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State ex rel. Aman Deep Singh

Appeal No.

Vs.

13 AP 1724

Paul Kemper, Warden

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APPELLANT BRIEF AND APPENDIX

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## I. NO TRANSCRIPTS ARE REQUIRED FOR THIS APPEAL

Aman Deep Singh's pro se appeal does not concern any discretionary decisions of the trial court. This issue is entirely one of law which the appellate court reviews *de novo*. While a telephonic hearing was conducted in this matter, no evidence was introduced or testimony taken during that hearing. Therefore, a transcript of that hearing is unnecessary for this appeal.

"This court owes no deference to the trial court's resolution of issues of law"

Katze v. Randolph & Scott Mut. Fire Ins., 111 Wis. 2d 326, 330;  
330 N.W.2d 232, 234

"The question of whether alleged facts constitute a cause of action is reviewed as a question of law. Questions of law are determined independent of the trial court's conclusion."

Chetek State Bank v. Barberg, 170 Wis. 2d 516, 521; 489 N.W. 2d 385, 387

"In this case, however, the trial court's review was restricted to a 'paper record' and did not involve the taking of testimony or the weighing of credibility. As a result, we are in just as good a position to determine the reasonableness of the petitioner's delay based on the undisputed record. Accordingly, we review this question independently." State ex rel. McMillian v. Dickey, 132 Wis.2d 266, 281, fn15. "As previously noted, the procedural history of the case is undisputed. Consequently, we review this case independent of the trial court's conclusions." *Id.*

In this present case as well, appellate review of whether the facts alleged in Singh's petition constitute a cause of action is a question of law that is to be determined independent of the trial court's conclusions.

## II. STATEMENT OF THE CASE

On April 29, 2010, Singh was sentenced in Waukesha County Case Number 08CF1368 in Count #1 of a non-violent class H felony of Obtaining a Controlled Substance by Fraud contrary to Wis. Stat. 961.43(1)(a) to 3 years in prison (18 months

initial confinement / 18 months extended supervision) imposed and stayed for 3 years of probation. On December 13, 2011, the probation was revoked and the stayed prison sentenced was imposed.

On December 29, 2011, Singh was sentenced in Count #1 of Milwaukee County Case Number 11CF4004 to 5 years in prison (2 years IC / 3 years ES) to be served consecutive to the Waukesha matter. The offense date was July 25, 2011. This offense was also for a violation of 961.43(1)(a).

On June 28, 2013, Singh filed the instant Petition for a Writ of Habeas Corpus. Singh alleges that he is being detained illegally because his constitutional protection from ex post facto laws is violated by a denial of the opportunity to be found eligible for early release based on Positive Adjustment Time (PAT) and other provisions from 2009 ACT 28 that were repealed by 2011 ACT 38. Singh alleged that he has reached his eligibility date for under multiple 2009 ACT 28 provisions, but has no remedy available to petition for early release.

### III. THE HABEAS CORPUS CRITERIA ARE MET IF AN EX POST FACTO VIOLATION OCCURRED

Habeas corpus relief is available “only where the petitioner demonstrates: (1) restraint of his or her liberty, (2) the restraint was imposed contrary to constitutional protections or by a body lacking jurisdiction and (3) no other adequate remedy available at law.” *State v. Pozo*, 258 Wis. 2d 796, 802.

Singh is incarcerated at Racine Correctional Institution by respondent Warden Paul Kemper. The only remedy at law currently available for PAT grants is Wis. Stat. 973.198 (Sentence adjustment; positive adjustment time). However, by the plain language of subsec. (1), this remedy is only for PAT earned before August 4, 2011. Singh’s current petition concerns PAT that he earned after that date, for which no other remedy exists. Singh alleged that he has reached his eligibility dates for early release, and has met the published standards for a grant. Therefore, if Singh is correct that his restraint is contrary to the ex post facto clause, habeas corpus will lie.

Furthermore, there are no remedies available to petition for early release based on other non-PAT provisions that were created by 2009 ACT 28 and later repealed by 2011

ACT 38. The retroactive application of the 2011 ACT 38 amendments to Singh, who committed his crimes before the effective date of the Act, makes his punishment more onerous and therefore violates ex post facto protections.

#### IV. 2009 ACT 28 CREATED MULTIPLE EARLY RELEASE PROVISIONS FOR SINGH'S EARLY RELEASE

The legislature, through 2009 ACT 28, created multiple opportunities for inmates to be found eligible for early release. The provisions were made retroactive to all crimes committed after December 31, 1999. Since Singh is serving sentences for non-violent class H felonies, his opportunities include:

- 1) s. 302.113(2)(b) release by the DOC after serving 66% of his sentence based on PAT earned.
- 2) s. 302.113(9)(h) certain early release by the Secretary of the DOC within a year of his ES release date based on a low risk of assaultive behavior.

Furthermore, two additional provisions under c. 304 Parole and Pardons apply:

- 3) s. 304.06(bg)(1) release by the parole board (renamed the earned release review commission) after serving 75% of the sentence based on PAT earned.
- 4) s. 304.06(bg)(3) release by the parole board after serving 75% of the sentence based on any other factors.

Wis. Stat. 302.113(4) reads "All consecutive sentences imposed for crimes committed on or after December 31, 1999 shall be computed as one continuous sentence." Singh's total consecutive sentence consists of a 42 month term of initial confinement. As of August 20, 2013, Singh has served 32 ½ months, and has 9 ½ months remaining. Singh reached his PAT eligibility under s.302.113(2)(b) after 28 months, and his certain early release date under s.302.113(9)(h) after 30 months. His parole date under s. 304.06(bg) was reached after 30 ½ months. Therefore, under the

laws in effect at the time Singh committed his crimes, he has passed the eligibility date for each of these forms of early release.

#### V. THE AMENDATORY REPEAL OF THESE PROVISIONS WAS RETROACTIVE

Subsequently, the legislature, through 2011 ACT 38, repealed these provisions and returned to a mandatory sentencing scheme. The effective date of ACT 38 was August 4, 2011. Since Singh's offenses were committed before this date, the act was made retroactive to him. Both the department of corrections, and the trial court in this matter, claim Singh is ineligible for any PAT or early release as a result of the repeal.

#### VI. THE ACT 38 AMENDMENTS, WHEN APPLIED RETROACTIVELY TO SINGH, VIOLATES THE EX POST FACTO CLAUSE OF THE WISCONSIN CONSTITUTION

Earned early release (whether termed parole, good time, positive adjustment time, gain time, etc.) is a discretionary determination by some authority that an inmate has met criteria that merit release from a term of confinement before the maximum release date is reached. Since the grant is discretionary, there is no vested right to early release. However, when such laws exist, inmates do have an affirmative right to the **opportunity** to be found eligible. The retroactive elimination of such early release opportunities that were available by law when an offense was committed is a violation of ex post facto provisions.

As explained above, Singh reached his eligibility date for early release after serving 28 and 30 months of his 42 month total. The effect on Singh of the 2011 ACT 38 amendments is to delay his eligibility for release by 10-14 months until the maximum 42 month term is served.

“Any law which was passed after the commission of the offense for which the party is being tried is an ex post facto law when it inflicts a greater punishment than the law annexed to the crime at the time it was committed, or which alters the situation of the accused to his disadvantage.” *State ex rel. Mueller v. Powers*, 64 Wis. 2d 643, 646.

“The retroactive application of an amendatory statute increasing the period to be served by an offender before he is eligible for parole consideration is constitutionally prohibited as an ex post facto law.” *Id* at 647.

Similarly, here, the 2011 ACT 38 amendatory statute increased the period to be served before Singh was eligible for release by 1/3 to ¼ of his total sentence. As in *Mueller v. Powers*, this ‘alters the situation of the accused to his disadvantage’, and therefore is prohibited by the ex post facto clause of the Wisconsin Constitution.

It is no defense to argue, as the respondent Warden did in his motion to dismiss in the trial court, that early release is a discretionary determination. Whether Singh would ultimately be granted PAT under s. 302.113 or parole under s. 304.06 is irrelevant here, it is ex post facto to retroactively deny him the opportunity to be found eligible. “Although the decision to refuse or grant parole lies within the discretion of the department of corrections, Wisconsin law grants petitioners as a matter of right the opportunity to be considered for parole after serving a given period of time. A retroactive increase of this period violates petitioner’s constitutional rights.” *Id*.

The same principles have been applied in Wisconsin when disadvantageous changes to good time formulas are retroactively effected. See *State ex rel. Eder v. Matthews*, 115 Wis. 2d 129. There is no substantive difference, for the purposes of ex post facto analysis, between the various labels attached to early release, such as parole, good time, positive adjustment time, gain time, etc. Eliminating Singh’s such opportunities, after he committed his crime, is an ex post facto violation.

## VII. THE ACT 38 AMENDMENTS, WHEN APPLIED RETROACTIVELY TO SINGH, VIOLATES THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION

The United States Supreme Court has “found no distinction between depriving a prisoner of the right to earn good conduct deductions and the right to qualify for, and hence earn, parole. Each materially alters the situation of the accused to his disadvantage.” *Weaver v. Graham*, 450 U.S. 24, 34. “It is the effect, not the form, of the law that determines whether it is *ex post facto*. The critical question is whether the law changes the legal consequences of acts completed before its effective date.” *Id* at 31.

In Weaver v. Graham, 450 U.S. 24, the US Supreme Court ruled a Florida statute ex post facto that, as in Singh's case, retroactively applied an amendment that reduced the rate at which prisoners were eligible to earn early release based on good behavior. It does not matter whether the inmate would ultimately be granted early release or not. "The inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual." *Id* at 33.

First, the court summarized the criteria for ex post facto. "Two critical elements must be present for a criminal or penal law to be *ex post facto*, it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Id* at 29. Since Singh has been ruled ineligible by the DOC and the trial court for early release under 2009 ACT 28 as a result of 2011 ACT 38 although his crimes were completed before the effective date of the latter, the 2011 ACT 38 amendments are plainly applied retroactively to Singh.

In Weaver, the Supreme Court of Florida had denied the petitioner, ruling that early release based on good behavior was a discretionary determination, an 'act of grace', and therefore it could be modified at any time. The petitioner had no vested right to early release, and therefore no cause of action.

The Weaver court first explained why this explanation based on discretionary acts of grace is invalid.

"Contrary to the reasoning of the Supreme Court of Florida, a law need not impair a 'vested right' to violate the ex post facto prohibition. Evaluating whether a right has vested is important for claims under the Contracts or Due Process Clauses, which solely protect pre-existing entitlements. The presence or absence of an affirmative, enforceable right is not relevant, however, to the ex post facto prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense."  
Weaver v. Graham, 450 U.S. 24, 30

The Weaver court then ruled the amendment was void when applied retroactively to the petitioner. "Thus, 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. This result runs afoul of the prohibition against *ex post facto* laws.” Weaver v. Graham, 450 U.S. 24, 36. “It may be ‘legislative grace’ for Congress to provide for parole but when it expressly removes all hope of parole upon conviction and sentence for certain offences, this is in the nature of an additional penalty.” Warden v. Marrero, 417 U.S. 653, 663.

In arriving at this conclusion, the Weaver court discussed an earlier decision. “In Lindsey v. Washington, 301 U.S. 397, 401-402, we reasoned 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 [] term. Here, petitioner is similarly disadvantaged by the reduced opportunity to shorten his time in prison simply through good conduct.” Weaver v. Graham, 450 U.S. 24, 33-34. “A law may be retrospective not only if it alters the length of the sentence, but also if it changes the maximum sentence from discretionary to mandatory.” *Id* at 32, n. 17.

Singh is similarly substantially disadvantaged by the retroactive application of 2011 ACT 38 amendments, which deprived him of all opportunity to shorten his time in prison. “There, we rejected as an *ex post facto* violation a legislative change from flexible sentencing to mandatory maximum sentencing because the retrospective legislation restricted defendant’s opportunity to serve less than the maximum time in prison.” *Id* at 35, n. 20. Under the laws in effect at the time Singh committed his offenses, his 42 month sentence was discretionary with opportunities for early release based on good behavior as early as after 28 months and parole after 30 months. The retroactive application of 2011 ACT 38 to Singh, is in violation of the *ex post facto* clause of the United States Constitution because it turned Singh’s discretionary sentence into a mandatory sentence of 42 months.

#### VIII. WIS. STAT. 973.198 DOES NOT APPLY TO SINGH

Wis. Stat. 302.113(4) reads “All consecutive sentences imposed for crimes committed on or after December 31, 1999 shall be computed as one continuous sentence.” There is no legal authority for treating Singh’s consecutive sentences

individually. See *State v. Harris*, 2011 WI App 130; 337 Wis. 2d 222. Therefore, there is no 'sentencing court' for Singh to petition under Wis. Stat. 973.198(1). There simply is no legal authority to assign any particular day Singh has served to one case or the other for the purposes of determining whether PAT was earned on that day. Since there is no 'sentencing court' when consecutive sentences are imposed from separate cases and counties, s. 973.198 offers no authority for Singh's convicting courts to make PAT determinations. Habeas corpus is therefore the only means for this.

#### IX. WIS. STAT. 973.198 IS AN UNCONSTITUTIONAL EX POST FACTO LAW

In Kemper's Motion to Dismiss in the trial court, it characterized s. 973.198 as a procedural change, and therefore did not violate the ex post facto clause. "Alteration of a substantial right, however, is not merely procedural, even if the statute takes a seemingly procedural form." *Weaver v. Graham*, 450 U.S. 24, 29, n. 12. In this case, s. 973.198 is ex post facto because (1) it eliminates the opportunity to earn PAT after August 4, 2011 as argued above, and (2) because it places additional barriers to earning PAT for time served before that date.

Under 2009 ACT 28, the DOC administratively makes a determination whether PAT was earned, and then releases the inmate unless expressly vetoed by the court. Under s. 973.198, the petitioner must still have the DOC make a PAT calculation, but now must also get the court's approval. This additional step was not required under 2009 ACT 28, and retroactive application of it is ex post facto.

A similar situation occurred in Maryland. The legislature there passed an amendment that required approval from the governor before parole would be granted. In *Gluckstern v. Sutton*, 319 Md. 634, their supreme court ruled that by adding this extra approval step, the path to early release was made more difficult and therefore retroactive application of the amendment violated ex post facto.

Singh argues the same here. Before, PAT was earned and early release would be granted without requiring any action from the court. Now, a petitioner must get not just the DOC approval as before, but also the court's affirmative approval as well. This makes the process more onerous and therefore is ex post facto.

## X. SINGH EARNED PAT BEFORE AUGUST 4, 2011

In Kemper's Motion to Dismiss granted by the trial court, it argued that Singh did not serve a day in prison until January 4, 2012, the date that he was first received for admission at Dodge Correctional Institution. It argues that the time Singh served before that was in the county jail, and therefore that time served is ineligible for PAT since it was not in prison. However, this is contrary to Wis. Stat. 973.155(3), which provides that sentence credit "shall be computed as if the convicted offender had served such time in the institution to which he or she has been sentenced."

Since Singh was sentenced to prison, the time he served in the county jail before reception at Dodge Correctional Institution is prison time and eligible for PAT. Much of that time was served before August 4, 2011.

## XI. SINGH'S ARGUMENTS MATCH OTHER JURISDICTIONS

While caselaw from other states is not precedential, it may serve a persuasive role. In this case, there is uniformity. Whenever other state legislatures have passed laws restricting inmates' opportunities for early release, their courts have virtually unanimously ruled that an ex post facto violation occurs when these laws are applied retroactively. For a sampling, note:

TEXAS	Ex post Alegria, 464 S.W. 2d 868
MISSISSIPPI	Puckett v. Abels, 684 So. 2d 671
S. CAROLINA	Elmore v. State, 409 S.E. 2d 397
NEVADA	Goldsworthy v. Hannifin, 86 Nev. 252
KANSAS	Kesterson v. State, 276 Kan. 732
LOUISIANA	State v. Curtis, 363 So. 2d 1375
ALASKA	Malloy v. State, 153 P. 3d 1003
MISSOURI	State v. Pollard, 746 S.W. 2d 632
NEW MEXICO	Devine v. N.M. Dept of Corr., 866 F. 2d 339
MASSACHUSETTS	Murphy v. Commonwealth, 172 Mass. 264
CALIFORNIA	In re: Griffin, 63 Cal. 2d 757
MONTANA	State ex rel. Nelson v. Ellsworth, 142 Mont. 14
ILLINOIS	Barger v. Peters, 163 Ill. 2d 357
NEW HAMPSHIRE	State v. Reynolds, 138 N.H. 519
WASHINGTON	In re: Powell, 117 Wn. 2d 175
OREGON	Flemming v. Oregon Bd. Of Parole, 998 F.2d 721

ARIZONA	State v. Valenzuela, 144 Ariz. 43
KENTUCKY	Blondell v. Commonwealth, 556 S.W. 2d 682
IOWA	State v. Iowa Dist. Court, 759 N.W. 2d 793
INDIANA	Dowd v. Sims, 229 Ind. 54
WEST VIRGINIA	Adkins v. Bordenkircher, 164 W.Va. 292

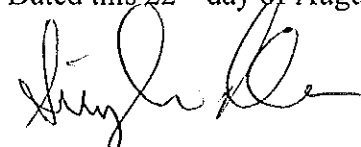
Furthermore, this position is consistent with the 7<sup>th</sup> circuit caselaw position as well, whether ruling on federal inmates or state inmates. Note:

7 <sup>th</sup> CIRCUIT	Rodriguez v. U.S. Parole Com., 594 F. 2d 170
7 <sup>th</sup> CIRCUIT	Welsh v. Mizell, 668 F. 2d 328

## XII. REQUESTED RELIEF

Singh requests the court declare that the 2011 ACT 38 penal law amendments that eliminate the early release statutes are unconstitutionally ex post facto and void when applied retroactively. This includes s. 302.113(2)(b), 302.113(9)(h), and 304.06(bg). However, as the remand advises in *Weaver v. Graham*, only those parts of the law that are ex post facto are to be voided. Therefore, the repeal of the provisions that permitted sentencing court review and potential veto are not ex post facto because their repeal and retroactive application do not make it more onerous. In fact, it makes the process for early release easier and therefore the repeal of the court veto statutes is constitutional. Since Singh has met the eligibility date, and the respondent did not contest and introduced no evidence in the trial court that Singh did not meet the criteria for early release under s. 302.113(2)(b), Singh requests this court order his release instead of remand for a new hearing. Singh also requests the court declare Wis. Stat. 973.198 unconstitutional as an ex post facto law.

Dated this 22<sup>nd</sup> day of August, 2013



Aman Deep Singh