Ap. 149). But *Mueller* correctly focused on the effect of a law passed after the commission of a crime.

In *Mueller*, prison inmates challenged the application of a statute which extended the time a prisoner must serve before being eligible for parole. 64 Wis. 2d at 645. The *Mueller* court held that the statute, which increased the length of the sentence, clearly violated the ex post facto clause. The *Mueller* court stated:

> It is undisputed that a legislative act increasing the sentence to be given an offender *for a crime committed before the law was passed would be an ex post facto law and constitutionally prohibited*. A

> more difficult problem arises when a legislative act does not increase the sentence, but in some other manner alters the punishment of the offender to his detriment *after he has committed the crime*, or, as in the instant case, after he has been convicted and sentence

Id. at 646.

The *Mueller* court held that the statute violated the ex post facto clause under the following standard:

> any law which was passed after the commission of the offense for which the party is being tried is an *ex post facto* law, when it inflicts a greater punishment than the law annexed to the crime at the time it was committed . . . *or which alters the situation of the accused to his disadvantage*[.]

64 Wis. 2d at 646 (citation omitted).

Mueller was distinguished years later by this Court in *State v. Theil*, 188 Wis. 2d 695. In *Theil*, this Court recognized that the "language in *Mueller* which extends ex post facto prohibitions to laws that alter the situation of an accused to his or her disadvantage, is misplaced." *Id.* at 702. The *Theil* Court noted that the Court had "long looked to the pronouncements of the United States Supreme Court in construing the Ex Post Facto Clause of the Federal Constitution as a guide to construing the Ex Post Facto Clause of the Wisconsin Constitution." *Id.* at 699 (footnote omitted).

> We hold that an ex post facto law, prohibited by the Wisconsin Constitution, is any law: "'which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, *after its commission*, or which deprives one charged with crime of any defense available according to law at the time when the act was committed.

Id. at 703 (emphasis added) (internal citation omitted).

E. Wisconsin and United States Supreme Court cases are in agreement: the proper inquiry for an ex post facto violation is on a change in the law relative to the time the defendant committed the crimes.

The cases of the United States Supreme Court and this Court do not provide what the court of appeals provided: that the focus of an ex post facto violation is the change in the law in effect when a defendant "committed [the crime] *or was convicted and sentenced*." *Singh*, 353 Wis. 2d 520, ¶ 10 (R-Ap. 148). Rather, as demonstrated, the cases provide that the proper inquiry concerns *only* the time the defendant committed the crime. Because of this, and because Singh committed his crime in 2008 before the enactment of the 2009 Act, the ex post facto clause is not implicated in this case.

CONCLUSION

The court of appeals erred when it determined that the 2011 Act violates the ex post facto clause because the court focused on the "law in effect when [Singh] committed or was convicted and sentenced[.]" *Singh*, 353 Wis. 2d 520, ¶ 11 (R-Ap. 149). That is not the correct focus. The time when Singh "was convicted and sentenced" is not factor that a court is to consider in an ex post facto inquiry. Because Singh committed his crime before the enactment of the 2009 Act, there is no ex post facto violation. The State requests that this court reverse the court of appeals' decision.

Dated this 19th day of January, 2016.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4948 words.

_____
Sara Lynn Shaeffer
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

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A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 19th day of January, 2016.

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Sara Lynn Shaeffer
Assistant Attorney General