STATE OF WISCONSIN
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 the Circuit Court for Racine County
Honorable Gerald P. Ptacek presiding
Racine County Circuit Court Case No. 2013CV001540

RESPONSE BRIEF OF PETITIONER-APPELLANT-PETITIONER AMAN SINGH

Thomas L. Shriner, Jr., Bar No. 1015208
Brett H. Ludwig, Bar No. 1024271
Philip C. Babler, Bar No. 1070437
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400
Counsel for Petitioner-Appellant-Petitioner Aman Singh

February 15, 2016

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

CASES

STATUTES

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The Warden presents this issue in his brief:

"Did the court of appeals err when it determined that the 2011 Act violates the ex post facto clause of the United States and Wisconsin Constitution because it 'has resulted in Singh being required to serve the full term of the initial confinement portion of his sentence for these two offenses while the law in effect when he committed *or was convicted and sentenced* on them afforded him the opportunity to be released earlier'?" (Brief at 2.)

The Warden, apparently, has abandoned the only issue upon which he petitioned the Court for review and upon which the Court granted his cross petition:

"Whether the retroactive application of provisions of 2011 Wisconsin Act 38, which repealed provisions of 2009 Wisconsin Act 28 that gave inmates the opportunity to apply for early release, increases his penalty and therefore violates the *ex post facto* clauses of

the United States and Wisconsin Constitution." (Cross Petition for Review at 11.)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Singh agrees that oral argument and publication are warranted on the cross petition.

INTRODUCTION

The Warden's entire argument is premised on an incomplete statement of the facts. The Warden argues that, because Mr. Singh was convicted for conduct occurring in 2008, the enactment of positive adjustment time in 2009 and its retroactive repeal in 2011 do not create an *ex post facto* issue, even though he pleaded guilty in 2010. (Brief at 2-3, 6, 18.) But one of Mr. Singh's convictions was for conduct that *took place* on July 25, *2011*, 2011CF004004 (Milw. Cnty. Cir. Ct.) (R. 8:20, App.49), between the respective effective dates of the 2009 Act and the 2011 Act. Thus, the Warden effectively

concedes that the Court of Appeals must be affirmed, because, even if the Warden were right on the law, the facts of this case do not fit within the Warden's legal theory.

Mr. Singh was entitled to positive adjustment time for the Milwaukee County conviction; therefore, his continued confinement was unconstitutional when he was not given the benefit of the positive adjustment time he had earned. Because Mr. Singh was entitled to habeas relief, the Court of Appeals must be affirmed.

The Warden challenges only five words of the Court of Appeals' decision, "*or was convicted and sentenced*," (Brief at 2); *see Singh v. Kemper*, 2014 WI App 43, ¶10, 353 Wis. 2d 520, 846 N.W.2d 820, but otherwise does not challenge the Court of Appeals' holding or analysis. The Warden's argument is simple: Mr. Singh was convicted of a crime relating to conduct in 2008, the Legislature first granted positive adjustment time in 2009, and (the Warden argues) the *ex post facto* clause does not prohibit the Legislature from taking

away early release opportunities that it first grants to a person after he has already committed a crime. (*See* Brief at 9.)

Even if the Warden's interpretation of the *ex post facto* clauses were correct (as explained below, the single supporting case he cites is not on point), his argument would not require reversal because Mr. Singh was also convicted of a positive-adjustment-time eligible crime based on conduct that occurred while the positive adjustment time system was in place—*i.e*, after the 2009 Act was enacted but before the 2011 Act was effective.

Furthermore, the conviction based on conduct in 2008 presents its own *ex post facto* problems. When Mr. Singh pleaded guilty in that case in 2010 and was sentenced, positive adjustment time was part of the operative sentencing law for his offense. The old law was gone and could not, as a matter of Wisconsin law, be revived. Furthermore, the principles of fair notice underlying the *ex post facto* clauses prohibit the Legislature from enhancing Mr.

Singh's sentence after the fact of his guilty plea, conviction, and sentencing.

Therefore, the Warden presents no reason to reverse the Court of Appeals. Under the Warden's best-case scenario, this Court's mandate would be "affirmed as modified." Furthermore, the Warden's abandonment of the issue presented for review in the cross petition, and his "smuggling additional questions into [the] case," *see Irvine v. California*, 347 U.S. 128, 129 (1954), by asking the Court to serve as an error-correcting court, might warrant the Court dismissing the cross petition as improvidently granted. This Court should affirm the Court of Appeals on the issues in the cross petition.

STATEMENT OF THE CASE

Mr. Singh incorporates his statement of the case from his opening brief, which sets forth in detail the relevant statutory and factual history for this case. Rather than repeating that detailed history in full here, Mr. Singh highlights the following key facts:

Mr. Singh filed a single petition for a writ of habeas corpus challenging his confinement during a single consecutive sentence based on two separate convictions, each a Class H felony, in Waukesha County Case No. 08CF1368 and Milwaukee County Case No. 11CF4004. (R. 1:1, App.25.)[1] While the conduct underlying the Waukesha County case took place before positive adjustment time had been enacted in Wisconsin, positive adjustment time applied retroactively, and it mitigated punishments for crimes already committed by the time that Mr. Singh pleaded guilty (March 29, 2010), and was convicted (*id.*) and sentenced (April 29, 2010) in the Waukesha County case. (R. 8:13-15, App.42-44); 2009 Wis. Act 28, §§ 9311, 9411(2u). Positive adjustment time was also in effect on July 25, 2011, the date of the charged conduct underlying the felony

[1] The record also reflects that Mr. Singh was serving other non-positive-adjustment-time-eligible sentences concurrently to these two sentences. (R. 8:17, App.46, R. 8:22, App.51.) These other concurrent sentences do not change the analysis.

conviction in the Milwaukee County case, 11CF4004. (R. 8:20, App.49); *see also* 2011 Wis. Act 38.

Both of Mr. Singh's relevant convictions made him eligible to earn positive adjustment time under Wis. Stat. § 302.113(2)(b) (2009-10).[2] Each was for a non-violent, Class H felony. As the Court of Appeals recognized, and as remains true today, the Warden has never contested the fact that Mr. Singh is eligible for and has earned positive adjustment time if the Legislature was constitutionally prohibited from retroactively repealing the positive adjustment time statutes as it applied to him. *See Singh v. Kemper*, 2014 WI App 43, ¶18 & n.6, 353 Wis. 2d 520, 846 N.W.2d 820; (*see generally* Warden's Brief). Mr. Singh also argued below, and the Court of Appeals apparently agreed, 353 Wis. 2d 520, ¶30, that Mr. Singh was eligible for early release under other provisions of the 2009 Act, including

[2] The Warden focuses his discussion on § 304.06(1)(bg) positive adjustment time. (*E.g.*, Brief at 7.) As explained in his opening brief, Mr. Singh was eligible for § 302.113(2)(b) positive adjustment time, rather than the alternative § 304.06 positive adjustment time.

Wis. Stat. §§ 302.113(9h) and 304.06(1)(bg)(3) (2009-10). The Warden does not challenge here Mr. Singh's eligibility for early release under any of these provisions, if the *ex post facto* clauses prohibit the Legislature from repealing them retroactively.

ARGUMENT

When viewed *in toto*, the facts and procedure below require that the Court affirm the Court of Appeals on the issues in the cross petition. In addition to the Waukesha County conviction that the Warden discusses, Mr. Singh was convicted for a crime for which the charged conduct occurred in July 2011, when positive adjustment time was in effect. Therefore, the Court of Appeals must be affirmed even under the Warden's interpretation of the law. And it certainly must be affirmed under the applicable case law.

Other than the Warden's argument about the interplay between the *ex post facto* clauses and Mr. Singh's Waukesha County conviction, the Warden in no way challenges the Court of Appeals'

decision or analysis. Therefore, this Court should affirm the Court of Appeals and adopt its analysis on the issues in the cross petition.

I. THE UNDISPUTED FACTS REQUIRE THAT THIS COURT AFFIRM THE COURT OF APPEALS.

The genesis of this case was a single petition for a writ of habeas corpus in which Mr. Singh challenged the constitutionality of his continued confinement. (R. 1, App.25.) The circuit court quashed the writ and dismissed the petition. (R. 10, App.24.) The question in the Court of Appeals and the question here is whether Mr. Singh's continued confinement was unconstitutional. (*See* R. 1, App.25); *see also State ex rel. Dowe v. Waukesha Cnty. Cir. Ct.*, 184 Wis. 2d 724, 728, 516 N.W.2d 714 (1994) (internal citations and quotation marks omitted) ("Habeas corpus is a civil proceeding guaranteed by the Wisconsin and United States constitutions to test the right of a person to his personal liberty . . . ."). If Mr. Singh's confinement was unconstitutional, Mr. Singh was entitled to habeas relief. *See Olson v. Litscher*, 2000 WI App 61, 233 Wis. 2d 685, 608 N.W.2d 425.

Because Mr. Singh was entitled to habeas relief even under the Warden's interpretation of the law, the Court of Appeals must be affirmed on the cross-petition issues.

The Warden's entire legal argument is based on an incomplete statement of the undisputed facts in this case. (Brief at 2-6.) All of those facts are drawn from the materials that the Warden's trial counsel filed by affidavit with his motion to dismiss the habeas petition. (R. 8:12-9:2, App.41-71.) The Warden argues that the *ex post facto* clauses are concerned only with changes to the law that was in force when a defendant committed a crime, that Mr. Singh committed a crime before positive adjustment time was ever the law, and that, therefore, the Legislature could repeal positive adjustment time for Mr. Singh's conviction. (*See* Brief at 9.) But Mr. Singh was convicted also for a crime that he was charged with committing in July 2011, Milwaukee County Case No. 11CF4004, when positive adjustment time *was* part of Wisconsin law. (R. 8:20-

23, App.49-52.) Therefore, Mr. Singh was entitled to habeas relief under even the Warden's statement of the law because Mr. Singh had earned positive adjustment time for the Milwaukee County conviction.

Because Mr. Singh was entitled to habeas relief after the Warden denied him positive adjustment time, the Court of Appeals must be affirmed on the issues in the cross petition. The only remaining question is whether the Court should affirm outright or should, as the Warden now invites (*see* Brief at 6, 18), engage in error correcting to determine the precise number of days of positive adjustment time to which Mr. Singh was entitled had the writ been timely granted. These error-correcting issues are not appropriate for this law-declaring court. *See State v. Mosley*, 102 Wis. 2d 636, 665, 307 N.W.2d 200 (1981) ("It is not the primary purpose of this court any longer merely to correct error in trial court proceedings—a function now largely met by the court of appeals—but instead to oversee and

implement the statewide development of the law."). Both parties argue for affirmance—Mr. Singh for outright affirmance and the Warden to affirm as modified.

This law-declaring Court should fulfill its constitutionally assigned role by affirming the Court of Appeals outright.

II. THE *EX POST FACTO* CLAUSES REQUIRE THAT POSITIVE ADJUSTMENT TIME BE EARNED ON MR. SINGH'S WAUKESHA COUNTY CONVICTION AS WELL AS HIS MILWAUKEE COUNTY CONVICTION.

The Warden's sole argument is that the *ex post facto* clauses do not apply to Mr. Singh's Waukesha County conviction because positive adjustment time was not enacted until 2009, after the conduct underlying that conviction. But this argument fails to grapple with two facts: (1) when the Legislature enacted positive adjustment time, it did so retroactively; and (2) the *ex post facto* clauses are concerned also with sentencing. Under each of these principles, the Warden's argument fails.

A. The 2009 Act's Retroactive Implementation Made It the Operative Law for Mr. Singh's Waukesha County Conviction.

When the Warden argues that the *ex post facto* clauses are concerned solely with the date when a crime was committed, he ignores a key facet of the 2009 Act: it was enacted to apply retroactively. 2009 Wis. Act 28, §§ 2722, 9311. When the 2009 Act was enacted in June 2009, a sentencing structure that included positive adjustment time became, for all intents and purposes, the law that was effective for crimes that had been committed after December 31, 1999. *Id.* The Legislature did not, under the 2009 Act, limit positive adjustment time to "time in prison between October 1, 2009 and August 3, 2011" as the Warden suggests. (*See* Brief at 7.) Once the Legislature enacted positive adjustment time in June 2009 (2009 Wis. Act 28), positive adjustment time could be earned beginning in October 2009 (*id.,* § 9411(2u)), but, critically, it could be earned by anyone sentenced on or after December 31, 1999 (*id.*, §§ 2722, 9311). From the time of its enactment forward, positive

adjustment time was a part of Wisconsin's sentencing system, and it served to reduce the punishment for 2008 crimes as well as for 2011 crimes. *See Garner v. Jones*, 529 U.S. 244, 258 (2000) (Scalia, J. concurring) ("A statutory parole system that reduces a prisoner's sentence by fixed amounts of time for good behavior during incarceration can realistically be viewed as an entitlement—a reduction of the prescribed penalty—rather than a discretionary grant of leniency.").

The pre-positive adjustment time system was gone—its available range of sentences was repealed in part by the 2009 Act. When the pre-2009 system was partially repealed, one could no longer (subject to a few statutory exceptions) be sentenced for a non-violent Class H felony without being eligible for positive adjustment time. Wis. Stat. § 302.113(2)(b) (2009-10); *see Goodno v. Oshkosh*, 31 Wis. 127, 130 (1872) ("The original section, as an independent and distinct statutory enactment, ceased to have any existence the very

moment the amendatory act was passed and went into effect, and whatever provisions of it remained as law were such solely by virtue of being again enacted in the amendment. The original section, as a separate statute, was as effectually repealed and obliterated from the statute book . . . ."); *see also* Wis. Stat. § 990.04 ("penalties" can be "expressly remitted . . . by the repealing statute" for pending actions); *State v. Campbell*, 44 Wis. 529, 536 (1878) ("the general rule is as contended for by defendant's counsel, that the punishment of the offense must follow the law existing at the time judgment is rendered, though a different punishment was prescribed by law when the offense was committed. But chapter 340 cannot apply, because it subjects the offense to a heavier punishment than when committed, and the former law was abrogated before the defendant was convicted."); *State v. Smith*, 107 P. 980, 982 (Or. 1910) ("from which it follows that the penalty prescribed in the act, as to this defendant, is *ex post facto*, and the penalty provided in the act in

force at the time of the commission of the offense, having been repealed by the act in force at the date of the trial, cannot be invoked against him."), *cited by Lindsey v. Washington*, 301 U.S. 397, 401 (1937). The 2011 Act, which attempted to limit the availability of positive adjustment time for those who were convicted or sentenced before August 2011, is not the *solution* to the *ex post facto* problem here. (*Contra* Brief at 7.) It *creates* the *ex post facto* problem.

Because the 2009 Act was the operative law for Mr. Singh's sentence, as if it had been in effect in 2008, any later-passed law that disadvantaged him by increasing his sentence—like the 2011 Act—was an *ex post facto* law. The Legislature did not, indeed could not, merely return the law to its pre-2009 state. The Legislature cannot "revive" former laws by repealing laws that repealed them. Wis. Stat. § 990.03(1) ("No law repealed by a subsequent act of the legislature is revived or affected by the repeal of such repealing act."). That was the case even in the early days of our state. *See, e.g.*,

Wis. Rev. Stat. 1849, ch. 4, sec. 3 ("No act, or part of an act, repealed by a subsequent act of the legislature, shall be deemed to be revived by the repeal of such repealing act."). The old, pre-2009 law was irretrievably gone. Any attempt to return the law to its former state required a new law. Applying such a disadvantageous law retrospectively would plainly violate the *ex post facto* clauses. The 2011 Act, which purported to do just that, was to that extent (though not in its prospective application) unconstitutional.

B. The *Ex Post Facto* Clauses Are Also Concerned with the Law in Effect at the Time of Sentencing.

The Warden also argues, for the first time, that the sole relevant date under the *ex post facto* clauses is the date when a crime was committed. (*See* Brief at 6-9.) *Ex post facto* protection is not so circumscribed. The Warden has not met his burden to show why the Court of Appeals should be reversed on this point. The law the Warden cites would not require reversal even if the facts were limited to Mr. Singh's conviction in the Waukesha County case, the

only conviction that the Warden discusses. The Warden's complaint about five words in the Court of Appeals decision, "*or was convicted and sentenced*," *see Singh v. Kemper*, 2014 WI App 43, ¶10, 353 Wis. 2d 520, 846 N.W.2d 820, must be rejected even apart from Mr. Singh's argument in Part II.A., *supra*.

Ex post facto simply means "after the fact." The *ex post facto* clauses prohibit a Legislature from passing criminal laws "after the fact"—that is, retroactively—that disadvantage criminal defendants. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990). The question that the Warden presents here is "after what fact?"

Quoting *State v. Kurzawa*, 180 Wis. 2d 502, 513-14, 509 N.W.2d 712 (1984), the Warden argues that the *ex post facto* clauses are "concerned with changes in the law relative to the time the defendant engaged in his allegedly illegal behavior," *id.*; Brief at 9, and thus prohibit the Legislature from passing a law increasing the punishment for a crime after that crime has been *committed*.

Standing alone, that premise is undeniably true. A primary protection of the *ex post facto* clauses is that a Legislature cannot retroactively add or increase punishment *after* conduct has occurred. *Calder v. Bull*, 3 U.S. 386, 3 Dal. 386, 390 (1798) (Opinion of Chase, J.) ("Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed."). That is why so many cases say that punishments cannot be enhanced after a crime has already been committed. But that protection is not the only one afforded by the *ex post facto* clauses.

The underlying principles of the *ex post facto* clauses include due process concepts like "fair warning," which is described by *Kurzawa* itself as "the clause's animating principle." 180 Wis. 2d at 513 (quoting *Marks v. United States*, 430 U.S. 188, 192 (1977)). Under the principle of fair warning, the Legislature cannot increase the punishment a prisoner is to serve "after-the-fact" of his conviction and sentencing (regardless of what total potential punishment he

faced when he committed the crime), any more than the Legislature can increase the punishment for a crime after-the-fact of its commission but before a person's sentencing.

These *ex post facto* principles are particularly applicable in the context of convictions following guilty pleas, like Mr. Singh's Waukesha County conviction. *Weaver v. Graham*, 450 U.S. 24, 32 (1981) ("We have previously recognized that a prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed."). The law as it stood when Mr. Singh pleaded guilty to the one crime the Warden discusses in his brief, the Class H felony in Waukesha County Case No. 08CF1368, permitted those convicted of a Class H felony to earn positive adjustment time. The elimination of positive adjustment time *after* Mr. Singh's plea and sentencing on the 2008 case is as unconstitutional as the retroactive elimination of positive

adjustment time after Mr. Singh committed the offense underlying the Class H felony conviction in Milwaukee County Case No. 11CF4004.

Yet the Warden attempts to push aside these "animating principles." His argument, if taken to its logical end, would permit someone to be convicted after pleading guilty, to be sentenced under the law in effect when he was sentenced, and then to have his punishment retroactively increased (by the Legislature taking away his right to early release), as long as the total sentence he would serve is no longer than the maximum permitted sentence when the crime was committed. (*See* Brief at 6, 9, 18.)

But *ex post facto* protection extends further than the Warden would have it. For cases involving changes to early release—be it parole, good time credit, or other forms of early release—the time of sentencing also is a relevant time period for the *ex post facto* inquiry. *State ex rel. Eder v. Matthews*, 115 Wis. 2d 129, 133, 340 N.W.2d 66 (Ct.

App. 1983) (emphasis added) ("A law which increases or alters the punishment of an offender to his detriment, *after he has been convicted and sentenced*, constitutes an ex post facto law prohibited by Wis. Const. art. I, § 12 and U.S. Const. art. I, § 10."); *State ex rel. Mueller v. Powers*, 64 Wis. 2d 643, 645, 221 N.W.2d 692 (1974) (emphasis added) ("Petitioners contend that the statute relating to parole eligibility in force at the time petitioners *were convicted and sentenced* would authorize their eligibility for parole following the service of two years' imprisonment, whereas the current statute . . . would extend such period to five years. Petitioners maintain that . . . insofar as it is being applied retrospectively to them by the respondents, it constitutes an *ex post facto* law . . . ."). [3] Thus, the Court of Appeals was not making up out of whole cloth the "five words" that the

---

[3] This Court did not, as the Warden contends (Brief at 16-17), hold in *State v. Thiel*, 188 Wis. 2d 695, 524 N.W.2d 641 (1994), that *Mueller*'s focus on the time a defendant is "convicted and sentenced" is irrelevant for *ex post facto* analysis. In *Thiel*, this Court withdrew language that any laws "that alter the situation of the accused to his or her disadvantage" are *ex post facto* laws. *Thiel* did not change *Mueller*'s focus on the relevance of sentencing.

Warden challenges. Instead, it was correctly applying (virtually quoting) decades of *ex post facto* jurisprudence. *See Singh v. Kemper*, 353 Wis. 2d 520, ¶9. If this Court were to modify the "five words" in the decision below, the Court would be upsetting far more than this one decision before it on review.

In *Eder*, the Court of Appeals held that changes to good time credit after parole revocation were an *ex post facto* law. *State ex rel. Eder v. Matthews*, 115 Wis. 2d 129. Changes to parole eligibility by their very nature relate to the post-sentencing changes rather than solely post-conviction changes. *See Eder*, 115 Wis. 2d at 133 (emphasis added) ("A law which increases or alters the punishment of an offender to his detriment, *after he has been convicted and sentenced*, constitutes an ex post facto law prohibited by Wis. Const. art. I, § 12 and U.S. Const. art. I, § 10.").

The time of sentencing is relevant to the *ex post facto* analysis because eligibility for parole and other early release are inextricably

tied to the sentence imposed, and that sentence is lengthened when the right to parole or early release is retroactively taken away. *Cf. Warden v. Marrero*, 417 U.S. 653, 658 (1974) ("Similarly, a pragmatic view of sentencing requires the conclusion that parole eligibility . . . is also determined at the time of sentence. . . . [P]arole eligibility is a function of the length of the sentence fixed by the district judge."); *see also Garner*, 529 U.S. at 258 (Scalia, J. concurring) ("A statutory parole system that reduces a prisoner's sentence by fixed amounts of time for good behavior during incarceration can realistically be viewed as an entitlement—a reduction of the prescribed penalty—rather than a discretionary grant of leniency.").

In cases from *Eder* to *Weaver*, and others, the date of a plea or sentencing is as relevant to the *ex post facto* analysis as the date when an individual committed a crime. Retroactive and disadvantageous changes to the length of a sentence, or the right to early release, enacted after a crime is committed but before an person is sentenced

plainly violate the *ex post facto* clauses, as the Warden concedes. (*See* Brief at 6-9.) But changes to the early release laws after a person has been sentenced under those laws presents the same *ex post facto* problem. The Warden does not even acknowledge *Eder*, which was one of the cases, together with *Weaver* (which he also ignores), that the Court of Appeals relied on in applying its decision to Mr. Singh's Waukesha County conviction. *See Singh v. Kemper*, 353 Wis. 2d 520, ¶9. Yet, adopting the Warden's position would require overruling *Eder* as well as *Mueller*.

When parole eligibility and other early release credits are at stake, it ultimately does not matter how a person's *actual* sentence served compares to the *maximum* sentence he faced when the crime was committed. Courts do not look simply at whether the total sentence served is within the possible range of sentences that a person could have received when he was convicted. *See Lindsey*, 301 U.S. at 400-02. That is, it is not a condition precedent to finding an *ex*

post facto violation that the person be serving a longer sentence than the maximum he faced when he committed a crime. *See id.* Courts simply look at whether a sentence is increased by later-passed laws. *Weaver v. Graham*, 450 U.S. 24; *Mueller*, 64 Wis. 2d 643. After-the-fact sentence enhancement violates the *ex post facto* clauses whether it occurs between the crime and sentencing or after sentencing.

This case is unique in the context of *ex post facto* jurisprudence in that after the crime was committed the Legislature mitigated a punishment and then after Mr. Singh was convicted and sentenced it tried to undo that mitigation. Boiled down, though not framed quite this way by the Warden, the question presented is whether it is true under the *ex post facto* clauses that what the Legislature gives (in the form of retroactive mitigation for punishments) it cannot take away. As discussed in Part II.A, *supra*, the answer is "yes" as a matter of Wisconsin statutory law. As a matter of constitutional law, when one pleads guilty and accepts the mitigated punishment, the answer

is also a resounding "yes." *See Weaver*, 450 U.S. at 32; *Mueller*, 64 Wis. 2d 643.

The Warden relies on language in five cases to argue that the *ex post facto* clauses are concerned with the time when a crime is committed. Again, Mr. Singh does not dispute the principle that a Legislature cannot change the law to increase punishment for an offense after the offense is committed. But the protections of the *ex post facto* clauses, as explained above, go further than that. In none of the Warden's five cases did the respective court hold that a person can be sentenced under a mitigated sentencing system in effect when he was sentenced, but that later the Legislature can constitutionally increase the length of that sentence retroactively by making the person ineligible for early release. That narrow question is the precise issue raised by the cross petition.

The Warden relies primarily on *Kurzawa*, which, on first blush, contains some language that supports his argument. But a careful

reading of the case shows that it does not limit *ex post facto* protections in the way that the Warden contends. *Kurzawa* was not a true *ex post facto* case. 180 Wis. 2d at 511. Instead, it involved the principle that due process parallels *ex post facto* protection, to a certain extent, in that due process prevents the retroactive application of certain judicial decisions if they substantially change the definition of criminal conduct after the conduct has occurred. *Id.* Specifically, Kurzawa argued that double-jeopardy protections in cases after he committed his crime afforded him a defense to prosecution and that those cases could not be retroactively overruled to permit him to be prosecuted. *Id.* at 514.

This Court's analysis in *Kurzawa* does not bear at all on the question of whether the *Legislature* can take away the right to earn early release after a person pleads guilty and is sentenced under a system under which early release credits are available to him, thereby increasing a punishment after it is imposed. If a favorable

precedent is issued and repealed all within the time between the commission of a crime and when the defendant stands trial for it, due process has not been violated. That is the limited holding of *Kurzawa*.

Kurzawa's holding is consistent with the underlying principles of the *ex post facto* clauses. Kurzawa neither committed a crime nor accepted a punishment under the supposedly mitigated intervening case law. He did not lack the "fair warning" required by the clause. Nor was the intervening case capricious or otherwise the type of legislative mischief that the clause prohibits. *James v. United States*, 366 U.S. 213, 247 n.3 (1960) (Harlan, J. concurring in part and dissenting in part) ("Aside from problems of warning and specific intent, the policy of the prohibition against *ex post facto* legislation would seem to rest on the apprehension that the legislature, in imposing penalties on past conduct, even though the conduct could properly have been made criminal and even though the defendant

who engaged in that conduct in the past believed he was doing wrong (as for instance when the penalty is increased retroactively on an existing crime), may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons.").[4] But fair warning is lacking when a person pleads guilty to a crime and is eligible for positive adjustment time then, but his eligibility is taken away after plea and sentence. *Weaver*, 450 U.S. at 32.

The Warden's other four cases, *Garner*, *Peugh*, *Lindsey*, and *Morales*—each cited by the Court of Appeals—do involve the interplay between sentencing, or sentencing adjustments, and *ex post*

---

[4] The Warden does not rely on *Lynce v. Mathis*, 519 U.S. 433 (1997), which contains dicta to the same effect as *Kurzawa*. *See id.* at 449 (there may be "force" to the argument that the federal *ex post facto* clause does not prohibit the cancellation of good time credit first awarded after person was incarcerated). *Lynce*'s dicta do not control here because the Court ultimately rejected the argument that the *ex post facto* clause permitted the retroactive repeal of good-time credit that had been granted. The Court's suggestion that the state *might* be able to grant discretionary good-time credit to individuals already incarcerated and then cancel a portion of those credits does not reflect the actual holding of the case, nor does it fit the facts here.

facto law, unlike *Kurzawa*. But while each of these cases refers to the time when a crime was committed, none of them permits a state to increase a sentence after it has already been imposed. *Garner* involved a change to the frequency of parole hearings. *Garner v. Jones*, 529 U.S. 244 (2000). *Morales*, before it, involved the same thing. *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995). *Lindsey* involved a change to a state's sentencing framework that made maximum sentences mandatory sentences. *Lindsey v. Washington*, 301 U.S. 397 (1937).

Peugh is the most on-point of the four cases. It involved changes to sentencing guidelines that provided higher recommended sentencing ranges at the time of sentencing than at the time when the crime was committed. *Peugh v. United States*, 133 S. Ct. 2072 (2013). Only in *Peugh* was there a meaningful distinction between the sentencing framework in place when the crime was committed and when the sentence was imposed. But in *Peugh* the

change to sentencing guidelines took place between the time the act was committed and when the defendant was sentenced, which was unconstitutional.

The Warden pulls language from a dissent in the case to argue that "The *Peugh* Court stated that the ex post facto inquiry does not 'hinge on the expectations that prisoners and defendants have about how many days they will spend in prison.'" (Brief at 13, *quoting Peugh v. United States*, 133 S. Ct. 2072, 2094 (2013) (Thomas, J. dissenting).) The problem with this language is that it comes from a dissent that the Court *rejected* and that even the other dissenters were unwilling to join. Expectations *do* matter in the *ex post facto* context. *Peugh*, 133 S. Ct. 2072; *Dobbert v. Florida*, 432 U.S. 282 (1977); *Weaver v. Graham*, 450 U.S. 24. Those expectations drive whether a person expects to be punished and how much he expects to be punished when he commits an act or when he pleads guilty. The expectations also drive plea negotiations. *Weaver*, 450 U.S. at 32.

In short, none of the Warden's cases says a thing about the situation presented by his cross petition. *Ex post facto* law develops "by an accretion of case law." *Dobbert*, 432 U.S. at 292. And under that accretion, the clauses prevent a legislature from increasing a sentence after it has already been imposed following a guilty plea. *Weaver*, 450 U.S. at 32.

Ultimately, as discussed above, Mr. Singh is entitled to habeas relief in any event, and the Court of Appeals should be affirmed, as modified, on the Warden's best day. But since Mr. Singh is entitled to relief in any event, the "five words" that the Warden challenges are not essential to its decision. It would be trivial for this Court to assess the specific positive-adjustment-time calculation to which Mr. Singh was entitled. That is particularly so given Mr. Singh's circumstances—his other sentence, and his current status of having been released from prison.

The time of sentencing matters for *ex post facto* analysis, particularly when the Legislature seeks to take away, retroactively, the right to early release from people who pleaded guilty under a system that entitled them to early release. The Legislature's actions here were unconstitutional, even as to Mr. Singh's Waukesha County conviction.

III. THE WARDEN DOES NOT CHALLENGE THE COURT OF APPEALS DECISION ON THE ISSUES IN THE CROSS PETITION IN ANY OTHER WAY.

The Warden has not in any other way challenged the decision of the Court of Appeals, including regarding Mr. Singh's 2011 conviction in Milwaukee County Case No. 11CF4004. And it is too late for him to challenge it on reply. *State v. Mechtel*, 176 Wis. 2d 87, 100, 499 N.W.2d 662 (1993) ("We do not generally address arguments raised for the first time in reply briefs."). Thus, even if the Court were to agree with the Warden about Mr. Singh's 2008 conviction and engage in the error correcting that the Warden

invites it to do, the result should still be affirmance of the Court of Appeals' holding and adoption of all but five words of its analysis.

It is not surprising that the Warden has abandoned the issue he raised in the petition for review and is no longer challenging the heart of the Court of Appeals decision, including the applicability of the *ex post facto* clauses to Mr. Singh's conviction in Milwaukee County Case No. 11CF4004. The Court of Appeals applied nearly a century of precedent from this Court and from the United States Supreme Court. These cases clearly hold that taking away good time credit from inmates retroactively, including the right to earn good time throughout a sentence, violates the *ex post facto* clauses. *E.g.*, *Weaver v. Graham*, 450 U.S. 24; *State ex rel. Mueller v. Powers*, 64 Wis. 2d 643.

CONCLUSION

Mr. Singh is entitled to habeas relief because he was unconstitutionally confined longer than he should have been when he was denied use of the positive adjustment time he had earned

and denied the other early release rights afforded him by the 2009 Act, including for the Waukesha County conviction. Because the Warden does not challenge the Court of Appeals' decision regarding the retroactive repeal of positive adjustment time as to the Milwaukee County conviction, and because the Court of Appeals was plainly correct, this Court should affirm the Court of Appeals on all issues in the cross petition.

Dated: February 15, 2016

Thomas L. Shriner, Jr., Bar No. 1015208
Brett H. Ludwig, Bar No. 1024271
Philip C. Babler, Bar No. 1070437
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202
(414) 271-2400
(414) 297-4900 facsimile
tshriner@foley.com
bludwig@foley.com
pcbabler@foley.com

Counsel for Petitioner-Appellant-Petitioner Aman Singh

CERTIFICATION OF FORM, LENGTH AND ELECTRONIC FILING

I hereby certify that this response 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 5,937 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: February 15, 2016

Philip C. Babler

CERTIFICATE OF MAILING

I hereby certify that on February 15, 2016 I caused the foregoing Response 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: February 15, 2016

Philip C. Babler