That fact notwithstanding, it is more important that petitioner is currently locked into a medium classification designation since the 1998 inflexible reapplication of the rules, and PRC is again absolutely precluded from even considering the appropriate reduction in classification. It is the precise situation petitioner faced in the original proceeding in 1989. What is more, the rules contained in the respondent's current proffer before this Court are even more onerous than the current rules, as will be discussed in the next argument.

Given the fact that petitioner was deemed appropriate for reduction in classification under the old and proper criteria on numerous occasions because virtually all of the relevant factors were "low," and because all of the current factors are also rated "low," there is no articulable reason upon which a current denial of classification reduction can be based. That is, absent the inflexible application of the rules.

Petitioner has and will continue to be punished as a result of the respondents' actions, or lack thereof, and their past actions demonstrate how the pending rules (respondent's proffer) will be implemented in ex post facto fashion to achieve their administrative agenda. As will be discussed in the next argument, the pending rules will be utilized to mis-classify the entire prison population across the board by, inter alia, making the already defunct Parole Commission the de facto PRC, thus eliminating any possibility of being parole qualified.

In the instant matter, the respondents are prohibited from using petitioner's classification to punish him and must,

therefore, grant him his earned reduction when the appropriate criteria are considered. See, §301.001, Wis.Stats., purpose of the Department of Corrections.

In **Mid Plains Tele v. PSC**, 202 N.W.2d 907, 910 (1973), the court held that "(e)very administrative agency must conform precisely to the statutes from which it derives power." Since §301.001, Wis.Stats., permits only rehabilitation and protection of the public as grounds for incarceration, the respondents must rely on those two factors in determining petitioner's request for his rightfully earned classification reduction.

The note to §DOC 302.14, as it existed prior to December 1988, also supports petitioner's contentions. It states:

> "... Experience teaches, for example, that some people with life sentences can appropriately reside in less than maximum security institutions. When this is consistent with security and program assignment, length of sentence should not bar assignment to such an institution and transfer among such institutions."

Prior to the promulgation of §DOC 302.145, and under §DOC 302.14, the respondents are limited to considering the fourteen (14) listed factors, only. The standard for interpreting those factors is found in §DOC 302.11. The DOC promulgated this section for the purpose of stating exactly what the purpose of having different levels of security is, and what substantive criteria guide classification level determinations. Section DOC 302.11 states:

> "Security Classification. The purpose of security classification program assignment and assignment to an institution are:
>
> (1) The treatment of the resident in accordance with individual needs, and the resources of the department of corrections;
>
> (2) The placement of the resident in a secure setting that

provides supervision in accordance with the resident's needs; and

(3) The social reintegration of the resident and the protection of the public through appropriate supervision."

The factors found in §DOC 302.14 used to be considered according to the Appendix Notes in the Administrative Code, and the actual "weight" was set by a policy of common sense. Albeit it was an unwritten policy, it was governed by the provisions contained in §DOC 302.11, supra. Courts in this State view unwritten policy as being set by a standard of past demonstration. The pre-1988 policy and standards have been generously demonstrated at numerous points for the record in this matter.

Given the facts of the case, there is no way that any reasoned analysis could result in the determination that petitioner is not currently an appropriate candidate for such a reduction in classification when considering the appropriate criteria.

Moreover, there can be no question that petitioner is currently precluded from obtaining a parole while rated at a medium classification. Indeed, the PC relied on that fact as a basis for denying petitioner his parole at his last three interviews. (See, Exhibits V-4, V-6, and V-13, affixed hereto.) Furthermore, petitioner has a very definite liberty interest in his proper classification rating because of the definite and significant causal nexus between classification and parole, as noted in the determinations of the trial court and, especially, the court's order denying respondent's motion for

reconsideration. (Exhibit B.)

As of 18 February 1998, petitioner is once again locked into the same "catch-22" situation where he cannot obtain a parole until he gets to minimum, and cannot get to minimum until he gets a parole. In effect, the liberty interest in both minimum classification and parole have been stripped from petitioner through the inflexible reapplication of the rules; he no longer enjoys the liberty of earning his way through the system to a point where he can be found parole qualified. The mandatory PAC rules direct that no lifer will be paroled with a moderate risk classification.

And, what is more, the rules are also the only means by which the respondents have inappropriately determined petitioner's suitability for an out of state (OOS) transfer for an indeterminant length of time. (See, Exhibits V-5, V-7, and V-10, affixed hereto.) The current OOS screening sheet indicates the time frame as four-years at a crack. The pending rules submitted in respondents instant proffer will serve the same function per §§DOC 302.07(12), and DOC 302.19. (See, Appendix Notes.) And when the PC accurately professes it "**doesn't** handle inmate movement," that is precisely what will occur. As is petitioner's current demise, the prisoner will not move. Period.

It cannot seriously be disputed that petitioner does not have a very definite liberty interest in his reduced classification rating, mainly because of the definite and significant causal nexus between classification, work/study release, and parole. These very liberty interests have been

completely stripped from petitioner through the inflexible application of the mandatory PRC rules "working together" with the mandatory PAC rules.

As the liberty interests in this matter concern the notion of fair play and due process, Courts have been generous with providing the protections afforded in the Constitution. "Assuming that plaintiff has properly claimed a protectable liberty or property interest ... See, Garga v. Miller, 668 F.2d 480, 484-86 (7th Cir. 1982); Stringer v. Rowe, 616 F.2d 993, 996-97 (7th Cir. 1980), prison officials can properly take them away only after a disciplinary hearing that comports with due process." **Redding v. Fairman**, 717 F.2d 1105, 1112 (7th Cir. 1983); **Jackson v. Carlson** 707 F.2d 943, 949 (7th Cir. 1983). See, §DOC 324.13, WAC.

Imprisonment does not completely divest prisoners of their constitutional rights. **Turner v. Safley**, 482 U.S. 78, 84, 107 S.Ct. 2254 (1987); **Martin v. Brewer**, 830 F.2d 76, 77 (7th Cir. 1987). Prisoners, however, retain only those rights which are not inconsistent with their status as prisoners or with legitimate penological objectives of the correction system. **Rios v. Lane**, 812 F.2d 1032, 1035-36 (7th Cir.), cert.denied, 483 U.S. 1001 (1987); **Ustrak v. Fairman**, 78 F.2d 537, 580 (7th Cir.), cert.denied, 479 U.S. 824 (1986). Federal courts will step in to protect fundamental constitutional guarantees of prisoners. **Turner**, supra, at 85; **Williams v. Lane**, 851 F.2d 867, 871 (7th Cir. 1988), cert.denied, 488 U.S. 1047 (1989).

The Supreme Court in **Turner** articulated the extent to which

prisoner's constitutional rights bay be burdened as follows: "A prison regulation (that) impinges on inmates' constitutional rights . . . is valid if it is reasonably related to legitimate penological interests." **Id.** at 89. The **Turner** test applies equally to the policy decisions of prison officials. **Young v. Lane**, 922 F.2d 370 (7th Cir. 1991). It is not a particularly demanding standard. **Reed v. Faulkner**, 842 F.2d 960, 962 (7th Cir. 1988).

The respondents herein had no legitimate penological interest in returning petitioner to medium status and then making it impossible to return to minimum status via the "catch-22" scenario explained earlier. Petitioner's right not to have these interests infringed upon by the respondents is sheltered by the Fifth and Fourteenth Amendments against the State's unwarranted usurpation, disregard and violation of those rights.

Procedural protections will not save an (administrative) action that infringes on the prisoner's constitutional rights. **Black v. Lane**, 22 F.3d 1395, 1403 (7th Cir. 1994). A prisoner subjected to a loss of liberty interest is entitled to certain protections. **Wolff**, supra, at 563-71.

The constitutional guarantees of due process to prisoners are subject to those restrictions imposed by the nature of imprisonment. **Wolff**, supra, at 539. Prisoners claiming a due process violation must demonstrate that they have been deprived of a protected liberty or property interest by arbitrary government action. **Meachum v. Fano**, 427 U.S. 215, 223-24 (1976); **U.S. ex rel. Burnett v. Illinois**, 619 F.2d 668 (7th Cir. 1980);

Doherty, supra. The court then determines what process the prisoner is due by balancing the interest affected, the risk of error in the procedures used, and the state interest in institutional security. **Williams**, supra, at 879.

In **Allen v. McCurry**, 101 S.Ct. 411 (1980), the Court held that federal courts could step in where the state courts were unable or unwilling to protect federal rights. **Id.**, at 415; **Board of Regents v. Tomanio**, 100 S.Ct. 1790 (1980); **Haring v. Prosise**, 103 S.Ct. 2368 (1983).

II. THE EX POST FACTO CLAIM.

The reapplication of the rules in this case, as well as those contained in the respondent's instant proffer, are demeaning to the interests of justice and constitutionally offensive when viewed in the context of the conjoined ex post facto claim. When applied inflexibly, the mandatory classification rules "work together" with the mandatory parole rules and affect a longer duration of petitioner's confinement. They have very definitely stripped petitioner's liberty interests in work release and parole clean away from him once again.

Petitioner acknowledges that he does not have a liberty interest in where he is housed, but the same cannot be said of the classification, where he has a very substantial and constitutionally protectible liberty interest in maintaining a minimum-security custody rating. This is true even if DOC elects to house petitioner in maximum security isolation, for whatever reason or no reason at all. When the rules are "working together" in conjunction they not only restrict petitioner's

qualifications for parole but completely eliminate the potential he once retained of being found parole qualified. The damage is not comparable to a mere alteration in conditions but, rather, the complete elimination of conditions.

The damage done to petitioner's liberty interests is even worse than in the case of **Weaver v. Graham**, 450 U.S. 24, 101 S.Ct. 960 (1981), where the prisoner lost the ability to earn gain time by 40%, the application of the rules in this case reduces parolability by 100%. It is obvious from the facts in this case that the loss of such a liberty interest is punitive, much like in the case of **Knox v. Lanham**, 895 F.Supp. 750, 758 (D.Md. 1995), and that the rules have a similar effect of foreclosing parole. When applied inflexibly, the rules have a punitive effect much like ex post facto law. As such, the application is subject to ex post facto prohibition. See, **Inglease v. United States Parole Com'n.**, 768 F.2d 932 (7th Cir. 1985). The effect is penal when it increases petitioner's length of incarceration, potentially for life. See, **Miller v. Florida**, 107 S.Ct. 2446 (1987).

The risk rating system should not be applied to mean that prisoners will necessarily move more slowly into minimum security than they would absent the rating. Likewise, the purpose of the risk rating system should not be to retain prisoners in maximum or medium security for longer periods of time than they would be retained absent the rating system. Of all the cases in the prison system at present, the instant case is possibly the most glaring demonstration of these precise effects. This

petitioner cannot even be considered for a return to minimum with the inflexible application of the rules. See, Exhibits V through V-17, affixed hereto.

DOC statistical bulletins will bear out the truth of just what the rules are actually accomplishing; they are the most poignant reason for the massive overcrowding in the prison system.

There is ample evidence in the record in this matter to show that petitioner would definitely be assigned his rightfully earned minimum classification absent the application of the rules. The **only** reason petitioner is not rated minimum at this time is because of the inflexible application of the rules.

Petitioner's eligibility for reduced imprisonment is a significant factor entering into the equation. Time is punishment; increasing the time necessarily increases the punishment. It is quintessentially punitive.

Classification may not technically be part of the criminal penalty, but it is an integral part of petitioner's sentence, and it becomes punitive in nature when it lengthens the mean average length of time by changing the conditions to a mandatory "life" maximum. The changes increases the penalty, as in **Lindsey**, and it does not matter if the rules were enacted with a punitive intent. The lack of intent is overcome by the evidence of the effect being hopelessly punitive.

Another rub is that the respondents have to admit that pursuant to §PAC 1.06(7)(e), WAC, the release of the inmate into the public must not be an unreasonable risk as determined by the

judgment of the commission. When that unreasonable risk is virtually mandated by §DOC 302.145, it excludes minimum and, thus, parole consideration. Potentially forever. And, rubbing deeper still, §DOC 302.07(12), WAC (the respondent's proffer of pending rules) will serve the same function with regard to the crucial classification factor being determined by the PC. See, petitioner's Motion For Preliminary Injunctive Relief, submitted herewith, which depicts the manner in which the PC now becomes the de facto PRC.

Pursuant to **Board of Regents v. Roth**, 92 S.Ct. 2701 (1972), the issues presented in this habeas action are the denial of due process and equal protection of law through the retroactive application of ex post facto classification mandates, which is prohibited pursuant to **Marks v. United States**, 97 S.Ct. 990 (1977), a case which addresses the fundamental concept of constitutional liberty as protected against judicial action by the substantive due process Clause of the Fifth Amendment.

The **Marks** Court held that the principle upon which the Clause is based is fundamental to our concept of Constitutional liberty, and the restrictions in that case rested on an unexpected construction of the law. "(A)n unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, §10, of the Constitution forbids." **Id.** at 992-93.

Wisconsin has allowed the DOC to be exempt from the ex post facto Clause by virtue of the one-prong intent-only analysis, as opposed to the proper two-prong intent-effect analysis in

Lindsey, supra. The **Lindsey** Court held that where there is a change from indeterminate sentences to mandatory terms, it violates the ex post facto Clause:

> The ex post facto clause of the Federal Constitution looks to the standard of punishment prescribed by statute rather than to the sentence actually imposed, and an increase in possible penalty may be a violation of the clause regardless of the length of the sentence actually imposed; the application to prior offenses of a state statute changing a law as to indeterminate sentences is a violation of the ex post facto clause of the Federal Constitution where the original statute, which allowed the court to impose a sentence not less than a minimum nor greater than a maximum term of imprisonment, is changed so as to require a court to impose a maximum sentence, the duration of confinement to be fixed by the parole board which is given the power to lengthen such duration of confinement not exceeding the maximum term and to return the prisoner to confinement after his release at any time before the expiration of the maximum term, there being no possibility under the new law, as there was under the old law, of unqualified release before the expiration of the maximum term.

When one views the totality of the effect of the mandatory classification rules, and the way they operate inflexibly "together with" the mandatory parole rules, and especially in light of the facts as presented to this Court, it is not difficult to see they operate as prospective punishment. The Court in **Corbitt v. New Jersey**, 99 S.Ct. 493 (1978), held that "(t)he effect of the new statute is to make mandatory what was before only the maximum sentence." ... "Removal of the possibility of a sentence of less than fifteen years...operates to (defendant's) detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old." Id. at 503.

Mr. Justice Marshall, in **Weaver**, supra, found the respondent's argument as to the retrospective application failed, as any single-prong intent-only ex post facto analysis must also

fail as applied to petitioner's case. "This argument fails to acknowledge that it is the effect, not the form, of the law that determines whether it is ex post facto." **Id.** at 965.

In the instant case, if the facts are accepted as true, and they must be, then the constitutional violation becomes apparent. DOC statistics will bear the fact that no lifer has ever been paroled in WI absent a minimum classification. Not only has it never occurred, but it cannot occur by virtue of the mandatory PAC rules. When the mandatory PRC rules then prohibit minimum consideration it strips the liberty interest away in a very punishing fashion. And such punishment can be deemed nothing but punitive.

The Supreme Court in **In re Medley**, 10 S.Ct. 384, 386-87 (1890), held the ex post facto clause to be violated by a statute retroactively requiring that prisoners awaiting execution be kept in solitary confinement, for the nature and history of such confinement were found clearly to evince a punitive purpose.

Even in post-**Weaver** cases the courts only considered whether the legislative enactment lengthened the period of incarceration, without examining the legislative intent or purpose. **Miller**, supra, at 2446 (quoting) **Dobbert v. Florida**, 97 S.Ct. 2290-99 (1977). These cases rested entirely on an objective appraisal of the impact/effect on the length of time.

Other cases like **California Dept. of Corrections v. Morales**, 115 S.Ct. 1597 (1995), rightfully focus on the effect, without the DOC's subjective purpose, **Weaver**, supra, at 996, and whether the rules increase the quantum of punishment. DOC's purported

intent is not relevant to the ex post facto inquiry. **Morales**, supra, at 1602.

In this case, the retrospective change clearly operates to deprive petitioner of his rightfully earned minimum status, his arduously earned right to work release and, thus, his ability to remain parole qualified, which requires years at a minimum placement. It cannot even be seriously argued that it is not the manner in which the rules "work together" to affect that exclusion. Whether it functions by design or not does not matter. In the final analysis DOC's purported purpose and penological interest must still be governed by the Supreme Court directives in **Turner**, because prisoners are simply not divested of all their constitutional rights.

Pursuant to **Lynce v. Mathis**, 117 S.Ct. 891, 897 (1998), being a prison ex post facto case, the State is certainly not exempt from the ex post facto Clause through a one-prong intent-only analysis because "the purpose of the law alone never has been considered by the Court under the ex post facto Clause." As in **Lynce**, this case involves the elimination of having a parole-qualified status which petitioner had already earned and maintained arduously over his 27+ years of incarceration.

In **Sequoia Books, Inc. v. Ingemunson**, 901 F.2d 630 (7th Cir. 1990), the Court held that:

> The Constitution explicitly bars states from passing ex post facto laws. U.S. Const. Art.I, §10, cl.1. The Supreme Court long ago established that legislative bodies must not only refrain from punishing prior behavior under newly minted criminal statutes, but they are also prohibited from imposing harsher penalties retrospectively. Calder v. Bull, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648. "(A)lmost from the outset, we have recognized that

> central to the ex post facto prohibition is a concern for 'the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.' Miller v. Florida, 482 U.S. 423, 430, 107 S.Ct. 2446, 2451, 96 L.Ed.2d 351 (quoting Weaver v. Graham, 450 U.S. 24, 30, 101 S.Ct. 960, 965, 67 L.Ed.2d 17.)" **Id.** at 639.

The **Weaver** Court also held that "it is the effect, not the form, of the law that determines whether it is ex post facto."

The Seventh Circuit Court of Appeals in **Sequoia Books** also provided that "signs do not all point in one direction," with regard to the appropriate ex post facto analysis. After the first inquiry (intent), the Court went on to state "then the second inquiry is 'whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.' (Emphasis added.) United States v. Ward, 448 U.S. 242, 248, 100 S.Ct. 2636, 2641, 65 L.Ed.2d 742." **Id.** at 639-640. The Court then cautioned with a discussion on the element of proof required to show that the statutory scheme at issue "is punitive in both purpose and effect so as to negate that intention," and proposed the same findings held in **Kennedy v. Mendoza-Martinez**, 83 S.Ct. 554, 567-68 (1963), regarding "(w)hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment..."

The Ninth Circuit Court of Appeals in **Russell v. Gregoire**, 124 F.3d 1079, 1084-93 (9th Cir. 1997), has also taken up the task of expounding upon the two-prong test establishing a clear test to determine what constitutes punishment under the ex post facto Clause. The **Russell** Court found:

Our court has not previously established a clear test to determine what constitutes punishment under the ex post facto clause. Likewise, the Supreme Court has not articulated a 'formula' for identifying the legislative changes that fall within the constitutional prohibition. Morales, 514 U.S. at 508-10, 115 S.Ct. at 1603.

The Supreme Court has decided a series of punishment cases recently, including United States v. Ursery, ___ U.S ___, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996). Ursery held that in rem civil forfeitures were not punishment under the Double Jeopardy Clause. In reaching that conclusion, the Court returned to the two-part test for punishment it announced in United States v. One Assortment of 89 Firearms, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984), which we shall call the 'intent-effect' test. 'First, we ask whether Congress intended proceedings . . . to be criminal or civil. Second, we turn to consider whether the proceedings are so punitive in fact as to "persuade us that the forfeiture proceeding(s) may not legitimately be viewed as civil in nature," despite Congress' intent.' Ursery, ___ U.S. ___, 116 S.Ct. at 2147 (quoting 89 Firearms, 465 U.S. at 366, 104 S.Ct. at 1107)." **Russell**, at 1084.

Where does the Ursery punishment test stand now? We are persuaded that the Court's approach to the punishment question is essentially the same in both Ursery and Hendricks. Nothing in Lynce is to the contrary. Consequently, we will apply the Ursery - Hendricks "intent-effects" test to determine whether the Act imposes punishment. When examining whether a law violates the ex post facto Clause, we inquire whether (1) the legislature intended the sanction to be punitive, and (2) the sanction is "so punitive" in effect as to prevent the court from legitimately viewing it as regulatory or civil in nature, despite the legislature's intent. Ursery, ___ U.S. ___, 116 S.Ct. at 2147, see, Hendricks, ___ U.S. ___, 117 S.Ct. at 2080. The first part of the test ("intent") looks solely to the declared purpose of the legislature as well as the structure and design of the statute. Ursery, ___ U.S. ___, 116 S.Ct. at 2147 (examining terms used by Congress and structure of forfeiture statute under first part of test); see, United States v. Huss, 7 F.3d 1444, 1447 (9th Cir. 1993), (deciding pre-Ursery that court should look to intent and design of statute as well as effects). The second part of the test ("effects") requires the party challenging the statute to provide "the clearest proof" that the statutory scheme is so punitive either in purpose or effect as to negate the State's nonpunitive intent. Hendricks, ___ U.S. ___, 117 S.Ct. at 2082; Ursery, ___ U.S. ___, 116 S.Ct. at 2148, see, Flemming v. Nestor, 363 U.S. 603, 617, 80 S.Ct. 1367, 1376, 4 L.Ed.2d 1435 (1960)("Only the clearest proof could suffice to establish the unconstitutionality of a statute on [the ground that the 'history and scope' notwithstanding the legislative intent].") In assessing the Act's effects, we shall refer to the appropriate Mendoza-Martinez factor. See, Hendricks, ___ U.S. ___, ___, 117 S.Ct. at 2079-80, 2082 (considering some Mendoza-Martinez factors); Ursery, ___ U.S. at ___, 116 S.Ct. at 2148-49 (same)."