STATE OF WISCONSIN
SUPREME COURT
No. 2013AP1724

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STATE OF WISCONSIN ex rel.
AMAN SINGH,

Petitioner-Appellant-Petitioner,

v.

PAUL KEMPER, Warden,
Racine Correctional Institution,

Respondent-Respondent-Cross-Petitioner.

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On Petition for Review of a Decision of the
Court of Appeals, District II
Appeal from the Circuit Court for Racine County
Honorable Gerald P. Ptacek presiding
Racine County Circuit Court Case No. 2013CV001540

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# BRIEF OF PETITIONER-APPELLANT-PETITIONER AMAN SINGH

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## STATEMENT OF THE ISSUE

Whether Wis. Stat. § 973.198, which changed the role the sentencing court plays in reviewing prisoners' potential early release based on positive adjustment time, is unconstitutional.

Answered by the Court of Appeals: The court held that "Singh has not convinced us that this procedural change violates the ex post facto clauses." *Singh v. Kemper*, 2014 WI App 43, ¶20, 353 Wis. 2d 520, 846 N.W.2d 820.

Answered by the Circuit Court: This issue, as formulated by this Court, was not presented to the Circuit Court. (R. 1, App.25, R. 10, App.24.)

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Court hears argument and publishes its decision in all of its cases, and this case, which involves the constitutionality of legislative changes to Wisconsin's sentencing system, should be no exception.

## STATEMENT OF THE CASE

Nature of the Case

This case is about the constitutionality of Wis. Stat. § 973.198 under the *ex post facto* clauses of the state and federal constitutions. Wis. Const. Art. I, sec. 12; U.S. Const. Art. I, sec. 10, cl. 1. Since 2009, certain individuals sentenced under Wisconsin's Truth-in-Sentencing laws have been able to earn "positive adjustment time," a type of sentence reduction credit based on an inmate's good behavior during his incarceration. Inmates who earn positive adjustment time are eligible for release before they have served the full term of their sentence of confinement.

Before Wis. Stat. § 973.198 was enacted in 2011, persons who had earned positive adjustment time would be released on the first date they were eligible for release (their Eligibility Date) following a process that began up to 90 days before the projected Eligibility Date. *E.g.*, Wis. Stat. § 302.113(2)(c)1. (2009-10). Under Wis. Stat. § 973.198, which applies retroactively, those *same individuals* who are

eligible for early release cannot *start* the process necessary to realize the benefit of the positive adjustment time they have earned until their Eligibility Date. So, rather than being released on their Eligibility Date, these inmates are not permitted to petition the circuit court until that day; they are actually released up to 90 days *later*. This change necessarily results in a later release and longer incarceration. Wisconsin Stat. § 973.198 is, therefore, an *ex post facto* law that violates the state and federal constitutions.

This issue reaches this Court on review of a decision on appeal from the denial of habeas corpus. Petitioner-Appellant-Petitioner Aman Singh (Mr. Singh) petitioned the Racine County Circuit Court for a writ of habeas corpus after the Department of Corrections refused to process his request for release based on positive adjustment time. Even though Mr. Singh was convicted for one crime committed while the 2009 law was in effect, and sentenced for another, the Department of Corrections determined

that he was ineligible for positive adjustment time because the positive-adjustment statute was repealed before Mr. Singh served any time in prison. The Court of Appeals held that Mr. Singh *was* entitled to earn positive adjustment time throughout his sentence, because the repeal statute was an *ex post facto* law to that extent, but the court, without the benefit of adversarial briefing, held that he was required to use the Wis. Stat. § 973.198 procedure to be released on positive adjustment time and that this procedure did not violate the constitutional provisions.

Factual and Statutory Background

This case involves the Legislature's implementation and repeal of Wisconsin's system of "positive adjustment time," which was a form of good-time credit that could be earned, beginning in 2009. In the 2009 budget bill, the Legislature enacted a positive adjustment time system under which certain offenders could earn sentence-reduction credit and be eligible for early release. *See* 2009

Wis. Act 28. The new positive adjustment time law applied retroactively. 2009 Wis. Act 28, § 9311.

In 2011, the Legislature repealed that positive adjustment time system. 2011 Wis. Act 38, § 100. The Legislature purported to make the repeal effective retroactively—so that individuals who had been convicted and sentenced under the 2009 Act, those who committed crimes while the 2009 Act was in effect, and those already in prison before the 2009 Act would no longer be able to earn positive adjustment time—but the Court of Appeals held that the Legislature could not repeal the law retroactively because of the *ex post facto* clauses. *Singh v. Kemper*, 2014 WI App 43, ¶¶6-19, 353 Wis. 2d 520, 846 N.W.2d 820. The Court of Appeals was correct, as will be shown in Mr. Singh's brief on the Warden's cross-petition.

Mr. Singh contends here that an additional part of the 2011 Act—Wis. Stat. § 973.198—is also an *ex post facto* law because the statute delays by roughly 90 days the date when inmates who have

earned positive adjustment time are released from prison, and it changes the standard that circuit courts apply in reviewing early release. Below is a more detailed recounting of the history of Wisconsin's adoption and repeal of positive adjustment time.

*Wisconsin Replaces Its Indeterminate Sentencing System With "Truth-in-Sentencing."*

The necessary context for the statutory changes at issue in this case begins before 2000, when Wisconsin law employed what is known as an "indeterminate" sentencing system. *See generally* Michael B. Brennan & Donald V. Latorraca, *Truth-in-Sentencing*, WIS. LAWYER, Vol. 73, No. 5 (May 2000). Under that system, persons convicted of a crime could be given an indeterminate sentence of "imprisonment." A prisoner serving an indeterminate sentence might be released on parole as soon as 25% of the way through his sentence and as late as two-thirds of the way through his sentence, in the discretion of the Parole Commission. *Id.*; *see also* Wis. Stat. § 304.06(1)(b); Wis. Stat. § 302.11. The Parole

Commission exercised substantial discretion to determine whether an inmate was eligible for parole before the presumptive release date. *See generally Gendrich v. Litscher*, 2001 WI App 163, ¶¶7-9, 246 Wis. 2d 814, 632 N.W.2d 878.

In 1998, Wisconsin adopted "Truth-in-Sentencing," a new system that governed sentences for crimes committed on or after December 31, 1999. *See* 1997 Wis. Act 283. In so doing, Wisconsin joined several other states, Paula M. Ditton & Doris James Wilson, *Truth in Sentencing in State Prisons*, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, U.S. DEP'T OF JUSTICE (Jan. 1999), and was reacting to a public perception that the discretion of parole boards created too much uncertainty in the sentencing process. Michael B. Brennan & Donald V. Latorraca, *Truth-in-Sentencing*, WIS. LAWYER, Vol. 73, No. 5 (May 2000) ("In recent years many citizens have become concerned that parole and other forms of early release have resulted in a criminal justice system in which many offenders serve less than

one-half of their sentences. To provide greater public safety and restore confidence in the criminal justice system the Wisconsin Legislature passed and the governor signed into law 1997 Wis. Act 283, which brought Truth-in-Sentencing to Wisconsin.").

Those sentenced under Truth-in-Sentencing receive a "bifurcated sentence" that has two parts: a term of "confinement" and a term of "extended supervision." Wis. Stat. § 973.01(2). The "truth" in "Truth-in-Sentencing" denotes that they will be in prison for the entire initial period of confinement. *See e.g.*, Wis. Stat. § 973.01(4) (2013-14). They then serve a period of "extended supervision," when they are subject to department of corrections supervision. *See e.g.*, Wis. Stat. § 302.113(7m), (7r), (8m). Extended supervision differs from parole in that the start date for extended supervision is set by the sentencing court at the beginning of the sentence, rather than by a parole board later.

Truth-in-Sentencing worked a fundamental change to sentencing. Truth-in-Sentencing is unquestionably harsher than indeterminate sentencing, in that the term of initial confinement is generally served in its entirety. Wis. Stat. § 973.01(4). Offenders sentenced for crimes committed under Truth-in-Sentencing cannot ask the Parole Commission to grant them a discretionary early release, as they could before. *See State v. Hall*, 2002 WI App 108, ¶20 n.10, 255 Wis. 2d 662, 648 N.W.2d 41.

Wisconsin's Truth-in-Sentencing system has been a work-in-progress from the beginning. The Legislature adopted the bifurcated sentencing system in 1998, 1997 Wis. Act 283, but its effective date was postponed until December 31, 1999. *Id.* "Although Act 283 speaks in some detail about the new type of sentence, it is evident that the legislature did not envision the law going into effect without considerable supplementation." Michael B. Brennan, Thomas J. Hammer & Donald V. Latorraca, *Fully*

*Implementing Truth-in-Sentencing*, WIS. LAWYER, Vol. 75, No. 11 (Nov. 2002). Substantial modifications to Truth-in-Sentencing took effect on February 1, 2003, fully implementing the new penalty structure. *See id.*; *see also* 2001 Wis. Act 109.

*2009: Wisconsin Partially Reverts Toward an Indeterminate Sentencing System.*

In 2009, as part of its biennial budget, 2009 Wis. Act 28 (the 2009 Act), the Legislature overhauled the Truth-in-Sentencing system again, creating several early release opportunities, in a partial return to Wisconsin's pre-Truth-in-Sentencing, indeterminate sentencing system. *See generally* Michael B. Brennan, *The Pendulum Swings: No More Early Release*, WIS. LAWYER, Vol. 84, No. 9 (Sept. 2011).

One of these new opportunities for early release was "positive adjustment time," under Wis. Stat. §§ 302.113(2)(b) and 304.06(1)(bg) (2009-10), which rewarded prisoners for good behavior in prison. Inmates convicted of non-violent, lower-class felonies were able to

earn more positive adjustment time than those convicted of more serious crimes. For example, under § 302.113(2)(b), individuals like Mr. Singh who were convicted of non-violent Class F to Class I felonies[1] could earn credit for up to one third of their sentences (one day for every two days of time served with good behavior):

> An inmate sentenced under s. 973.01 for a misdemeanor or for a Class F to Class I felony that is not a violent offense . . . may earn one day of positive adjustment time for every 2 days served that he or she does not violate any regulation of the prison or does not refuse or neglect to perform required or assigned duties. An inmate convicted of a misdemeanor or a Class F to Class I felony that is not a violent offense . . . shall be released 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 . . . less positive adjustment time that he or she has earned.

[1] The sentence range for these felonies was twelve and a half years (Class F) to three and a half years (Class I). Wis. Stat. § 939.50(3)(f)-(i).

Wis. Stat. § 302.113(2)(b) (2009-10). Positive adjustment time had the effect of converting a portion of the term of confinement into a longer period of extended supervision. Wis. Stat. § 302.113(3)(e) (2009-10) ("If an inmate is released to extended supervision under sub. (2) (b) . . . the term of extended supervision is increased so that the total length of the bifurcated sentence does not change."). So if a prisoner earned 30 days of positive adjustment time and was, therefore, released 30 days before the end of his sentence of confinement, he would have 30 extra days of extended supervision.

Some prisoners ineligible for positive adjustment time under § 302.113(2)(b) could nevertheless earn credit under § 304.06(1)(bg)1., which provided a reduction of up to one quarter of a sentence (one day credit for every three days of time served with good behavior):

> A person sentenced . . . for a Class F to Class I felony or a misdemeanor that is not a violent offense . . . and who is ineligible for positive adjustment time under s.

> 302.113 (2) (b) . . . or for a Class F to Class I felony that is a violent offense . . . may earn one day of positive adjustment time for every 3 days served that he or she does not violate any regulation of the prison or does not refuse or neglect to perform required or assigned duties. 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 . . . less positive adjustment time he or she has earned.

Wis. Stat. § 304.06(1)(bg)1. (2009-10).[2] Whether the Legislature could retroactively repeal those two positive adjustment time statutes and other early release provisions is the subject of the Warden's cross-petition. The issue on this petition involves the timing of the actual

[2] Mr. Singh, convicted of a non-violent Class H felony, was eligible for positive adjustment time under Wis. Stat. § 302.113(2)(b). Wisconsin Stat. § 304.06(1)(bg) provided positive adjustment time for those not eligible under § 302.113(2). So, if Mr. Singh were not eligible under § 302.113(2), he would be eligible under § 304.06(1)(bg)1. Some offenders convicted of higher class felonies could earn positive adjustment time under Wis. Stat. § 304.06(1)(bg)2. This Court's decision on Wis. Stat. § 973.198 will apply to that section as well.

release once the inmate has earned enough positive adjustment time to warrant release.

Critically for the issue accepted in Mr. Singh's petition for review, those who qualified for positive adjustment time under the 2009 Act would be released on what, for purposes of this briefing, we will call the "Eligibility Date." When an inmate had earned enough positive adjustment time so that:

(time served)
+ (positive adjustment time earned)
= (original confinement portion of bifurcated sentence)

the inmate was released. *E.g.*, Wis. Stat. § 302.113(2)(b) (2009-10) (emphasis added) ("An inmate . . . shall be released to extended supervision *when* he or she has served the term of confinement . . . less positive adjustment time he or she has earned."). That is, an inmate was released *on* his Eligibility Date.

In order for an inmate to be released on the Eligibility Date, a process was set in motion 90 days *before* the Eligibility Date. For

positive adjustment time under § 302.113(2)(b), the department of corrections[3] notified "the sentencing court" of the plan "to modify the inmate's sentence" when the inmate was "within 90 days of release to extended supervision," accounting for accrued and projected positive adjustment time. Wis. Stat. § 302.113(2)(c)1. (2009-10). The sentencing court then had 30 days to decide *whether* to hold a hearing on the inmate's release and 60 days (from the notice) to hold that review hearing. Wis. Stat. §§ 302.113(2)(c)1. and 302.113(2)(c)2.a. (2009-10). Therefore, the court-review process would conclude 30 days *before* the Eligibility Date. If the sentencing court decided not to hold a review hearing, the department of corrections would release the inmate on the Eligibility Date. Wis. Stat. § 302.113(2)(c)1.

The sentencing court could hold a review hearing to double-check the department's calculations of positive adjustment time or to

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[3] *See* Wis. Stat. § 301.01 (definitions).

determine whether any of three statutory criteria justified preventing an inmate's early release: the inmate's conduct in prison, his risk of reoffending under an evidence-based instrument, or the nature of his crime. Wis. Stat. § 302.113(2)(c)2.b. (listing factors). But the default provision under the statute was release in the absence of court action, and the circuit court was required to conclude its review 30 days before the projected Eligibility Date. Wis. Stat. § 302.113(2)(c)1.[4]

The 2009 Act applied both prospectively and retroactively. 2009 Wis. Act 28, § 9311 ("the statutes first apply to a person sentenced on December 31, 1999."). Individuals already convicted of

[4] Court review of early release under Wis. Stat. § 304.06(1)(bg)'s positive adjustment time contained parallel requirements that the sentencing court be notified "within 90 days of release," accounting for positive adjustment time, and the sentencing court had the same 30 days from notice to decide whether to hold a hearing and 60 days from notice to hold that hearing. Wis. Stat. § 304.06(1)(bk) (2009-10). But the latter statute was administered by the earned release review commission, Wis. Stat. § 304.06(1)(bg)1., which did retain some discretion to review petitions from prisoners requesting that they be released on their Eligibility Date, *id.* ("The person may petition the earned release review commission for release . . . .").

crimes before June 30, 2009, when the 2009 Act took effect, were eligible to begin earning positive adjustment time. Thus, the 2009 Act had the effect of mitigating punishment for persons already convicted of crimes.[5] Those who committed crimes after June 30, 2009 had an expectation that the confinement portion of their sentence, whatever it would be, could be shortened by one-third through positive adjustment time. As was the case before passage of the Truth-in-Sentencing law, inmates could be released before their sentence was finished—as early as two-thirds of the way through a confinement sentence, as a reward for good behavior.

*2011: The Wisconsin Legislature Tries to Undo Its 2009 Adoption of Positive Adjustment Time.*

Just two years after adopting the positive adjustment time system, the Legislature repealed it and purported to do so retroactively. In 2011 Wisconsin Act 38 (the 2011 Act), the

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[5] Indeed, the Legislature contemplated that positive adjustment time would apply *only* retroactively, *e.g.*, 2009 Wis. Act 28, § 2722, and the Governor's line item veto made the law applicable prospectively too, *id.*

Legislature made several changes to sentencing and corrections law that reversed much of what it had done in the 2009 Act and returned to the harsher Truth-in-Sentencing regime. Notably, under the 2011 Act, the Legislature repealed Wis. Stat. §§ 302.113(2)(b) and 304.06(1)(bg), the positive adjustment time statutes. 2011 Wis. Act 38, §§ 38 and 58.

In the Act's initial applicability section, § 100 of the Act, the Legislature provided that the Act applies retroactively for all individuals sentenced after December 31, 1999, except it preserved "positive adjustment time earned on or after October 1, 2009, but before the effective date of this subsection." 2011 Wis. Act 38, § 100. The Act was published on August 2, so its effective date was August 3, 2011. 2011 Wis. Act 38; *see* Wis. Stat. § 991.11. Therefore, what the Legislature purported to do (but the Court of Appeals held that it could not do constitutionally) was to repeal positive adjustment time, not only for those who committed crimes after August 2, 2011,

but also for those who committed crimes before August 3, 2011, for whom the 2009 Act applied, either based on when they committed their crimes or as a result of the 2009 Act's retroactive application. For these latter groups of individuals, the Legislature attempted to preserve only the positive adjustment time earned before August 3, 2011, and not the right to earn positive adjustment time throughout the sentence.

To account for the positive adjustment time earned between October 1, 2009 and August 3, 2011, the Legislature repealed the court-review provisions of Wis. Stat. §§ 302.113(2)(c) and 304.06(1)(bk), 2011 Wis. Act 38, §§ 39, 59, and replaced them with Wis. Stat. § 973.198, 2011 Wis. Act 38, § 96.

But the court-review procedure of Wis. Stat. § 973.198 is not like the procedures it replaced. Unlike the old process that began 90 days *before* the Eligibility Date, Wis. Stat. §§ 302.113(2)(c)1. and 304.06(1)(bk)1. (2009-10), the Wis. Stat. § 973.198 procedure cannot

be invoked *until* the Eligibility Date. Wis. Stat. § 973.198(1) ("When an inmate . . . has served the confinement portion of his or her sentence less positive adjustment time earned . . ., he or she may petition the sentencing court to adjust the sentence under this section"); *see also* Form CR-281, Petition for Positive Adjustment Time § 973.198 ("5. I have filed this petition *after* serving the confinement portion on this count less the positive adjustment time that I *have earned*.") (emphases added). Once this new process is triggered, by an inmate's filing a petition, the sentencing court has 60 days to deny the petition or to hold a hearing. Wis. Stat. § 973.198(3). The default result under the new statute is continued imprisonment rather than release. *E.g.*, *id.*; *cf.* Wis. Stat. § 302.113(2)(c)1. Furthermore, at the hearing, the sentencing court can choose to reduce the sentence based on positive adjustment time earned but, nevertheless, delay release by 30 days even when the prisoner has already earned enough positive adjustment to satisfy

the remaining time on the confinement portion of his sentence and allow him to be released. Wis. Stat. § 973.198(5). Therefore, under Wis. Stat. § 973.198, release is delayed not only until after the Eligibility Date; it can be delayed up to 90 days after that date (a hearing 60 days after the petition was filed, plus a 30 day delay added by the court).

Timeline of Statutory Changes and Mr. Singh's Convictions

Both of Mr. Singh's relevant convictions were for obtaining a controlled substance by fraud, contrary to Wis. Stat. § 961.43(1), a non-violent Class H Felony, Wis. Stat. §§ 961.43(2) and 301.048(2)(bm)1. (R.8:13-15, R.8:20), for forging prescriptions for pain medication. The timing of the cases and statutory changes follows:

June 30, 2009: The 2009 Act took effect, implementing positive adjustment time in Wisconsin. 2009 Wis. Act 28, § 9311.

March 29, 2010: Mr. Singh was convicted in Waukesha County, Circuit Court Case No. 2008-CF-1368. (R. 8:13-15, App.42-44.)

April 29, 2010: Mr. Singh was sentenced to one-and-a-half years initial confinement and one-and-a-half years extended supervision. At this time, individuals sentenced for Class F to Class I felonies could earn positive adjustment time under the 2009 Act. Mr. Singh's sentence was stayed, and Mr. Singh was put on probation for three years. (R. 8:13-15, App.42-44.)

July 25, 2011: Date of the conduct underlying Milwaukee County conviction. At this time, those sentenced for Class F to Class I felonies could earn positive adjustment time under the 2009 Act.

August 3, 2011: 2011 Wisconsin Act 38 takes effect, repealing positive adjustment time, and purporting to repeal it retroactively.

November 9, 2011: Mr. Singh was convicted in Milwaukee County, Circuit Court Case No. 2011-CF-4004 for conduct that occurred on July 25, 2011. (R. 8:20, App.49.)

December 13, 2011: Mr. Singh's probation in Waukesha County was revoked, and the stayed prison sentence was imposed. (R. 8:25, App.54.)

December 29, 2011: Mr. Singh was sentenced in Milwaukee County to two years initial confinement and three years extended supervision, to be served consecutive to the sentence in the Waukesha County case. (R. 8:20, App.49.)

Procedural Posture and Disposition in Lower Courts

On June 28, 2013, Mr. Singh, then confined at Racine Correctional Institution and acting *pro se*, filed a petition for a writ of habeas corpus in the Circuit Court for Racine County. He filed this petition after the Department of Corrections refused to process his request for early release under the 2009 Act on the basis that Mr.

Singh's eligibility for positive adjustment time had been eliminated by the 2011 Act, and that he had not, under the department's interpretation, earned any positive adjustment time under the now-repealed act. (R. 1:3, App.27; R. 8:27, App.56.) Mr. Singh alleged that the 2011 Act's retroactive repeal of positive adjustment time and its enactment of Wis. Stat. § 973.198 violated the *ex post facto* clauses. (R. 1, App.25.) Mr. Singh argued that Wis. Stat. § 302.113(2)(b) (2009-10) granted a mandatory right to earn positive adjustment time, that the *ex post facto* clauses required that he be "entitled to earn positive adjustment time throughout his entire sentence," and that Wis. Stat. § 973.198 was defective in that it required the filing of a petition with the sentencing court even though an individual serving consecutive sentences would have multiple sentencing courts. (R. 1:2–3, App.26-27.)

The Circuit Court for Racine County, the Honorable Gerald P. Ptacek, Circuit Judge, presiding, entered an order on July 3, 2013

that the clerk issue a writ. (R. 3, App.28.) The clerk signed the order for the writ and set a hearing for July 29, 2013, and ordered Paul Kemper, warden of Racine Correctional Institution (the Warden), to produce Mr. Singh for the hearing by phone. (R. 4, App.29.) The Warden moved to quash the writ, arguing, *inter alia*, that Mr. Singh could not demonstrate an *ex post facto* clause violation. The Warden argued that the right to earn positive adjustment time was repealed before Mr. Singh actually served time in prison, so he was ineligible for it (R. 8, App.30), even though positive adjustment time was a part of Wisconsin law when Mr. Singh committed one offense and was sentenced for the other. The Warden "in no way intimate[d] that the nature of Singh's offenses, his behavior at the prison, or any other factors suggest he would not be released early under one or more of the relevant provisions of 2009 Wis. Act 28." *Singh v. Kemper*, 2014 WI App 43, ¶18 n.6, 353 Wis. 2d 520, 846 N.W.2d 820.

In short, the Warden never called into question that Mr. Singh "met the criteria for earning [positive adjustment time]." *Id.*, ¶18.

On July 29, 2013, Judge Ptacek entered an order quashing the writ and dismissing the petition with prejudice.[6]

Mr. Singh timely appealed, R. 11, and prosecuted his appeal *pro se*. On the issue whether the retroactive appeal of positive adjustment time was an *ex post facto* law, the Court of Appeals held that it was. *Singh v. Kemper*, 2014 WI App 43, ¶1, 353 Wis. 2d 520, 846 N.W.2d 820. The court reasoned that "The enactment of the 2011 act 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

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[6] A transcript of the circuit court's decision was not made part of the record during the proceedings below on the basis that the case involves solely an issue of law. (R. 11; Appellant's Ct. App. Brief at 3.) In any event, the question that this Court directed counsel to brief before the Court was not squarely presented to the circuit court.

earlier." *Id.*, ¶10. The court ruled against Mr. Singh regarding the constitutionality of Wis. Stat. § 973.198, stating that "Singh has not met his burden of proving this change in the method for securing early release based upon PAT violates the ex post facto clauses." *Id.*, ¶22. It rejected his arguments that Wis. Stat. § 973.198 did not apply to him because he, serving consecutive sentences, had no single sentencing court to petition and that Wis. Stat. § 973.198 was an *ex post facto* law because it required affirmative court approval, which was not required under the old law. (*See* App. Ct. App. Br. at 9-10.) The court also ruled against Mr. Singh on the question of whether positive adjustment time could be earned in jail, *see Singh*, 353 Wis. 2d 520, ¶¶26-29, an issue that this Court did not accept for review.[7]

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[7] This Court's order granting review appears to have excluded this final issue. This Court's decision on the *ex post facto* issues will leave unresolved whether the Court of Appeals was correct that individuals serving a portion of a prison sentence in jail are not entitled to good time credit under either the jail good-time credit statute or the prison good-time statute. *Compare State v. Harris*, 2011 WI App 130, 337 Wis. 2d 222, 805 N.W.2d 386 (inmate serving prison sentence in jail not entitled to good-time credit under jail statute) *with Singh v. Kemper*, 335 Wis. 2d 520 (individual serving prison sentence in jail not entitled to good-time credit

Mr. Singh moved for reconsideration, on the ground that Wis. Stat. § 973.198 was an *ex post facto* law because it delayed court review of positive adjustment time release from before the projected positive adjustment release date to up to 90 days later. He argued also that Wis. Stat. § 973.198 is ambiguous regarding the treatment of consecutive sentences, that positive adjustment time may be earned in jail, and that the Department of Corrections improperly denied him access to the statistics necessary to prove that Wis. Stat. § 973.198 was unconstitutional because it decreased the number of early releases. Mr. Singh also moved for temporary relief that he be released on extended supervision. The Court of Appeals denied both motions in a single order, without awaiting a response.

The parties both petitioned for review. This Court granted the Warden's cross-petition in its entirety and granted review of this

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under prison statute). This issue may warrant the Court's attention should a party raise it here again.

issue raised in Mr. Singh's petition: "Is § 973.198, Stats., which changed the role the sentencing court plays in reviewing prisoners' potential early release based on positive adjustment time, unconstitutional." (Nov. 4, 2015 Order.)

## STANDARD OF REVIEW

"The constitutionality of a statute is a question of law which this court reviews without deference to the circuit court's reasoning." *State v. Migliorino*, 150 Wis. 2d 513, 524, 442 N.W.2d 36 (1989). "All legislative acts are presumed constitutional, and every presumption must be indulged to sustain the law." *State v. Randall*, 192 Wis. 2d 800, 824, 532 N.W.2d 94 (1995). "The party bringing the challenge must show the statute to be unconstitutional beyond a reasonable doubt." *State v. McManus*, 152 Wis. 2d 113, 129, 447 N.W.2d 654 (1989).

## ARGUMENT

### I. WISCONSIN STAT. § 973.198 VIOLATES THE *EX POST FACTO* CLAUSES BECAUSE IT DELAYS THE TIME WHEN PRISONERS WHO EARNED POSITIVE ADJUSTMENT TIME ARE RELEASED.

The *ex post facto* clauses of the federal and state constitutions prohibit the Legislature from passing any law that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull*, 3 U.S. 386, 3 Dall. 386, 390 (1798) (Opinion of Chase, J.); *see also State v. White*, 97 Wis. 2d 517, 518-19, 294 N.W.2d 36 (Ct. App. 1979). Wisconsin Stat. § 973.198 is an *ex post facto* law that violates both these clauses.

Before Wis. Stat. § 973.198 took effect on August 3, 2011, inmates who earned positive adjustment time were released on their Eligibility Date. Under Wis. Stat. § 973.198, inmates cannot file a petition with the circuit court to let them realize the benefit of their earned positive adjustment time until their Eligibility Date, with release necessarily delayed for up to 90 days after that petition is

filed. This change in the law necessarily extends the time that prisoners who earned good-time credits are incarcerated and, therefore, violates the *ex post facto* clauses.

### A. The *Ex Post Facto* Clauses Prohibit the Legislature From Increasing the Punishment for an Offense After It Has Been Committed.

The Declaration of Rights in Wisconsin's Constitution says that "No . . . *ex post facto* law . . . shall ever be passed . . . ." Wis. Const. Art. I, sec. 12. The United States Constitution says that "No State shall . . . pass any . . . *ex post facto* Law . . . ." U.S. Const. Art. I, sec. 10, cl. 1.

Regarding the interpretation of these two clauses, this Court has stated: "We have 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." *State v. Thiel*, 188 Wis. 2d 695, 699, 524 N.W.2d 641 (1994).

Under these clauses,

> No one can be punished more severely than prescribed by the law which existed before or at the time the supposed offense or offenses were committed. A law which makes an innocent act criminal, which changes the nature of the offense, or which increases the punishment for the same offense, violates the constitutional prohibition against *ex post facto* laws.

*White*, 97 Wis. 2d at 518-19; *see also, e.g.*, *Calder*, 3 U.S. 386, 3 Dall. at 390. This case involves the last prohibition described in *White*. Because Wis. Stat. § 973.198 is a law that "increases the punishment for the same offense," *White*, 97 Wis. 2d at 519—namely, it increases the punishment for all individuals who earn positive adjustment time under the 2009 Act—the statute violates the *ex post facto* clauses. *See Weaver v. Graham*, 450 U.S. 24, 30 (1981).

The *ex post facto* clauses apply to calculations for good-time release, *Eder v. Matthews*, 115 Wis. 2d 129, 130, 340 N.W.2d 66 (1983), like positive adjustment time and Wis. Stat. § 973.198. The Legislature can, consistently with the *ex post facto* clauses,

retroactively mitigate punishment, *Keene v. State*, 3 Pin. 99, 105 (Wis. 1850); *Calder*, 3 U.S. 386, 3 Dall. at 391, but it cannot retroactively enhance punishment. *White*, 97 Wis. 2d at 518-19; *see also, e.g.*, *Calder*, 3 U.S. 386, 3 Dall. at 390.

### B. Wisconsin Stat. § 973.198 Is an *Ex Post Facto* Law Because It Delays Positive Adjustment Time Release by 90 Days.

Wisconsin Stat. § 973.198 is an unconstitutional *ex post facto* law because it adds up to 90 days of incarceration to a sentence, which were not required to be served under its predecessor statute, for inmates who have earned positive adjustment time. *Mueller v. Powers*, 64 Wis. 2d 643, 221 N.W.2d 692 (1974), which the Court of Appeals properly relied on below on the cross-petition issues, is equally on point on the Wis. Stat. § 973.198 issues and provides a framework for the analysis. *Mueller* was a writ proceeding in this Court brought by inmates in the state prison system, on behalf of a similarly situated class of inmates, seeking a declaration that an amendment to the parole laws was an *ex post facto* law. *Mueller*, 64

Wis. 2d at 644-45. Specifically, the inmates were challenging a 1973 act that extended their initial eligibility date for parole from two years into their imprisonment to five. *Id.* at 645.

This Court declared the 1973 law unconstitutional. The statute, which increased "the time that must be served by petitioners before they are eligible for parole consideration from two to five years in a very real and practical sense imposes an additional penalty and violates the constitutional inhibition against *ex post facto* legislation." *Mueller*, 64 Wis. 2d at 647. It did not matter that the actual decision to grant or deny parole was a discretionary decision (then of the Department of Health & Social Services' division of corrections), the inmates had "as a matter of right the opportunity to be considered for parole after serving a given period of time." *Id.* When the Legislature took away the right to be considered at two years and delayed parole consideration until the prisoner had served five years, it violated the *ex post facto* clauses. *Id.*

Not only does *Mueller* compel reversal of the Court of Appeals on the question of the constitutionally of Wis. Stat. § 973.198, it also removes any doubt about Mr. Singh's standing to continue this appeal even though he is now out of prison. This Court in *Mueller* declared the statute unconstitutional even though it was not able to grant any actual relief to the petitioners because they had not pleaded that they had already served two years of their sentences; in order to be eligible for parole consideration under the old law, and for the rights to have "accrued to them," they needed to have served two years. *Mueller*, 64 Wis. 2d at 648. *Mueller* instructs that this Court's duty as a law-declaring court "to say what the law is" is paramount to the "application of the rights declared" in granting relief. If a current and still curable injury-in-fact were required for standing to challenge Wis. Stat. § 973.198, it would be nearly impossible to challenge the statute because there would be only a 90-day window in which to challenge it—the 90 days before an inmate

reaches positive adjustment time—because the principal *ex post facto* violation challenged here is the additional 90 day delay added by the statute. The briefing schedule alone in this case exceeds 90 days, to say nothing of the time it takes to appeal from the circuit court and petition for review from the Court of Appeals. This case, an appeal from a denial of habeas, is the best vehicle for the Court to address the constitutionality of the amendments to positive adjustment time. *See also Olson v. Litscher*, 2000 WI App 61, ¶1, 233 Wis. 2d 685, 608 N.W.2d 425 (granting petition for habeas, based on improper extension of confinement, even though inmate had already been released); *McMillian v. Dickey*, 132 Wis. 2d 266, 286, 392 N.W.2d 453 (Ct. App. 1986) (citations omitted) ("Relief under habeas corpus is not limited to release of the person confined. Habeas corpus is essentially an equitable doctrine and a court of equity has authority to tailor a remedy for the particular facts."). In this case, Mr. Singh has already been released from prison. Therefore, when this Court

orders that the writ be granted it should remand the case with instructions that the Circuit Court consider what further equitable relief is warranted.

*Mueller* remains good law today. The only relevant change to *ex post facto* jurisprudence in this State and in this Court since *Mueller* is the precise formulation of the test regarding what constitutes an *ex post facto* law. *Mueller*, following century-old U.S. Supreme Court precedent, recited a formulation of the *ex post facto* test that included in its language a prohibition against any law "which alters the situation of the accused to his disadvantage." *Mueller*, 64 Wis. 2d at 646 (*quoting Medley v. Petitioner*, 134 U.S. 160, 171 (1890)). In *State v. Thiel*, 188 Wis. 2d 695, this Court upheld a new statute prohibiting convicted felons from possessing firearms and rejected an argument that *Mueller* required that any law that *disadvantaged* a prisoner in any way was an *ex post facto* law. *Id.* at 699-703. While the Court withdrew some of the broad language in

*Mueller*, it left unchanged *Mueller*'s holding that retroactively increasing a sentence—as happened in *Mueller* when a law "extended the time a prisoner must serve before being eligible for parole" by moving it from two years to five years—was an *ex post facto* violation. *Id.* at 699-703.[8]

Wisconsin Stat. § 973.18 suffers from the same constitutional infirmity as the law in *Mueller*. The statute under challenge increased all positive-adjustment-time eligible sentences by up to 90 days, from release on the "Eligibility Date" to release on a date up to 90 days later:

- Under Wis. Stat. §§ 302.113(2)(c)1. and 304.06(1)(bk)1. (2009-10), "When an inmate is within 90 days of release to extended supervision," the Department of Corrections or the earned release review committee,

[8] *See also Peugh v. United States*, 133 S. Ct. 2072, 2083 n.4 (2013) (discussing history of test).

respectively, "shall notify the sentencing court that it intends to modify the inmate's sentence and release the inmate to extended supervision."

- Under Wis. Stat. § 973.198, "When an inmate . . . who has earned positive adjustment time under s. 302.113, 2009 stats., or under s. 304.06, 2009 stats., has served the confinement portion of his or her sentence less positive adjustment time earned . . . he or she may petition the sentencing court to adjust the sentence under this section" for release.

A different thing happened under the old statute than under the new at the time "when an inmate . . . has served the confinement portion of his or her sentence less positive adjustment time earned." Under the old statute he was released *on* that date. Wis. Stat. § 302.113(2)(b). Under the new statute, he is for the first time permitted to begin a process that might drag on for 90 days before

he is released. It is not the change in procedure *per se* that, is unconstitutional, but the fact that, during the 90 days after a prisoner's Eligibility Date, when he would have been released under the old law, he remains incarcerated. As the 1973 Act was unconstitutional in *Mueller* because it delayed parole eligibility by three years, so, too, is the 2011 Act unconstitutional because it delays early release for positive adjustment time by up to 90 days.

Post-*Mueller* cases decided by the U.S. Supreme Court reaffirm the legal principle relied on by *Mueller*. In *Weaver v. Graham*, which applies both to the issue in the petition and to those in the cross-petition, the Court struck down as unconstitutional a change to Florida's "gain time for good conduct" statute—an analogue to positive adjustment time—because the changes extended the time that persons who had already been convicted of a crime were required to spend in prison. 450 U.S. at 26-28.

In *Weaver*, Florida had repealed portions of its gain-time system and replaced it with other opportunities to be released. "On its face, the statute reduce[d] the number of monthly gain-time credits available to an inmate who abides by prison rules and adequately perform[ed] his assigned tasks." *Id.* at 33. This was unconstitutional because, "by definition" it "lengthen[ed] the period that someone in petitioner's position must spend in prison." *Id.*

*Weaver* relied on *Lindsey v. Washington*, 301 U.S. 397 (1937), in which the Court held violative of the *ex post facto* prohibition a law that converted the inmate's *maximum* sentence into a mandatory sentence. Under each of these cases, changes to the statutory framework *extended the length of sentences* that inmates were made to serve; prisoners were required to spend more time in prison as a result of legislation than they would have had to spend when they committed a crime or were convicted. Such changes cannot be applied to crimes already committed. *Id.* at 401.

Wisconsin Stat. § 973.198, in requiring prisoners to stay in prison for up to 90 days longer than would have been the case before the statutory change, is an *ex post facto* law. Though *California Department of Corrections v. Morales*, 514 U.S. 499 (1995), restated the test for when an early release law violates the *ex post facto* clause, it did not, of course, change these principles. The Court in *Morales* stated that "whether a legislative change produces some ambiguous sort of 'disadvantage,'" or is one that merely "*affects*" early release opportunities, is not what makes it an *ex post facto* law, but only whether those changes "alter[] the definition of criminal conduct or increase[] the penalty by which a crime is punishable." *Id.* at 506 n.3 (emphasis added). While *Morales* was dismissive of the "focus" of the "inquiry" in *Weaver* and *Lindsey*, it left their holdings intact. In *Weaver* and *Lindsey* the statutes "had the purpose and effect of enhancing the range of available prison terms" retroactively, *Morales*, 514 U.S. at 507, and, therefore, were *ex post facto* laws. By

contrast, in *Morales* the length of the sentence did not change, the initial eligibility date for parole remained unchanged, the standard for parole remained unchanged, and only later procedures were changed. *Morales*, 514 U.S. at 507; *see also Lynce v. Mathis*, 519 U.S. 433, 442-47 (1997); *cf. Burrus v. Goodrich*, 194 Wis. 2d 654, 667, 535 N.W.2d 85 (Ct. App. 1995).

On March 29, 2010, Mr. Singh was convicted in Waukesha County (R. 8:13-15, App.42-44), on April 29, 2010 he was sentenced, and on July 25, 2011, he committed the conduct underlying his Milwaukee County conviction. Each of these events occurred while the 2009 statutory structure applied. Accordingly, Mr. Singh was eligible not only to earn positive adjustment time throughout his sentence, as the Court of Appeals held, but *also* to be released *on* his Eligibility Date, calculated based on the positive adjustment time he had earned. The Legislature's attempt to forestall that release, including by delaying it for up to 90 days—and to delay the release

of many other of the most well-behaved prisoners—was unconstitutional. *Weaver*, 450 U.S. at 30 ("Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.").

Wisconsin Stat. § 973.198 is unconstitutional under the *ex post facto* clauses.

## II. WISCONSIN STAT. § 973.198 VIOLATES THE *EX POST FACTO* CLAUSES BECAUSE IT CHANGES THE STANDARD WHICH COURTS APPLY IN REVIEWING POSITIVE ADJUSTMENT TIME RELEASES.

Wisconsin Stat. § 973.198 also violates the *ex post facto* clauses for another reason: it modifies the standard that the sentencing court is to apply when it reviews positive adjustment time releases. Before § 973.198 was enacted, the default (*i.e.*, what happened in the absence of action by the sentencing court) was release for positive adjustment time. Wis. Stat. § 302.113(2)(c)1. (2009-10) ("If the court

does not schedule a review hearing within 30 days after notification under this subsection, the department may proceed" with release.); Wis. Stat. § 304.06(1)(bk)1. (2009-10) ("If the court does not schedule a review hearing within 30 days after notification under this subsection, the [earned release review commission] may proceed" with release.). The sentencing court could prevent release only by scheduling a hearing and finding that the department of corrections miscalculated positive adjustment time or if one of three specific statutory criteria applied. Wis. Stat. § 302.113(2)(c)2.b.; Wis. Stat. § 304.06(1)(bk)2.b. Under Wis. Stat. § 973.198, the new default rule is continued imprisonment, and only through affirmative action by the sentencing court, applying an undefined standard, can an inmate realize the benefit of positive adjustment time. Wisconsin Stat. § 973.198 is an *ex post facto* law for this reason, too, and this argument provides an independent and equally-sufficient ground for this Court to hold that the statute is unconstitutional.

The key question, when assessing whether the statute is an *ex post facto* law on this additional ground, is whether a parole agency or court conducting discretionary review of an early release applies the same standard for exercising its discretion under a new retroactive law as it applied under the old law. *Cf. Morales*, 514 U.S. at 507. If the standard for discretion remains unchanged, changes to the review process are more likely to be constitutional if they do not present a "significant" or "sufficient risk" of increased incarceration. *See Garner v. Jones*, 529 U.S. 244, 250, 251 (2000); *see also Peugh*, 133 S. Ct. at 2083 n.4; *Morales*, 514 U.S. at 509. If an agency or court applies a different substantive standard in exercising its discretion that presents a non-attenuated risk of increased incarceration—as is true here—the change is unconstitutional.

A number of Supreme Court decisions apply this principle. In *Weaver*, a Florida law was unconstitutional because it purported to convert a portion of mandatory gain time credits into other

opportunities for inmates to earn early release. 450 U.S. at 34-35. But a new standard applied to earning gain time under the new statute. *Id.* Rather than receiving gain time "solely for good conduct," as under the old statute, the "award of the extra gain time [was] purely discretionary" under the new statute. *Id.* at 35.

Common sense dictates that either of the 2011 Act's statutory changes—moving the default rule from release to continued imprisonment and removing the strict statutory review criteria altogether and making it "purely discretionary," *see Weaver*, 450 U.S. at 35—creates a sufficient risk of increased incarceration. Their combined effect certainly does.

*Morales*, on which the Court of Appeals and the Warden relied below, presented a different question. *See Morales*, 514 U.S. 499. *Morales* arose when California changed its parole process "for those prisoners who have been convicted of 'more than one offense which involves the taking of a life.'" *Id.* at 510. Under California's old

parole system, a prisoner who was denied parole at his initial suitability hearing would have additional parole hearings annually. *Id.* at 503. Under the new procedure California adopted, double-, triple-, and "mass"-murderers were still eligible for parole on the same initial date. *Id.* at 507, 511-12. But if these "mass murderers" were denied parole, the parole board could also delay the next parole hearing for up to three years if, based on the evidence at the initial parole hearing, there was "no reasonable probability" that he would be released before then. *Id.* at 507, 511-12. Critical to the Court's analysis, when it concluded that the change was not an *ex post facto* law, was the fact that the standard for "suitability" for parole *did not change*. *Id.* at 507. Rather, the board applied "identical substantive standards." *Id.* at 508. "The amendment had no effect on the standards for fixing a prisoner's initial date of 'eligibility' for parole, or for determining his 'suitability' for parole and setting his release date." *Id.* at 507 (citations omitted).

Also, *Morales* did not present the timing issue presented here because inmates in California were first eligible for parole on the same initial date when they were eligible under the old standard. *Id.* at 511 ("The amendment has no effect on the date of any prisoner's initial parole suitability hearing; it affects the timing only of *subsequent* hearings.") (emphasis added). Furthermore, an offender could request a hearing earlier than the one set by the parole board, and the parole board told the Supreme Court that it did conduct earlier reviews of meritorious cases. *Id.* at 512-13. In short, the statute not only did not take away opportunities for early release, thereby lengthening the sentence, the statute did not "affect" the opportunity for early release in any substantive way. *Id.*; *see also id.* at 506 n.3.

Under the rule in *Morales*, therefore, a parole board or court must apply the same (or a more lenient) standard of review of an inmate's suitability for early release under a new and retroactive

statute as it did under the older statute, in order for that new method to be constitutional. *Id.* at 507; *Miller v. Florida*, 482 U.S. 423, 432-33 (1987) (change in sentencing standard guidelines that resulted in longer sentences was unconstitutional).

The Court of Appeals, without the benefit of adversarial briefing on this issue, *Singh v. Kemper*, 2014 WI App 43, ¶20 n.7, 353 Wis. 2d 520, 846 N.W.2d 820, erred when it concluded that the procedural changes were constitutional because under both systems a prisoner must notify the sentencing court, and the court must exercise discretion. *Id.*, ¶¶23-25. The court understated the significance of the change in the default rule, going from release to continued imprisonment. *See id.*

Rather than keeping the strict statutory criteria of the old statute, Wis. Stat. § 973.198 is now silent as to what standard the sentencing court ought to follow when exercising discretion in

reviewing early release.[9] This statutory change did not involve merely discretion informed and improved by experience. Rather, the standard to be applied changed from specific, limited criteria to unfettered discretion. This change in substantive standard is unconstitutional.

Of course, not all changes to a statutory method of granting early release violate the *ex post facto* clauses. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990); *Morales*, 514 U.S. at 506 n.3. This Court recognized long ago that the Legislature can mitigate punishments, *Keene*, 3 Pin. at 105, as in fact it did with the 2009 Act. 2009 Wis. Act 28, § 9311; *see also Dobbert v. Florida*, 432 U.S. 282, 294 (1977) ("In this case, not only was the change in the law procedural, it was

[9] To the extent that the Court considers the statute ambiguous, it can consult the legislative history, *State ex rel. Kalal v. Circuit Court of Dane Cnty.*, 2004 WI 58, ¶¶46-52, 271 Wis. 2d 633, 681 N.W.2d 110, which shows that an earlier draft of the bill contained the same statutory standard for court review as in the 2009 Act. The Legislature consciously and intentionally changed the standard.

ameliorative. It is axiomatic that for a law to be *ex post facto* it must be more onerous than the prior law.").

It is also true that, in some circumstances, the Legislature may change who performs a specific task in setting a sentence. For example, in *Keene*, an issue once decided by a judge could constitutionally be decided by a jury under a new statute. 3 Pin. at 105-06 ("but this amounts to nothing more than giving the jury an additional duty, and relieving the court from a duty that before devolved upon it."); *see also Dobbert v. Florida*, 432 U.S. at 294. When two judges apply the same standard and arrive at different results, no constitutional violation exists. *See Keene*, 3 Pin. at 106. But what is not constitutionally permitted, as implicitly held in *Morales* and explicitly held in *Weaver*, is for the Legislature to change the standard that the court applies to early release decisions. But the Legislature did just that here. That was unconstitutional.

A substantial change to the role of the sentencing court in determining early release eligibility is the type of change that implicates the principles of "fair notice" that underlie the *ex post facto* clauses. *Peugh*, 133 S. Ct. at 2084-85 (lead opinion). This principle is evident in the context of this case. Mr. Singh's convictions arose out of plea agreements. Normally, parole and early release are collateral consequences of a plea. *State v. Byrge*, 2000 WI 101, ¶¶61-63, 237 Wis. 2d 197, 614 N.W.2d 477. But when the sentencing court simply *may* play a role in setting an eligibility date for early release, its role becomes a direct consequence of a plea, and due process requires that that procedure be made known to a defendant before a plea is valid. *Id.* , ¶¶67-68. The interplay of these due process principles and the *ex post facto* principles demonstrates the flaws in Wis. Stat. § 973.198. Mr. Singh could not have been told when he pleaded guilty that the sentencing court would have unlimited discretion to deny early release for positive adjustment time because, when he

pleaded guilty, the sentencing court had no such power. Instead, the law as it stood when Mr. Singh pleaded guilty required mandatory release to extended supervision based on § 302.113 positive adjustment time earned. A sentencing court could stop that release only through affirmative action, if specific statutory criteria applied. The due process issues implicated by this latter *ex post facto* violation make plain the statute's unconstitutionality.

This second issue (standard to apply) may present a closer question, *see Mueller*, 64 Wis. 2d at 646; *Weaver*, 450 U.S. at 37 (Rehnquist, J. concurring), than the first issue, but a barely unconstitutional law must be struck down no less surely than a plainly unconstitutional law. The Legislature's changing the statutory standard for sentencing court review of positive adjustment time releases was unconstitutional. Wisconsin Stat. § 973.198, because it applies only retroactively, is unconstitutional in its entirety.

## CONCLUSION

This Court should reverse the Court of Appeals in part and declare that Wis. Stat. § 973.198 is unconstitutional under the *ex post facto* clauses, and remand the case to the Circuit Court with instructions that the writ of habeas corpus be issued forthwith and that the Circuit Court determine what additional equitable relief is warranted under the circumstances.

Dated: January 19, 2016

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**CERTIFICATION OF FORM, LENGTH AND ELECTRONIC FILING**

I hereby certify that this brief conforms to the rules contained in WIS. STAT. § 809.19(8)(b)&(c) for a brief produced with a proportional serif font. The length of this brief is 9,037 words.

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date, except for the signature.

Dated: January 19, 2016

Philip C. Babler

## CERTIFICATE OF MAILING

I hereby certify that on January 19, 2016 I caused the foregoing Brief of Petitioner-Appellant-Petitioner Aman Singh and 22 copies to be sent by Federal Express for delivery to the clerk, and therefore, filed on this date, pursuant to Wis. Stat. § 809.80(3)(b)(2).

Dated: January 19, 2016

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