State of Wisconsin ex rel. Aman Singh,
Petitioner-Appellant,
v.
Paul Kemper, Warden, Racine Correctional Institution,
Respondent-Respondent.

Appeal No.
13 AP 1724

# APPELLANT REPLY BRIEF

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STATEMENT ON ISSUES

There are two issues in this appeal: (1) whether 2011 ACT 38 is constitutional when retroactively applied, and (2) whether Singh is entitled to positive adjustment time. These are separate inquiries.

## I. THE 2011 ACT 38 SENTENCING AMENDMENTS, WHEN APPLIED RETROACTIVELY, VIOLATE THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION

Since Singh's crimes were committed before 2011 ACT 38 went into effect, it has plainly been retroactively applied. Therefore, the key question is whether those sentencing amendments have made more burdensome the punishment for Singh's crimes. The Supreme Court of the United States spelled out what this entails for ex post facto analysis earlier this year. "The touchstone of this court's inquiry is whether a given change in law presents a 'sufficient risk of increasing the measure of punishment attached to the covered crimes.' The question when a change in law creates such a risk is a 'matter of degree'; the test cannot be reduced to a 'single formula'." *Peugh V. United States; 133 S. Ct. 2072, 2081; 186 L. Ed. 2d 84, 97.*

Singh claims that 2011 ACT 38, when retroactively applied to him, denies him the opportunity to earn PAT and early release which was available for his crimes before this law went into effect. Since the PAT statutes were particularly intended for inmates such as Singh (non-violent class F-I well behaved inmates with a low risk of re-offending), the change in law creates a sufficient risk that Singh will remain in prison longer than he would have otherwise.

### 1. *California Department of Corrections v. Morales, 514 U.S. 499*

Kemper's reliance on *California Department of Corrections v. Morales, 514 U.S. 499* is unavailing. It concerns a California statute that allowed the state parole board to defer parole hearings for up to 3 years for one very narrow class of inmates – multiple murderers. All other inmates continued to be given parole hearings yearly. The Supreme Court upheld the law for three reasons.

First, it "left unchanged the substantive formula for securing any reductions to this sentencing range .... Respondent was able to secure a one-third 'credit' or reduction in this minimum by complying with prison rules and regulations." *Id* at *507*. In other words, the statute, unlike 2011 ACT 38, did not eliminate the opportunity to earn good time.

Second, "the amendment had no effect on the standards for fixing a prisoner's initial date of eligibility for parole, or his 'suitability' for parole and setting his release date." *Id.* 2011 ACT 38, however, delays Singh's eligibility date for release by up to one-third of his entire sentence, or 16 months, as a result of the repeal of s. 302.113(2)(b).

Third, "the amendment applies only to a class of prisoners for whom the likelihood of release on parole is quite remote." *Id* at *510*. Therefore, "the amendment creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes." *Id* at *509*. Multiple murderers are so unlikely to be granted parole that less frequent hearings will not really affect the amount of time they actually spend in prison. Furthermore, if a drastic change actually were to arise that might warrant a parole hearing, the inmate could seek and the board could consider a request for an earlier hearing. *Id* at 512-513. These additional protections "would remove any possibility of harm even under the hypothetical circumstances suggested by respondent." *Id.*

2011 ACT 38, precludes the possibility of earning additional PAT after August 4, 2011, with no recourse or alternative to Singh. Since Singh is serving a non-violent class H felony and has met the criteria described in s. 302.113(2)(b), the repeal of this statute has the very clear and prohibited effect of turning Singh's discretionary sentence into a mandatory one. The statutes affected by 2011 ACT 38, were created for the primary purpose of permitting inmates such as Singh (non violent well-behaved class F-I felons with a low risk of reoffending) to be released early. Therefore, repeal of these statutes creates a sufficient risk, when applied retroactively, that Singh's effective sentence will be increased. As Singh showed through calculation in his appellant brief, full application of s. 302.113(2)(b) should have allowed Singh to be released on April 4, 2013. However, Singh remains incarcerated.

2. *Weaver v. Graham*, 450 U.S. 24

Kemper attempts to distinguish Singh's case from *Weaver* on three grounds.

First, Kemper argues that the *Weaver* statute was 'mandatory' while PAT is discretionary. Kemper offers no explanation for concluding that the *Weaver* gain time statute was mandatory. The Supreme Court of Florida had upheld the statute precisely because it was discretionary, explaining "that the right to gain time is not a vested one

and that it is obviously dependent on the course of conduct of the inmate.... gain time is granted by the sovereign as a matter of grace rather than of right ...." *Harris v. Wainwright, 376 So. 2d 855, 856.* The State of Florida also characterizes the statute as discretionary in its argument to the *Weaver* court. See *Weaver* at 29, fn 13. If the State of Florida itself calls the statute discretionary, it is frivolous for Kemper to insist that it in fact mandatory.

Moreover, the United States Supreme Court has repeatedly emphasized that discretion is not relevant to ex post facto analysis. See, e.g., *Weaver* at *29, fn.13* ("When a court engages in ex post facto analysis, ... it is irrelevant whether the statutory change touches any vested rights."); *Garner v. Jones, 529 U.S. 244, 253* ("The presence of discretion does not displace the protections of the ex post facto clause, however."); *Peugh v. United States, 133 S. Ct. 2072, 2081* ("Moreover, the fact that the sentencing authority exercises some measure of discretion will also not defeat an ex post facto claim.").

Kemper's second 'fact' is that s. 973.198 preserves the right to apply for PAT earned up to August 3, 2011. This 'fact' is not relevant either, as Singh's ex post facto claim concerns PAT earned after that date. Kemper acknowledges that 2011 ACT 38 "precluded the possibility of earning PAT after August 3, 2011..." (Kemper Brief p.11)

Kemper's third 'fact' is that "Singh was never eligible to earn PAT...." (Kemper Brief p. 11) This 'fact' is plain wrong. Singh was eligible to earn PAT by virtue of having committed his offenses before PAT statutes were repealed by 2011 ACT 38.

United States Supreme Court caselaw is very clear that any retroactively applied change in law which effectively "eliminated the lower end of the possible range of prison terms" *Morales* at *506* impermissibly increases the punishment for a crime, whether the change is in parole law (*Greenfield v. Scafati, 390 U.S. 713*), good time credits (*Weaver v. Graham, 450 U.S. 24*), prison overcrowding credits (*Garner v. Jones, 529 U.S. 244*), or sentencing guidelines (*Miller v. Florida, 482 U.S. 423*). Moreover, that these sorts of measures present a significant risk that an offender's sentence will be increased is so obvious that each was a unanimous 9-0 opinion with no justice dissenting.

## II. THE 2011 ACT 38 SENTENCING AMENDMENTS, WHEN APPLIED RETROACTIVELY, VIOLATE THE EX POST FACTO CLAUSE OF THE WISCONSIN CONSTITUTION

Kemper does not refute this claim.

Analysis of state constitutional protections is a separate issue from federal constitutional protections, and the state is free to offer greater protections than the federal counterpart. See *State v. Jennings, 2002 WI 44, P37-38; 252 Wis. 2d 228, 246-247.*

"The potential to earn positive adjustment time is similar to prior statutes allowing inmates to apply for release on parole before their full incarceration time had been served." *State v. Carroll, 2012 Wi App 83, P10; 343 Wis. 2d 509, 514.* Both involve a discretionary determination of whether and when an inmate has earned early release based on the nature of the offense, his behavior in prison, and other published criteria.

"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 violations petitioner's constitutional rights." *State ex rel. Mueller v. Powers, 64 Wis. 2d 643, 647.* The retroactive application of 2011 ACT 38 to Singh increased the period that Singh had to serve before eligibility for release, from 28 months under s. 302.113(2)(b), 30 ½ months under s. 304.06(1)(bg) and (bk), and 32 months under s. 302.113(9)(h), to a full 42 months.

## III. WIS. STAT. 973.198 IS NOT A PROCEDURAL CHANGE, BUT AN EX POST FACTO VIOLATION

"Alteration of a substantial right, however, is not merely procedural, even if the statute takes a seemingly procedural form." *Weaver* at *23, fn. 12.* Singh argues that the use of s. 973.198 is ex post facto because it changes the standards and availability of PAT early release. It does not simply change the procedure, but adds an additional hurdle. Not only meet all the requirements previously expected of him to earn good time for the applicable days, but he must also now get affirmative judicial approval. It has made court approval, which was optional before (an inmate would be released if the court took no action), and made it mandatory. That this poses a sufficient risk of increasing

punishment should be obvious from the statistics. Whereas before 2011 ACT 38, hundreds of inmates had been released early due to PAT by the DOC, afterwards only a handful, if any at all, have been given PAT grants through s. 973.198. The exact numbers are held by the DOC, and not Singh, so the court would have to order Kemper to produce them.

However, Singh would note that Kemper did not offer these numbers on his own to refute Singh's contention that the s. 973.198 procedure has made it much more difficult to receive PAT grants.

## IV. WIS. STAT. 973.198 VIOLATES DUE PROCESS BECAUSE IT DOES NOT PROVIDE FOR CONSECUTIVE SENTENCES

This argument was not refuted by Kemper.

Singh reiterates that *State v. Harris, 2011 Wi App 130; 337 Wis. 2d 222* clearly rejects any argument that consecutive prison sentences may be computed separately.

## V. SINGH MET THE POSITIVE ADJUSTMENT TIME CRITERIA

Kemper has conceded the following assertions by not refuting them:

(1) Singh is serving sentences for non-violent class H felonies.
(2) Singh has not violated any regulation of the prison and has not refused or neglected to perform required or assigned duties.
(3) Singh has rated a low risk of reoffending based on the COMPAS test, the DOC's objective risk assessment instrument.

Therefore, Singh has met the criteria to be awarded positive adjustment time under s. 302.113(2)(b), which provides that the inmate "*shall be released* to extended supervision when he or she has served the term of confinement in prison portion of his or her bifurcated sentence ... less positive adjustment time he or she has earned."

## VI. SINGH SERVED TIME IN PRISON BEFORE AUGUST 4, 2011

Kemper's brief places great importance on the date of January 4, 2012 – the day that Singh was first received at Dodge Correctional Institution. Kemper claims that this

was Singh's first day in prison. Kemper's argument is foreclosed by *State v. Harris, 2011 Wi App 130; 337 Wis. 2d 222.* Harris was sentenced to a 7 year prison sentence consecutive to 10 months in jail. At the time of sentencing, Harris had already accumulated over 10 months in pre-sentence credit, all in a house of correction. Harris argued that since he was first sentenced to 10 months in jail and he had served that entire period physically in a jail, then he was entitled to WIS. STAT. 302.43 jail good time sentence credit. However, the court explained that despite being sentenced to jail and having served time in jail, the statutes required his sentence to be computed entirely as a prison sentence. "Harris was not, nor would ever become, an inmate of a county jail or house of correction." *Id* at *229, P9.* "Harris was, under the terms of the statutes, an inmate of the prison system rather than the county jail." *Id* at *229, P10.*

Singh's situation is even simpler, as he was sentenced only to prison. Therefore, all of his sentence credit will be served as a prison inmate, in prison, regardless of what institution he is physically at. As is demonstrated by 'Exhibit 4' of Kemper's trial court motion to quash (Record Doc. #8), Singh served 262 total days towards his sentence prior to August 4, 2011. Since this is prison time, PAT should be available for it.

## VII. SINGH HAS MET THE HABEAS CORPUS CRITERIA

Singh (1) incarcerated at Racine Correctional Institution by Warden Paul Kemper, (2) in violation of constitutional ex post facto protections, and (3) has no other adequate remedies for receiving his PAT earned after August 3, 2011. Furthermore, he has no adequate remedy for PAT before that date because the DOC refuses to compute it based on a misapplication of the law. Because he earned adequate PAT for early release as of April 4, 2013, a writ of habeas corpus ordering his immediate release is warranted.

Dated this 1st day of November, 2013,

Aman Singh
Appellant pro se