STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP1724

STATE OF WISCONSIN ex rel.
AMAN SINGH,

Petitioner-Appellant-Petitioner,

v.

PAUL KEMPER, Warden, Racine
Correctional Institution,

Respondent-Respondent-Cross-Petitioner.

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

REPLY BRIEF OF RESPONDENT-RESPONDENT-CROSS-PETITIONER

BRAD D. SCHIMEL
Attorney General

SARA LYNN SHAEFFER
Assistant Attorney General
State Bar #1087785

Attorneys for Respondent-
Respondent-Cross-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-5366
shaeffersl@doj.state.wi.us

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I. Singh cannot prove that his lost opportunity to apply for PAT violates the ex post facto clause.

First, the State concedes that Singh committed one of his crimes on July 25, 2011 (8:20; R-Ap. 120), and therefore an inquiry is warranted on the issue of whether the retroactive application of the 2011 Act violates the ex post facto clause. The State recognized its mistake in its

Response Brief, identifying the commission of Singh's July 25, 2011 crime (State's Brief at 3).

The issue that this Court must decide is whether the retroactive application of the 2011 Act, which eliminates Singh's ability to petition for PAT, increases the punishment for his crime in violation of the ex post facto clause. Clearly, Singh is *disadvantaged* because he has lost his opportunity to petition for PAT – which, if granted, can be applied toward the reduction of his confinement. What this Court must decide, however, is whether the ex post facto clause prohibits this disadvantage. The State submits it does not.

Singh and the court of appeals rely upon *Lindsey v. Washington*, 301 U.S. 397 (1937), *Weaver v. Graham*, 450 U.S. 24 (1981), and *State ex rel. Mueller v. Powers*, 64 Wis.2d 643, 646, 221 N.W.2d 692 (1974). But these cases applied a broader ex post facto inquiry that has subsequently been narrowed.

The court of appeals concluded that the 2011 Act violated the ex post facto clause because Singh is now "required to serve the full term of the initial confinement portion of his sentence," whereas the 2009 Act "afforded him *the opportunity* to be released earlier." *State ex rel. Singh v. Kemper*, 2014 WI App 43, ¶10, 353 Wis.2d 520, 846 N.W.2d 820 (emphasis added) (R-Ap. 148). But a lost *opportunity* is not the focus of an ex post facto inquiry. Rather, it is "whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *California Dep't. of Corrections v. Morales,* 514 U.S. 499, 506 n.3 (1995).

This case concerns the latter inquiry – whether the 2011 Act increases Singh's penalty. The State submits that under the current caselaw, the retroactive application of the 2011 Act does not violate the ex post facto clause.

A. The court of appeals applied the prior, broader ex post facto inquiry.

1. *Lindsey v. Washington*

The court of appeals stated its decision that the 2011 Act violates the ex post facto clause is "in accord with" *Lindsey,* 301 U.S. 397 (R-Ap. 149-50). In *Lindsey,* the sentencing provision in effect when the petitioners committed their crimes provided a maximum sentence of 15 years. The law allowed judges to impose an indeterminate sentence, so long as it did not exceed 15 years. *Id.* at *398.* Before the petitioners were sentenced, however, a new statute *required* the judge to sentence petitioners to the 15-year maximum; under the new statute, the petitioners could secure earlier release only through the discretion of the parole board. *Id.* at 398-99. The Supreme Court held that the application of the statute violated the ex post facto clause because "the measure of punishment prescribed by the later statute is more severe than that of the earlier." *Id.* at 401. It stated that it "is plainly to the substantial disadvantage of petitioners to be deprived of all *opportunity* to receive a sentence which would give them freedom from custody and control prior to the expiration of the fifteen-year term." *Id*. at 401-02 (emphasis added).

The court of appeals in this case relied on *Lindsey's* deprivation-of-an-opportunity language to find an ex post facto violation (R-Ap. 150). But as will be discussed ahead, this no longer the inquiry.

2. *Weaver v. Graham*

The court of appeals also relied on *Weaver,* 450 U.S. 24. In *Weaver*, the petitioner was sentenced to 15 years in prison. At the time of his crime, state statutes provided a formula for *mandatory* reductions to the terms of all prisoners who complied with prison regulations and state laws. *Id*. at 26. The new statute the petitioner challenged

reduced the amount of "gain time" credits available under this formula.[1] The Court held:

> On its face, the statute reduces the number of monthly gain-time credits available to an inmate who abides by prison rules and adequately performs his assigned tasks. By definition, this reduction in gain-time accumulation lengthens the period that someone in petitioner's position must spend in prison.

Id. at 33. The Court provided that "the new provision constricts the inmate's *opportunity* to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment." *Id.* at 35-36 (emphasis added).

The court of appeals in this case focused on *Weaver's* "lost opportunity" language when it concluded that the 2011 Act violates the ex post facto clause, noting it "altogether eliminate[s] the early release opportunities the law previously afforded him" (R-Ap. 153). But this is not the correct test, because in *Morales,* the Supreme Court expressly stated that the focus of an ex post facto inquiry is *not* "[w]hether an amendment affects a prisoner's '*opportunity* to take advantage of provisions for early release' . . . but on whether any such change . . . increases the penalty by which a crime is punishable." *Morales*, 514 U.S. at 506 n.3.

[1] *Weaver v. Graham* deals with *automatic* good time earned (*see* 450 U.S. 24, 26 (1981)), and this case deals with the *discretionary* good time earned, an important distinction that will be discussed ahead.

B. The current ex post facto inquiry is narrower.

1. *Morales*: The focus is whether a change in the law "increases the penalty."

In *Morales,* the Supreme Court addressed an amendment that allowed the Board of Prison Terms to defer parole hearings for up to three years for certain inmates, while under the old statute, the petitioners would have been entitled to hearings every year. 514 U.S. at 503. The petitioner argued that the amendment constituted an ex post facto law. The Court stated that "[i]n evaluating the constitutionality of the 1981 amendment, we must determine whether it produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." *Id.* at 509. It concluded that the amendment created only "the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes," and that "such conjectural effects are insufficient under any threshold we might establish under the *Ex Post Facto* Clause." *Id.*

The Court noted that when examining whether an ex post facto violation occurs, the focus of the inquiry is no longer on whether a legislative change merely produces some sort of ambiguous "'disadvantage'" or a prisoner's lost "'opportunity to take advantage of provisions of early release.'" *Id.* at 506 n.3 (citation omitted). Rather, the focus is whether any such change "alters the definition" of a crime or "increases the penalty" by which a crime is punishable. *Id.*

> Our opinions in *Lindsey, Weaver,* and *Miller*[2] suggested that enhancements to the measure of criminal

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[2] The *Morales* Court discussed *Miller*:

> At the time that the petitioner in *Miller* committed his crime, his presumptive sentencing range would have been

(continued on next page)

> punishment fall within the *ex post facto* prohibition because they operate to the "disadvantage" of covered offenders. *But that language was unnecessary to the results in those cases and is inconsistent with the framework developed in Collins v. Youngblood*, 497 U.S. 37 [(1990)]. After *Collins,* the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of "disadvantage," nor, as the dissent seems to suggest, on whether an amendment affects a prisoner's "*opportunity* to take advantage of provisions for early release," . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.

Id. (emphasis and footnote added). Cases decided after *Morales* have followed its narrower inquiry.

2. *Lynce v. Mathis*

In *Lynce v. Mathis,* 519 U.S. 433, 445 (1997), the Supreme Court determined that a statute which canceled early release credits for certain classes of offenders *after the credits had been awarded* and after the petitioner had been released violated the ex post facto clause. The Court explained that the statute "did more than simply remove a mechanism that created an *opportunity* for early release for a class of prisoners whose release was unlikely; rather, it made ineligible for early release a class of prisoners who were previously eligible–including some, like [the] petitioner, who had actually been released." *Id.* at 446-47.

> 3 ½ to 4 ½ years. Before his sentencing, however, the state legislature altered the formula for establishing the presumptive sentencing range for certain sexual offenses by increasing the "primary offense points" assigned to those crimes. As a result, petitioner's presumptive range jumped to 5 ½ to 7 years. We held that the resulting increase in the "quantum of punishment" violated the *Ex Post Facto* Clause.

California Dept. of Corrections v. Morales, 514 U.S. 499, 505-06 (1995) (citation omitted).

Lynce is distinguishable. Whether Singh was eligible for PAT was never verified by the DOC (8:27; R-Ap. 127, 200). Further, *Lynce* concerns a change in a statute making the petitioner ineligible for the good time credits that were already awarded. 519 U.S. at 435. Singh's case is distinct from both *Lynce* and *Weaver* in that it does not involve the cancellation of good time credits already awarded or mandatorily awarded.

3. *Garner v. Jones*

Finally, *Garner v. Jones,* 529 U.S. 244, 255 (2000) reiterated *Morales's* narrower analysis:

> The standard announced in *Morales* requires a more rigorous analysis of the level of risk created by the change in law. . . . When the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule.

C. This Court follows *Morales*.

Following *Morales*, this Court has consistently applied its narrower ex post facto inquiry. But the court of appeals relied upon a 1974 Wisconsin case to support its decision that the 2011 Act violated the ex post facto clause, *State ex rel. Mueller v. Powers*, 64 Wis.2d 643, 646, 221 N.W.2d 692 (1974) (R-Ap. 149).

In *Mueller*, inmates argued that retroactive application of a new law that increased the prison time they had to serve before becoming eligible for parole consideration constituted an ex post facto law. 64 Wis.2d at 645. The inmates argued that an ex post facto law is "[a] law which imposes a punishment for an act which was not punishable at the time it was committed, or imposes an additional punishment to that then prescribed . . . '*or which alters the situation of the accused to his disadvantage*[.]'" *Id.* at 645-46

(emphasis added, quoted source omitted). This Court agreed with the inmates, concluding that such retroactive application "in a very real and practical sense imposes an additional penalty" and "ha[d] a substantial effect upon petitioners' punishment." *Id.* at 647.

But twenty years later, in *State v. Thiel*, 188 Wis.2d 695, 702 (1994), this Court recognized the "language in *Mueller* which extends ex post facto prohibitions to laws that alter the situation of an accused to his or her disadvantage, is misplaced."

1. *State v. Thiel*

The *Thiel* Court noted that it looks "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." 188 Wis.2d at 699 (footnote omitted). It, too, narrowed its inquiry:

> [W]e now withdraw any language in *Mueller* which would expand the definition of an ex post facto law beyond that expressed in *Collins*. . . . We hold that an ex post facto law[] . . . is any law: "'which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed[.]'"

Id. at 703 (citation omitted).

2. *State v. Kurzawa*

This Court again recognized the narrower inquiry in *State v. Kurzawa*, 180 Wis.2d 502, 514 n.5, 509 N.W.2d 712 (1994), noting that an ex post facto clause no longer embraces any change that alters a defendant's situation "to his disadvantage." Rather, this Court noted that for a law to be ex post facto, "'it must be more onerous than the prior

law.'" *Id.* (quoted source omitted). *See also State v. Barfell*, 2010 WI App 61, ¶12, 324 Wis.2d 374, 782 N.W.2d 437 (the court of appeals providing, "we must determine whether application of the new law . . . increases the penalty for conduct after its commission[.]").

II. Applied under the correct ex post facto inquiry, the 2011 Act does not increase Singh's penalty.

The 2011 Act does not increase Singh's penalty for his crime. Rather, the elimination of the opportunity to apply for PAT was simply that – removal of an *opportunity* to earn discretionary PAT. Under *Morales*, this is not enough to constitute an ex post facto violation.

While the court of appeals is correct that the 2009 Act "afforded [Singh] the *opportunity* to be released earlier" (R-Ap. 148), a lost opportunity is no longer the test. At the time that Singh committed his crime in July 2011, there was no promise or guarantee that, if convicted and sentenced to prison, he could satisfy his confinement portion earlier by maintaining good conduct. Whether Singh was actually *granted* PAT was within the discretion of the DOC or sentencing court. Wis. Stat. §§ 302.113(2)(b)&(c); 304.06(1)(bg)&(bk); 973.01(3d) (2009-10). Under the 2011 Act, all that Singh lost was his opportunity to apply for PAT toward the reduction of his prison sentence. It cannot be said that the 2011 Act operates to *increase* his sentence.

Other cases that considered similar ex post facto challenges – in which a law removed an inmate's opportunity to earn *discretionary* good time – have concluded the same. In *Abed v. Armstrong,* 209 F.3d 63 (2d.Cir. 2000), the Second Circuit addressed an ex post facto challenge to a Department of Corrections' directive disqualifying any inmate found to be a prison gang member from earning good-time credit. Because the good-time statute was *discretionary*, the court distinguished *Weaver* and *Lynce* and denied the ex post facto claim:

> Appellant's ex post facto claim fails for several reasons. His argument that the directive increased his punishment by restricting his eligibility to earn good time credit assumes that before the directive Section 18–7a(c) automatically entitled all inmates to be eligible to earn good time credit. That assumption is erroneous. Unlike the statutes at issue in both *Weaver* and *Lynce,* Section 18–7a(c) does not automatically confer the right to earn good time credit on all inmates. Rather, the statute states only that inmates "may" earn good time credit, thereby rendering good time credit a discretionary matter.

Id. at 66.

Similarly, in *Duncan v. State*, 987 S.W.2d 721, 722 (Ark. 1999), an inmate claimed that he was entitled to meritorious good-time credits accrued since repeal of the statutory authorization for such credits. He argued that the retroactive application of the statutes "disadvantage[d] him by denying him the opportunity to earn good time toward the reduction of his sentence." *Id.* The Arkansas Supreme Court disagreed, and held that retroactive application of statutes did not violate ex post facto clause because "where the award of good time is discretionary[] . . . the disadvantage suffered by the inmate is in the form of a lost opportunity to earn good time toward the reduction of his sentence." *Id.* The Arkansas Supreme Court noted that it had already "held that such a disadvantage was not prohibited by the *Ex Post Facto* Clause." *Id.* (citing *Ellis v. Norris,* 968 S.W.2d 609 (Ark. 1998)).

In *Ellis* the petitioner alleged that the retroactive application of a statutory amendment taking away his ability to earn discretionary, extra good time violated the ex post facto clause. The Arkansas Supreme Court disagreed, noting that "by performing one of the acts specified in the statute, a prisoner had the opportunity to add to the meritorious good time that he has earned automatically. It is clear from the wording of the statute, however, that the time

was also awarded at the discretion of the Director." *Ellis*, 968 S.W.2d at 612.

> We conclude that when Act 273 was repealed in 1993, all that was lost was the opportunity to earn discretionary good time toward the reduction of a prison sentence. Ellis has not demonstrated, moreover, that the Department of Correction denied him any extra good time that had already been recommended by the Director. Accordingly, it cannot be said that Acts 536 and 558 operated to increase his sentence.

Id.

The discretionary nature of Wisconsin's PAT statutes dictates a similar result. Under the 2009 Act, PAT was never a matter of right. Rather, it was a privilege granted in the discretion with DOC or sentencing court. Wis. Stat. §§ §§ 302.113(2)(b)&(c); 304.06(1)(bg)&(bk); 973.01(3d)(2009-10). The elimination of Singh's opportunity to earn discretionary PAT is not an increase in punishment prohibited by the ex post facto clause.

CONCLUSION

Under the 2009 Act, the DOC or the sentencing court had discretion to grant or deny an inmate's application for PAT. There was no guarantee that Singh could satisfy the confinement portion of his sentence prior to its date by maintaining good conduct. Under the correct ex post facto inquiry, Singh's lost opportunity to petition for PAT does not violate the ex post facto clause. The State requests that this Court reverse the court of appeals' decision which held that it does.

Dated this 29th day of February, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

SARA LYNN SHAEFFER
Assistant Attorney General
State Bar #1087785

Attorneys for Respondent-
Respondent-Cross-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-5366
(608) 266-9594 (Fax)
shaeffersl@doj.state.wi.us

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 2973 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 29th day of February, 2016.

_____
Sara Lynn Shaeffer
Assistant Attorney General