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.

ON PETITION FOR REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II. APPEAL FROM RACINE COUNTY CIRCUIT COURT QUASHING A PETITION FOR WRIT OF HABEAS CORPUS, THE HONORABLE GERALD P. PTACEK, PRESIDING

# BRIEF OF AND SUPPLEMENTAL APPENDIX RESPONDENT-RESPONDENT-CROSS-PETITIONER PAUL KEMPER

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## STATEMENT OF THE ISSUES

The State rephrases the issue as follows:

Aman Singh filed a petition for writ of habeas corpus in circuit court, arguing that he was entitled to positive adjustment time (PAT) for his offenses. The circuit court

quashed his petition. On appeal to the court of appeals, Singh argued that the retroactive application of a statute, Wis. Stat. § 973.198 (2011-12), violates the ex post facto clause of the United States and Wisconsin Constitutions because it increases his punishment.

Did the court of appeals correctly determine that the procedural changes of Wis. Stat. § 973.198 were constitutional and did not violate the ex post facto clause because, under the statute, the sentencing court still has discretion when it determines whether an inmate is entitled to PAT?

Singh raises another ex post facto challenge. He claims that Wis. Stat. § 973.198 adds "up to 90 days" of confinement, thereby increasing his penalty. The court of appeals did not consider this issue. It is the State's position that this claim is meritless because the application of Wis. Stat. § 973.198 does not add one day to an inmate's confinement, let alone "up to 90."

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case involves the issue of the constitutionality of a state statute. Therefore, oral argument and publication are requested.

## SUPPLEMENTAL PROCEDURAL HISTORY

Relevant timeline:

On October 16, 2008, in Waukesha County, 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[1]).

[1] References to R-Ap. 101 – 141 are from the State's Response Brief in the Court of Appeals, and references to R-Ap. 142 – 199 are from the State's Brief-in-Chief of its Cross-Petitioner Brief filed in this Court.

In 2009, the legislature enacted the 2009 Act, a statutory scheme that afforded inmates 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 Waukesha 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).

On July 25, 2011, in Milwaukee County, Singh committed the crime of obtaining a controlled substance by fraud (8:20; R-Ap. 120).[2] This is the only crime in which his acts were *committed* within the 2009 Act, and therefore the only one subject to his ex post facto claim. *See* State's Brief in Chief of its Cross-Petitioner Brief.

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

In November 2011, Singh was convicted in his Milwaukee County case for obtaining a controlled substance by fraud (8:20-23; R-Ap. 120-123). In December 2011, Singh's probation for his Waukesha County conviction was revoked, and his stayed prison sentence imposed (8:25; R-Ap. 125). Also in December 2011, Singh was sentenced for his Milwaukee County conviction (8:20; R-Ap. 120).

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[2] In this judgment of conviction, Singh was also convicted of additional offenses, where all other counts involved conduct that occurred on August 23, 2011, which is after the August 3, 2011 effective date of the 2011 Act (8:21-22; R-Ap. 121-22).

It is undisputed that Singh never served a day in prison until January 2012, after the enactment of the 2011 Act.

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, reduced by any PAT the inmate had earned. 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 holding a review hearing. Wis. Stat. § 304.06(1)(bk)1. (2009-10). At the hearing, the court could accept or reject 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 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.

The repeal of the 2009 statutes providing PAT and Wis. Stat. § 973.198's (2011-12) preservation of inmates' right to seek PAT for time served between October 1, 2009 and August 3, 2011:

The 2011 Act repealed Wis. Stat. 304.06(1)(bg)1. and it eliminated the PAT provisions of § 302.113(2)(b), precluding inmates from earning PAT *after* August 3, 2011. *See* 2011 Wisconsin Act 38, § 38, 58. However, the 2011 Act created Wis. Stat. § 973.198, which preserved an inmate's opportunity to seek early release based upon PAT that the inmate had earned *between* October 1, 2009 and August 3, 2011. *See* 2011 Wisconsin Act 38, § 96.

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

> 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).

Therefore, although the Wisconsin Legislature repealed portions of Wis. Stat. § 304.06 (2009-10) that *precluded* the possibility of earning PAT *after* August 3,

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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).

2011, it enacted Wis. Stat. § 973.198(1) (2011-12).[4] This latter statute preserved an inmate's right to apply for PAT potentially earned *between* October 1, 2009 and August 3, 2011.

Wisconsin Stat. § 973.198(1) is the statute at issue in Singh's appeal. Singh claims that this statute violates the ex post facto clause because, unlike the statutes providing for PAT in the 2009 Act, Wis. Stat. § 973.198 (1) gives circuit courts "unfettered discretion" when "exercising discretion in reviewing early release," and (2) delays PAT release (Singh Brief 52-53, 35).

Singh's petition for PAT:

In May 2012, the Department of Corrections (DOC) sent a letter informing the Waukesha County circuit court that Singh had filed a petition for PAT for the sentence imposed in the Waukesha County case (8:27; R-Ap. 127, 200). 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.*). The court denied his request for PAT.

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, *inter alia*, that he was entitled to PAT time, and that the repeal of the 2009 Act constitutes an ex post facto violation as applied to him (*id.*).

The Warden argued that this claim was vacuous because Singh served no time in prison during the effective dates of the 2009 Act, and so he could not earn any PAT as a matter of law (8:7; R-Ap. 107).

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[4] For the remainder of the State's brief, "Wis. Stat. § 973.198 (2011-12)" will be cited as "Wis. Stat. § 973.198."

The circuit court dismissed Singh's petition (10; R-Ap. 141). Singh appealed.

## THE COURT OF APPEALS' DECISION CONCERNING WIS. STAT. § 973.198

One of the issues that Singh raised on appeal was whether the retroactive applicability of the Wis. Stat. § 973.198 violates the ex post facto clause. The court of appeals held it did not. This holding is the subject of Singh's issue on appeal and this response brief.

Singh twice represents to this Court that the State did not brief or respond to this argument in the court of appeals (*see* Singh Brief at 5, 52). This is not the case. The State explicitly argued in its brief, as it argues now, that Wis. Stat. § 973.198 is only a *procedural* change and that the procedural change did not violate the ex post facto clause (State's Court of Appeals' Brief at 11, 9[5]). The State, citing caselaw that the court of appeals *relied upon* in its decision, argued that "[e]ven though it may work to the disadvantage of a defendant, a *procedural* change is not ex post facto" (citing *Dobbert v. Florida*, 432 U.S. 282, 293 (1977)) (State's Court of Appeals' Brief at 9, 11; *see also State v. Singh*, 2014 WI App 43, ¶22, 353 Wis. 2d 520, 846 N.W.2d 802; R-Ap. 142 – 60) (citing *Dobbert*)). The State also responded to Singh's argument that the retroactive application of Wis. Stat. § 973.198 violates the ex post facto clause because "'it turned Singh's discretionary sentence into a *mandatory* sentence of 42 months'" (State's Court of Appeals' Brief at 13). In responding, the State noted that a circuit court has *discretion* under the new statute to "to adjust the [petitioner's] sentence" for time served under the applicable time period. Wis. Stat. § 973.198" (*id.*, internal quotation marks omitted).

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[5] *See* State's Court of Appeals brief, page 9, with its own heading, "**D. The Retroactive Applicability of Wis. Sat. § 973.198 (2011-12) Does Not Violate the Ex Post Facto Clause**," and the three pages of argument that follow.

The court of appeals did not discuss Singh's claim that the statute violates the ex post facto clause because it adds additional days of confinement to the date of release; it did not do so because Singh did not raise this claim until he filed his motion for reconsideration, which the court of appeals denied.

Singh appeals.

## 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 granted Singh's petition for review on the following issue: "is § 973.198, Stats., which changed the role the sentencing court plays in reviewing [inmate's] potential early release based on positive adjustment time, unconstitutional[?]" *See* this Court's Order of November 4, 2015. The State submits that it is not.

### I. Singh cannot meet his burden of establishing beyond a reasonable doubt that Wis. Stat. § 973.198 violates the ex post facto clause. The procedural changes in Wis. Stat. § 973.198 do not change the standard of review for courts to apply when reviewing PAT petitions.

#### A. Changes in the law.

Under Wis. Stat. §§ 302.113(2)(c) and 304.06(1)(bk) (2009-10), the DOC or the earned release review commission would notify the sentencing court of an inmate's request for

PAT pursuant to §§ 302.113(2)(b) and 304.06(1)(bg). The sentencing court could hold a hearing to approve, reject, or modify the PAT. *See* Wis. Stat. §§ 302.113(2)(c)1. and 304.06(1)(bk)1. An inmate's request for PAT could also proceed to the review committee if the court chose *not* to hold a hearing. *Id.*

The 2011 Act modified the review process of a pending early release based upon PAT. Under the 2011 Act and Wis. Stat. § 973.198, an inmate seeking early release based upon PAT earned between October 1, 2009, and August 3, 2011, petitioned the sentencing court directly. Wisconsin Stat. § 973.198 removed the "middle man" – the review commission – under Wis. Stat. § 304.06. Under Wis. Stat. § 973.198, the sentencing court must then either deny the petition or hold a hearing and approve or reject the request within 60 days. *See* Wis. Stat. § 973.198(3).

Under the 2009 Act, if a sentencing court was notified of an inmate's pending release based upon PAT, the court was not *required* to hold a hearing. But, under Wis. Stat. § 973.198, the court hold *must* hold a hearing if it determines that PAT should be granted. *See* Wis. Stat 304.06(1)(bk)1. (2009-10) and Wis. Stat. § 973.198(3) (2011-12). But here's the procedural change that Singh takes issue with: Singh claims that under the new statue, Wis. Stat. § 973.198, the sentencing court applies an "undefined standard" in determining whether to grant an inmate PAT (Singh Brief at 47). And, according to Singh this "silent" standard of review "remov[es] the strict statutory review criteria" of the prior laws and therefore "creates a sufficient risk of increased incarceration" (Singh Brief at 49). For the following reasons, the State disagrees.

### B. The procedural changes in Wis. Stat. § 973.198 are not unconstitutional. Similar to the statutes in the 2009 Act, under Wis. Stat. § 973.198, the sentencing court retains discretion to grant or deny an inmate's request for PAT.

First, Singh does not explain how the court's discretionary review under the new law is different, or less strict, or more strict, than the court's review under the old law. For purposes of an ex post fact analysis, he does not show how a court's standard of review under the new law presents a "significant" or "sufficient" risk of increased incarceration. *See* Singh Brief at 48 (citing *Garner v. Jones*, 529 U.S. 244, 251 (2000)). Rather, Singh simply labels the review under the old law as "strict statutory review criteria" and then does not list that criteria that, according to Singh, a court is no longer required to follow under the new law (Singh Brief at 49).

Second, Singh is contesting a procedural change in the law. A procedural change in the law is one that "simply alter[s] the methods employed in determining" whether the punishment is to be imposed, rather than "chang[ing] . . . the quantum of punishment attached to the crime." *Dobbert*, 432 U.S. at 293-94. While a procedural change, in some circumstances, may have a substantive impact that violates the ex post facto clause, "speculative and attenuated possibilit[ies]" of increasing a inmate's actual term of confinement do not violate the clause. *See California Dep't of Corrections v. Morales*, 514 U.S. 499, 509 (1995).

A significant risk of prolonged confinement is not inherent in the framework of Wis. Stat. § 973.198's procedural change, and so such risk must be demonstrated by Singh. *See Garner v. Jones*, 529 U.S. at 255 ("When the rule does not by its own terms show a significant risk, the [petitioner] must demonstrate, by evidence drawn from the rule's practical implementation . . . that its retroactive

application will result in a longer period of incarceration than under the earlier rule.").

Singh cannot show how the procedural change violates the ex post facto clause. Under *both* laws, the sentencing court is notified of the potential release based upon PAT and exercises its discretion to grant or deny the PAT requested. Under the 2009 Act, the court could either decline to hold a hearing or hold a hearing, and the court could either grant release or order the inmate to remain in prison. Wis. Stat. §§ 302.113(2)(c)1, 304.06(1)(bk)1 (2009-10). Under Wis. Stat. § 973.198, the court can grant release after holding a hearing, or deny release, either with or without a hearing. *See* Wis. Stat. § 973.198(3). Under either law, the court has *discretion* to release an inmate early or require the inmate to serve the full period of confinement.

The statutory change of Wis. Stat. § 973.198 merely alters the *method* for determining whether early release based upon PAT would be granted; it does not increase Singh's punishment or result in a longer period of confinement. Such a change does not violate the ex post facto clause. *Dobbert*, 432 U.S. at 293-94. Singh has failed to establish that the procedural change of Wis. Stat. § 973.198 creates a significant risk of prolonging his confinement, and therefore his ex post facto claim fails.

### C. Singh has failed to prove that Wis. Stat. § 973.198 violates the ex post facto clause because that statute does not result in a delay of release from an inmate's confinement.

Singh also argues that Wis. Stat. § 973.198 violates the ex post facto clause because it results in an increase in confinement of up to 90 days (Singh Brief at 34, 35). Singh is incorrect. There is no delay, let alone "up to 90 days."

Under the new statute, Wis. Stat. § 973.198 (hereinafter "new law"), an inmate petitions for PAT (during October 1, 2009 – August 3, 2011), directly with the sentencing court. In its discretion, the court can either deny the petition or hold a hearing. Wis. Stat. § 973.198(3). A court is required to make its decision within 60 days of the inmate's filing for PAT. *Id*.

Under the prior statue, Wis. Stat. § 304.06(1)(bg) ("old law"), a petitioner filed a petition with the earned release review commission.[6] Then, there were intermediate steps before the inmate's petition reached the circuit court. As will be demonstrated below, the statutory scheme did not result in an automatic release, nor does the new law result in a longer, "up to 90 day" delay for an inmate's release.

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[6] Singh argues that he was eligible for PAT under Wis. Stat. § 302.113(2)(b), as opposed to Wis. Stat. 304.06(1)(bg)1. (Singh Brief at 14 n.2). Singh makes this assertion with no citation to the record, and, indeed, the record is unclear if he was ever determined to be ineligible for PAT under Wis. Stat. § 302.113(2)(b). Wisconsin Statute § 973.01(3d) (2009-10) provides:

> The department shall apply to every person serving a sentence imposed under sub. (1) an objective risk assessment instrument supported by research to determine how likely it is that the person will commit another offense. (b) *If the department of corrections determines under par. (a) that the person poses a high risk of reoffending, the person shall be ineligible to earn positive adjustment time under s. 302.113 (2)(b).*"

(emphasis added).

It *is* clear from the record that a "Verification of Eligibility for Positive Adjustment Time" form was never completed by the DOC (8:27; R-Ap. 127, 200). Regardless, as Singh notes, *even if* he "were not eligible [for PAT] under Wis. Stat. § 302.113(2)(b), he would be eligible [to apply for PAT] under § 304.06(1)(bg)1." (Singh Brief at 14 n.2). For purposes of the State's brief then, it will focus on PAT under Wis. Stat. § 304.06(1)(bg)1, but it also discuss the similarities between the two statutes.

### 1. Under *both* laws, inmates filed for PAT at the same time: when they have served their initial confinement, less any PAT they think they have earned.

Singh argues that Wis. Stat. § 973.198 is unconstitutional because it delays the circuit court's review of an inmate's request for PAT release. He argues it "adds up to 90 days of incarceration to a sentence . . . for inmates who have earned positive adjustment time" (Singh Brief at 35). Singh is incorrect.

Singh argues that under the old law, "inmates who earned positive adjustment time were released on their [confinement-end date, less PAT time requested]" (Singh Brief at 32, 51). He claims that under the *new* statute, "inmates cannot file a petition with the circuit court to let them realize the benefit of their earned positive adjustment time until their [confinement-end date, less PAT earned], *with release necessarily delayed for up to 90 days* after that petition is filed" (*id.*, emphasis added). That is not correct.

Under the plain language of *both* statutes, inmates can/could petition for PAT at the same time – when they have served the confinement portion of the sentence, less PAT they think they have earned:

| Old Statute: Wis. Stat. § 304.06(1)(bg)1. | New Statute: Wis. Stat. § 973.198(1) |
|---|---|
| [A] 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 . . . less positive adjustment time he or she has earned*. | *When an inmate* who is serving a sentence imposed under s. 973.01 and who has earned positive adjustment time . . . *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. |

Therefore, under both the old and new law, inmates filed petitions for PAT at the same time: when they have served the initial confinement portion of their sentence, less any PAT they believe they have earned. The only difference was *who* the inmates petitioned: the review committee or the sentencing court.

**2. Under *both* laws, there exists a discretionary, "less up to 30 days" delay.**

As indicated above, under the old law, an inmate first petitioned the review commission. Wis. Stat. § 304.06(1)(bg)1. Then, the review commission would forward the petition to the circuit court when the inmate

was within 90 days of his confinement-end date, less any PAT claimed. Wis. Stat. § 304.06(1)(bk)1.

Wisconsin Stat. § 304.06(1)(bk)1. provides in its entirety:

> When an inmate is within 90 days of release to extended supervision under par. (bg), the earned release review committee [earned release review commission] shall notify the sentencing court that it intends to modify the inmate's sentence and release the inmate to extended supervision under par. (bg), and the court may hold a review hearing. If the court does not schedule a review hearing within 30 days after notification under this subsection, *the earned release review committee* [earned release review commission] *may proceed under par. (bg).*

Emphasis added.[7]

The above-italicized portion of the statute, "may proceed" is important, because Singh claims that under the old law, if the circuit court did *not schedule* a hearing on PAT, then Singh was *automatically released* on the confinement-end date, less the PAT he requested (Singh's Brief at 32, 42; *see also* Singh Brief at 16: "If the sentencing court decided not to hold a review hearing, the department of corrections would release the inmate *on the* [*e*]*ligibility* [*d*]*ate*."). That is not the case. Under the old law, as the statute says, if the court did not schedule a hearing, then it *proceeds* to the earned release committee. Wis. Stat. § 304.06(1)(bk)1. And, under the old law, Wis. Stat. 304.06(1)(br)1., the earned release review commission could then reduce an inmate's term of confinement "by the amount of time remaining in the term of confinement in [the] prison

[7] As Singh's brief notes, this is similar to Wis. Stat. § 302.113(2)(b), where a sentencing court was notified "within 90 days of release to extended supervision" (Singh Brief at 16). And, also similar under Wis. Stat § 302.113(2)(c)1., the sentencing court had 30 days to decide whether to hold a hearing (Singh Brief at 16).

portion of the sentence, *less up to 30 days*, and a corresponding increase in the term of extended supervision."

This is important because this is the same "less up to 30 days" language provided in Wis. Stat. § 973.198 that Singh claims violates the ex post facto law because it adds 30 days of delay (Singh Brief at 21, 22). But *both* statutes provide a possible discretionary delay:

| Old Statute, Wis. Stat. § 304.06(1)(br)1. | New Statute, Wis. Stat. § 973.198(5) |
|---|---|
| If the review commission determines that the inmate has earned positive adjustment time, the review commission "may reduce the term of confinement of a person who petitions . . . by the amount of time remaining in the term of confinement in [the] prison portion of the sentence, *less up to 30 days*, and a corresponding increase in the term of extended supervision." | "If the court determines that the inmate has earned positive adjustment time, the court may reduce the term of confinement in [the] prison by the amount of time remaining in the term of confinement in prison portion of the sentence, *less up to 30 days*, and shall lengthen the term of extended supervision[.]" |

Therefore, under the old and new law, the commission or the court could, in its discretion, delay release an inmate to extended supervision "less up to 30 days." The only difference was *which* discretionary body made the decision: the review committee or the sentencing court. Wis. Stat. § 304.06(1)(br)1; Wis. Stat. § 973.198(5). Under the old law, there was no "default rule," under which an inmate was *automatically* released on his confinement-end date (less PAT requested) if the court did not schedule a hearing.

### 3. Under *both* laws, if the sentencing court exercises its discretion to hold a hearing, the sentencing court has 60 days to issue a decision from receipt of a PAT petition or notification of the PAT petition.

Then, under the old law, if the sentencing court held a hearing, the court had 60 days to issue its decision. Wis. Stat. § 304.06(1)(bk)2.a. (providing, "If the sentencing court opts to conduct a review, it shall hold the hearing and issue an order relating to the inmate's sentence modification and release to extended supervision within 60 days of its notification under subd. 1."). This, again, is similar to the new law, which requires a sentencing court to hold a hearing and issue its decision within 60 days receiving the petition. Wis. Stat. § 973.198(3). See below:

| Old Statute: Wis. Stat. § 304.06(1)(bk)2.a. | New Statute: Wis. Stat. § 973.198(3) |
|---|---|
| If the sentencing court opts to conduct a review, it shall hold the hearing and issue an order relating to the inmate's sentence modification and release to extended supervision *within 60 days of its notification* under subd. 1. | *Within 60 days of receipt* of a *petition* filed under sub. (1), the sentencing court shall either deny the petition or hold a hearing and issue an order relating to the inmate's sentencing adjustment and release to extended supervision. |

In sum, under the *new* law, an inmate who petitions for PAT will have a decision from the circuit court "within 60 days of receipt of a petition filed." Wis. Stat. § 973.198(3). Under the old laws, release on the confinement-end day less any PAT earned was not automatic. Rather, the inmate first

filed with the review commission. Then, the commission alerted the sentencing court. Then, the sentencing court had discretion to hold a hearing on an inmate's PAT petition. If the sentencing court held a hearing, the court's decision on a PAT petition under the old laws was required "within 60 days" after the sentencing court received notification from the review commission. Wis. Stat. § 304.06(1)(bk)2.a.

So, for example, under the *new* law, if an inmate seeks 30 days of PAT, and his confinement-end date is March 1, 2010, he can petition the court for PAT on February 1, 2010. Wis. Stat. § 973.198(1). The court is required to make its decision within **60 days** of the petition, which is **April 2, 2010** (sixty days after February 1, 2010).

Under the old law, if an inmate seeks 30 days of PAT, and his confinement-end date is March 1, 2010, he can petition the review committee for PAT on the same day: February 1, 2010. Wis. Stat § 304.06(1)(bg)1. The review committee informs the court of the petition when the inmate is within 90 days of his confinement-end date, less PAT time claimed (in this example, it could inform the court once it receives the petition, on February 1, 2010).[8] Wisconsin Stat. § 304.06(1)(bk)1. Once the court is notified of the petition on February 1, 2010, it then could exercise its discretion and hold a hearing, and issue its decision within **60 days** that notification. Sixty days of notification from February 1, 2010 is **April 2, 2010.** This is the *same* date that the court is required to issue its decision under the new law.

Under the new law, there is no up-to-90-day delay.

Therefore, Singh cannot show an increase in his sentence or penalty that results from the retroactive application of Wis. Stat. § 973.198, and so there is no ex post facto violation. While Singh relies on *Mueller v. Powers*, 64

[8] March 2, 2010 in this example is 90 days from his confinement-end date, less the 30 days that the inmate claimed for PAT.

Wis. 2d 643, 221 N.W.2d 692 (1974) and other United State's Supreme Court cases to support his position that an "increase in 90 days" results in an ex post facto violation (Singh Brief at 35-46), he cites those cases based on the assumption and proposition that his "up to 90 day" increase-in-penalty argument is correct. It is not. Singh is incorrect in his interpretation of the statutes. Because there is no "up to 90 day" increase in his confinement/penalty, the State need not address *Mueller* and other ex post facto cases, because Singh relies on those cases only in his effort to support his theory that under the new statute, the penalty for crimes is unconstitutionally increased.

## II. This Court's Order granting Singh's petition for review limited Singh to argue just one of the several issues that he raised in his petition.

Singh briefly argues at the end of his brief that the due process clause is "implicated" by the alleged *ex post facto* violation (Singh Brief at 56) (While he doesn't develop this argument or distinguish between substantive and procedural due process violations, it appears Singh is arguing a procedural due process violation). However, this Court was specific in its limited order granting Singh's petition for review. Singh raised several issues and sub-issues in his petition, including a due process violation. But this Court specifically limited Singh to argue only *one* of the several issues for which he sought review: "[I]s 973.198, which changed the role the sentencing court plays in reviewing [inmate's] potential early release based on positive adjustment time, unconstitutional." *See* this Court's Order of November 4, 2015. This Court specifically ordered that Singh "*may not raise or argue issues other than the issue set forth in the order* and [Singh] may not raise or argue issues not set forth in the cross petition for review unless ordered by the court." *Id.* Singh recognized this Court's limited Order in his brief (Singh Brief at 28 n.7), when he noted that this Court excluded Singh from arguing *another* issue that he raised in his petition for review.

Because this Court consciously chose *not* to review Singh's due process claim, the State will not respond to it now.[9]

## III. Singh's request for relief is not viable.

Finally, this Court is reviewing a court of appeals' decision that involves a circuit court's quashing of a petition for writ of habeas corpus. At the time Singh filed his petition for habeas relief, he was serving the initial confinement portion of his sentence, and he was seeking PAT in an attempt be released earlier. Singh is no longer in serving initial confinement in prison.

Singh requests that this Court order "that the writ be granted," and that this Court "remand the case with instructions that the Circuit Court consider what further equitable relief is warranted"[10] (Singh's Brief at 38-39). Singh does not suggest to this Court what such "further" or "equitable relief" could possibly be. Release is inappropriate because he has been released. And dismissal is inappropriate since he is not challenging his convictions. Singh has been released from prison; he can no longer request PAT because a circuit court can no longer grant it.

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[9] Singh did not argue a due process claim in the court of appeals, and therefore the State did not address it and the court of appeals did not consider it (*See* Singh's Court of Appeals' Brief).

[10] *See also* Singh's Brief at 57, where Singh requests that this Court "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."

## CONCLUSION

The State requests that this Court affirm the court of appeals' decision that Wis. Stat. § 973.198 (2011-12) does not violate the ex post facto clause.

Dated this 15th day of February, 2016.

Respectfully submitted,

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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 5384 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:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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 15th day of February, 2016.

_____
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