Russell, at 1086-87.

In the instant case, §DOC 302.145, and now §DOC 302.07(12), WAC (the latter being from the respondent's proffer) are "inextricably tied" to petitioner's scienter (mens rea) and criminal punishment and loss of liberty because they operate by precluding petitioner from ever becoming parole qualified. And the whimsical nature of §DOC 302.07 criteria will allow for even greater segments of the prison population to be equally deprived. (See, petitioner's Motion For Preliminary Injunctive Relief.) Any such practice or policy which allows some prisoners to earn and work their way through the system to prove their readiness for parole, and not others, must amount to a denial of equal protection of the law. The present rules, §DOC 302.145 (and especially §DOC 302.07(12)) are (and will) be applied to petitioner in such an intolerably mandatory fashion that evenhanded enforcement of the law is virtually impossible.

Both sets of rules in the record of this case are unconstitutional as applied to petitioner's situation because they are more onerous, they are applied retroactively, and infringe upon very substantial liberty interests by operating to deprive him of any opportunity to earn and work his way through the multi-level prison system by mandating that he is a Moderate security risk, thereby foreclosing any possibility of having his security reduced for work/study release and, ultimately, stripping him of any possibility of meeting the substantive predicate criteria for being found parole qualified. It is far from speculation how these particular mandatory classification

rules and the mandatory parole rules "work together" to deprive petitioner from returning to a situation where he can meet the substantive criteria for obtaining parole.

In the initial certiorari action (Exhibit B), the respondents challenged the court's analysis of **Weaver** on the ground that the **effect** of the rule was not substantial enough to merit a finding of ex post facto effect. The court disagreed, stating that "(the cases cited by respondents dealt with conditions of confinement such as double-celling. The rule in question here impacts not only an inmate's eligibility for less secure forms of custody. Because of the close nexus between discretionary parole release and levels of security classification, the rule has a very substantial impact on those inmates affected by it." (Emphasis supplied in original.)

The original certiorari Judge realized the court could not exclude the proper ex post facto analysis pursuant to **Hohn v. United States**, 118 S.Ct. 1969 (1998), **Marks**, supra, and **Hewitt**, supra. The substantive Due Process Clause prohibited the court from neglecting the ex post facto claim pursuant to **Lindsey**, supra. There is an absolute and definite combination ex post facto claim presented in this situation where the mandatory parole rules "working together" with the inflexible application of the classification rules "effectively deny () a 'meaningful opportunity for parole.'" See, **Knox**, supra.

The court in **Young v. Weston**, 192 F.3d 870 (9th Cir. 1999), held that the application of an amended statute can have an ex post facto effect. Likewise, the court in **State v. Hennings**, 919

P.2d 580 (Wash. 1996), held that a retroactive law which increases the quantum of punishment violates due process if the application deprives the individual of a vested right.

The court in **Hill v. State**, 659 So.2d 547, 559 (Miss. 1995), "reaffirmed its long held position that the question of what legislative adjustments are of sufficient moment to transgress the constitutional prohibition must be a matter of degree." (quoting) **Beazell v. Ohio**, 46 S.Ct. 68, 69 (1925). The infringement upon the liberty interests in the instant matter is substantive enough to effect the present and future enjoyment of those liberty interests. A reasonable and proper test of the constitutionality of the retroactive rule is whether a party has changed position in reliance upon the previous rule or whether the retroactive rule defeats the reasonable expectations of the parties. In this matter, the interests associated with parole have been completely eliminated.

The U.S. Supreme Court in **Garner v. Jones**, 120 S.Ct. 1362 (2000), held that "(o)ne function of the Ex Post Facto Clause is to bar enactments which, by retroactive operation, increase the punishment for a crime after its commission." (citing) **Collins v. Youngblood**, 110 S.Ct. 2715 (1990). Retroactive changes in laws governing parole may be violative of this precept. **Garner**, at 1367, (citing) **Lynce**, supra. The question is a matter of degree, **Id.**, and would operate in such fashion even if it only alters the standards for determining an inmate's suitability for parole. See, **Morales**, supra. In the instant matter, even the consideration for parole has been completely eliminated through

the combination of the mandatory parole rules "working together" with the mandatory and inflexibly applied classification rules.

The **Garner** Court also held that "the respondent must demonstrate, by evidence drawn from the rule's practical implementation ... that its retroactive application will result in a longer period of incarceration than under the earlier rule." **Id.**, at 1370. Also "the respondent must show that as applied to his own sentence the law created a significant risk of increasing the punishment." **Id.** Again, in the instant case, the record demonstrates petitioner's "catch-22" situation, where any possibility for meeting the substantive predicate criteria for parole has been completely eliminated.

The exhibits thus far submitted into the record amply demonstrate the respondent's position. The **Garner** Court held that "(t)he Court of Appeals erred in not considering the Board's internal policy statement. At a minimum, policy statements along with the Board's actual practices, provide important instruction as to how the Board interprets its enabling statute and regulations, and therefore whether, as a matter of fact, the amendment ... created a significant risk of increased punishment." **Id.** at 1370-71. See also, **Akins v. Snow**, 922 F.2d 1558 (11th Cir. 1991); **Harris v. Hammonds**, 217 F.3d 1346 (11th Cir. 2000); and **Smith v. Scott**, 233 F.3d 1191 (10th Cir. 2000).

In **In re Smith**, 986 P.2d 131 (Wash. 1999), the court held that even "(a) change in the law that limits eligibility for reduced imprisonment violates the ex post facto clause when applied to individuals whose crimes were committed before the law's enactment." (citing) **Weaver**, **supra**. And, again, the

mandatory and inflexible application of §DOC 302.145 (or the proposed §DOC 302.07), in conjunction with the mandatory parole rules not only "limits eligibility" for consideration for parole for petitioner, it completely eliminates it.

As presented earlier, Wisconsin has a mandatory parole system, in that once a prisoner meets the five substantive predicate criteria parole must be granted. The element of discretion comes into play when considering those five criteria. There is also the element of discretion with the classification rules; that is, until §DOC 302.145 (or §DOC 302.07(12)) is applied. Then the PRC has absolutely no discretion in the matter. And, consequently, the parole authorities have absolutely no discretion in making their determination, either. Hence, the "catch-22." Regardless, the court in **Jones v. Georgia State Board of Pardons and Paroles**, 59 F.3d 1145 (11th Cir. 1995), held "(i)n other words, the mere presence of some discretion ... before ... the change in law does not in and of itself foreclose an ex post facto claim." **Id.** at 1149.

The case of **Puckett v. Abels**, 684 So.2d 671 (Miss. 1996), dealt with the elimination of opportunities for parole that had previously existed. The court stated that "(b)y denying the opportunity for parole (it) effectually increases the 'standard of punishment,' (citing Miller, supra), is 'more onerous that the law in effect on the date of the offense,' (citing Weaver, supra), makes 'more burdensome the punishment for a crime,' (citing Beazell, supra), and is not a 'most speculative and attenuated risk of increasing the measure of punishment attached

to covered crimes.'" (citing Morales, supra.) In the instant case, the documentation reveals, and the situation presents the circumstances, which go beyond speculation as to how the rules "work together" to affect the deprivation of petitioner's liberty interests.

"The ex post facto standard we apply today is constant: it looks to whether a given legislative change has the prohibited effect of altering the definition of crimes or increasing punishment." **Morales**, supra, at 1604. Thus, the holding in **Morales** does not overrule **Weaver**, **Lindsey**, and **Miller** because the focus in those cases were on the effect the new law had on the defendant. **Morales** does, however, sharpen the ex post facto inquiry by looking at whether the statute affected the prisoners' actual term of confinement, rather than whether the statute had disadvantaged the defendant. In looking towards the statute's effect, the **Morales** Court held that the statute in question was not ex post facto law because "there (wa)s no reason to conclude that the amendment w(ould) have any effect on any prisoner's actual term of confinement...." Id. at 1604.

In **Puckett**, supra, the court applied the **Morales** "effect" review, and held that the effect of the California amendments in **Morales** and those of the Senate Bill in **Puckett** "are materially different in many ways." **Puckett**, supra, at 677. Unlike the amendments in **Morales**, the Senate Bill "clearly lengthens the () sentences." Id. "It clearly eliminates any possibility for parole..." Id. "(T)he ineligibility to receive parole...is to be exercised automatically across the board." Ergo, it is mandatory

and applied inflexibly. The same is true for §DOC 302.145, and will be for §DOC 302.07(12), WAC, and will yield an even longer term of confinement. Potentially forever. Such rules are ex post facto law.

Prior to the application of the rules, petitioner had a possibility to earn and work his way through the system to a point where his classification reduction would meet the substantive predicate criteria for being parole qualified. By stripping that liberty interest and, thus, denying any opportunity for parole, the rules effectually increase the "standard of punishment," as in **Lindsey**, supra, or the "quantum of punishment," as in **Miller**, supra, are "more onerous than the law in effect on the date of the offense," as in **Weaver**, supra, make "more burdensome the punishment for a crime, as in **Beazell**, supra, and are not a "most speculative and attenuated risk of increasing the measure of punishment attached to covered crimes," as in **Morales**, supra.

The rules, as applied retroactively and inflexibly, have the effect of increasing the punishment beyond that imposed prior to its enactment. Accordingly, as applied to petitioner, the rules are ex post facto law, and are in direct contravention of the United States and Wisconsin Constitutions.

The Court in **Inglease**, supra, held that a "guideline, when applied inflexibly can be law subject to ex post facto prohibitions." And moreover, in **Rodriguez v. United States Parole Commission**, 594 F.2d 170, 173 (7th Cir. 1979), the Court directed that, like legislation, administrative rules are subject

to constitutional provisions. When a legislative body delegates authority to an agency to make a rule instead of making the rule itself, the resulting administrative rule is an extension of the statute for purposes of the ex post facto clause since what a legislative body cannot do by itself, it cannot do by delegation.

In the case ar bar, the record demonstrates the combined punitive effect of foreclosing petitioner's statutory right to be found parole qualified. The use of the rules in such a mandatory and inflexible fashion suspends all meaningful independent review of classification assignments. Such a combined effect not only impacts eligibility for parole, but absolutely and completely forecloses petitioner from ever meeting the substantive predicate criteria for parole. Where petitioner once enjoyed the liberty of demonstrating his parole qualification, that liberty has been stripped from him in a constitutionally impermissible manner.

In a similar combination claim the court found in **Knox**, supra, that "(t)he effect of these changes is to foreclose lifers from ever being able to obtain parole. Hope and the longing for reward for one's efforts lie at the heart of the human condition. Their destruction is punishment in the most profound sense of the word." **Knox**, supra, at 758. The combined rules in the instant case prevent petitioner from being parole qualified. The Exhibits affixed hereto display how the respondents are accomplishing that objective.

"Plaintiffs do not seem to argue that their change in security classification alone violates the Ex Post Facto Clause." "Plaintiffs, instead, rely upon the combination of mandatory

security classification and the Parole Commission's alleged unwritten requirement of work release to challenge their being denied parole. Plaintiffs argue that the challenged policies, **working together**, effectively deny them a 'meaningful opportunity for parole.'" (Emphasis added.) "(T)he combined effect ... constitutes a violation of the Ex Post Facto Clause." **Knox**, supra, at 758.

"Since parole eligibility is considered an integral part of any sentence, cf., Warden v. Marrero, 417 U.S. 653, 663, 94 S.Ct. 2532, 41 L.Ed.2d 838 (1974), official post-sentencing actions that delay eligibility for supervised release runs afoul of the ex post facto proscription." **Shepard v. Taylor**, 556 F.2d 648, 654 (2nd Cir. 1977). This result follows even if the maximum statutory penalty for the crime remains unchanged.

The Court has made clear in **Boddie v. Connecticut**, 91 S.Ct. 780, 787 (1971), that a statute may be held constitutionally invalid as applied, when it operates to deprive an individual of a protected right.

In **Welsh v. Mizell**, 668 F.2d 328, 332 (7th Cir. 1982), the Court noted the affirmative right to be evaluated by the regulations in effect at the time the crime had been consummated: "We think the reasoning in these cases is flawed, as Judge Beatty's was here, by two misconceptions. First, the prisoner does not have to show that he had a vested right to be paroled. That showing would be necessary for a contract clause or due process challenge, but it is not relevant to an ex post facto claim. Weaver v. Graham, supra, 450 U.S. at 29-30, 101 S.Ct. at

964-965, now is dispositive on that point. Second, it is not an answer to an ex post facto challenge to say that parole is a matter of 'Legislative grace.' As Judge Aldrich noted in Greenfield v. Scafati, supra, 227 F.Supp. 644-646:

> It is true that parole is commonly spoken of as a matter of grace, and not of right. * * * It would be more accurate, however, to say that a prisoner's entitlement to parole lies in the discretion of the parole board. It would not follow because a prisoner might not receive parole that it would not be an unlawful ex post facto burden to deprive him altogether of the right to be found qualified.

"Even discretionary decisions are made under some constraints. We hold only that the constraints on the parole board's discretion in Welsh's case must be those contained in the statute and regulations that were in effect in 1962 not those subsequently enacted." Id.

Furthermore, in **Welsh**, supra, at 331, the Court held that "(t)he Supreme Court has also warned that a 'repealer of parole eligibility' may amount to a 'greater and more severe punishment than what was prescribed by the law at the time of the ... offense.' Sounding a pragmatic note, Justice Brennan wrote: '(O)nly on unusual prisoner could be expected to think that he was not suffering a penalty when he was denied eligibility for parole.' Warden v. Marrero, 417 U.S. 653, 662-663, 94 S.Ct. 2538, 2537-2538, 41 L.Ed. 383 (Emphasis in original; citation omitted), Accord, Rodriguez v. United States Parole Commission, 594 F.2d 170, 176 (7th Cir. 1979)."

CONCLUSION

In light of the facts, circumstances and documentary evidence presented, the instant case is probably the most glaring

example in Wisconsin demonstrating how the respondent has devised a means of affecting the "life means life" legislation to those already serving their sentences. They have done so by enacting more onerous rules and applying them retroactively thereby foreclosing any possibility of meeting the substantive predicate criteria for obtaining a parole. (See, Exhibits L & M, affixed to NR:20.)

The ex post facto application of the mandatory classification rules, in conjunction and working together with the mandatory parole rules, have stripped petitioner of a valuable liberty interest he once enjoyed. It is effectively preventing him from ever being parole qualified. Such an inflexible application necessarily violates the Constitutional prohibition against the creation of ex post facto law, and violates petitioner's Constitutional rights as protected under the aegis of the Fifth and Fourteenth Amendments.

Through all his pleadings, petitioner has demonstrated the loss of a substantial federal right by the respondents' use of the rules, culminating in the suspension of his right to be found parole qualified. (See also, Exhibits V through V-17, affixed hereto, which demonstrate the ongoing violation.)

The respondents are cognizant that such mandatory and insensitive intrusions blunt the flexibility of a useful device such as the classification system. The respondents have not thus far attempted to contest the combination ex post facto claim and petitioner's right to be found parole qualified. A ruling on the merits of the issues in this case would not only grant petitioner

the vindication of his rights, but it would compel the proper use of discretion and, subsequently, would force the classification system to function in the manner in which it was designed and intended by the Legislature.

During the course of this litigation petitioner has come to believe he was denied due process, contrary to **United States v. Wood**, 925 F.2d 1580, 1581-82 (7th Cir. 1991), where it was held that "(t)he district court may not look beyond the pleadings, and all uncontested allegations to which the parties had an opportunity to respond are taken as true." **Flora v. Home Federal Savings and Loan Ass'n.**, 685 F.2d 209, 211 (7th Cir. 1982).

What remains true is petitioner has been completely divested of his vested liberty interest absent due process and equal protection of the law. Where petitioner once enjoyed the liberty he strived arduously for 27+ years to secure, to earn and work his way through the system and be found parole qualified, he is now, again, locked into a "catch-22" situation by an intolerantly inflexible system which effectively forecloses any possibility for parole.

Petitioner prays this Honorable Court will grant the relief sought and relieve him of the unconstitutional conditions of confinement as the Court may deem reasonable, fair and just.

Dated this 31st day of December 2001.

Respectfully submitted,

Ronald Schilling

Ronald Schilling
Petitioner, pro se

24 February 1998

Ron Schilling #32219
Box 233
Black River Falls, WI
54615

Stephen M. Puckett
Classification Chief
Office of Offender Classification
Box 7925
Madison, WI 53707-7925

Re: classification override
file #32219

Dear Bill:

Although it's been a couple of years since we last communicated, it seems that once again it's you and me.

To refresh your memory, on 7/21/92 I was first transferred to JCBCC after having had a minimum rating for awhile at KMCI. And this was after serving some 17 years of incarceration. On 8/12/92 I was transferred to GCC. On 10/15/92 I was taken out of GCC and placed in the county jail through no action on my part; ostensibly because I was somehow deemed an "escape risk." On 10/28/92 I was returned to GCC because the risk was unsubstantiated. On 9/15/93 I was again taken out of GCC and placed in the county jail through no action on my part; again, ostensibly as an "escape risk." I was subsequently transferred to FLCI on 10/7/93.

After many letters back and forth, you approved my transfer to OCI on 5/11/94, where I spent some 16 days in the hole through no action on my part before being returned to FLCI on 5/27/94. After further correspondence back and forth you and everyone else began backpedaling on me, with our correspondence terminating on10/31/95.

Some time later I discovered a "written memo" from John Husz to the folks at GCC stating that I would not be considered for parole for some "five years," despite the fact that my PCA form only stated a 12-month defer. Hence, the real reason for my getting yanked out of minimum three times finally came to light. I also discovered a letter from Husz in '96 to the folks at FLCI stating that he was going to get "25 years" out of me, which would put my true PED at 2000.

Being aware of these facts I saw PRC at FLCI and the split decision was submitted to the second-step committee. Shortly after that I was told to pack my property; that I was being transferred to minimum once again. I declined the offer, and explained the foregoing saga. The PRC coordinator was contacted who, in turn, showed me the 8/21/96 PRC data on the computer and said he contacted your office and was informed that all relevant parties (Husz, Leik, Verhagen, Kingston, Sondalle, etc.) were contacted and essentially said I was good to go this time. I was told "they crossed all their T's and dotted all their I's" and was guaranteed a "smooth transition this time," without the fun-n-games. Apprehensively, I packed my property and was transferred to JCI.

Ex: V-1

On 10/10/96 I was transferred to BRCC and it became quickly apparent that I was not going to experience a "smooth transition," or be treated fairly. In fact, the superintendent had no compunction about knowingly and deliberately setting out to violate my civil rights because I assisted another inmate with his legal endeavors. He subsequently returned me to JCI on 2/3/97 with an all-the-way bogus major conduct report. The matter is currently at issue in the federal court pursuant to 42 U.S.C. §1983 and §1985 (**Schilling v. Sweney, et al.**, Case No. 97-CV-811-C). The conduct report at issue will absolutely be expunged when the case reaches disposition and the AG's office offers to settle out of court. For an explanation of the basics please read exhibits E and K, affixed hereto. What is more, they also used the risk rating system during that transfer, in violation of the Court's Order in **Schilling v. Goodrich, et al.**, Case No. 89-CV-2911, Dane County Circuit Court, where the Honorable Mark Frankel found the rules in violation of the ex post facto prohibition against the creation of such rules and, as such, they were unconstitutional as applied to my situation.

After serving my hole time at JCI I was trasferred to MCC on 2/19/97. My file did not arrive with me. I was immediately singled-out, taken aside in a back office and read the riot-act by the Assistant Superintendent Bob Flannery, who I had problems with many, many years ago when I was quite a different person. But all the while I attended numerous off-grounds work details, and routinely attended the religious services at the Foursquare Gospel Church in Rhinelander, unattended by staff, and it felt fantastic to have such trust and be accepted as a human being. Still, Flannery's tactics and games were incessant and became worse with time. Eventually, he had one of his officers write a major conduct report stemming from an incident which happened not at all as written; they took a few facts and a liberal amount of fantasy a number of days after the fact, and I was again placed in the county jail. I was returned to JCI on 7/25/97. This matter is currently at certiorari in Dane County Circuit Court (**State ex rel. Schilling v. Sweney, et al.**, Case No. 98-CV-0312). This conduct report will also be vacated and expunged because of many administrative violations, and because there is not one iota of evidence that I did anything wrong. For a truthful explanation of this matter please read exhibits E and G, affixed hereto.

After serving my hole time of 6 days, and 90 days program, I was released into the general population at JCI, where I find myself at this moment. I am, as always, conducting myself appropriately and trying to make the best of the situation.

My regular recall for PRC was supposed to be held in January. It was not. While speaking with the social worker, we discussed the aforementioned history at various minimums, corrected an erroneous '72 escape error (which never occurred), and she concurred that a transfer to TCC seemed appropriate. Then on 2/18/98 I was finally called for the PRC interview. It did not go well; they brought up the two escapes/walk aways in '70, as well as the '72 escape (which never occurred, and which was brought up no less than three times), and then went on to chastise me for the two bogus conduct reports from BRCC and MCC, and mentioned the social worker's recommendation that I remain here at JCI.

Their decision to retain me here at JCI was apparently unanimous since there was no second-step procedure recommendation. They also mentioned that if the Parole Commission recommended minimum they would consider an early recall (which, whether you're aware of it, doesn't hold any water at JCI).

I don't know what to say, Bill; when I was guaranteed a "smooth transition" I figured your offer was finally genuine and sincere. My last valid conduct report was 7/28/82, and I haven't so much as sneezed wrong since then. At this point I'm not sure whether there's another five-year defer which was slid under the table, or some other nefarious action which caused my return from MCC. I only know for certain it was not about the conduct report.

I'd appreciate your looking into this matter and, absent any recent external opposition to my progression through the system, overriding the JCI PRC recommendation. Of course, as always, my preference has been the TCC facility since it is closer to home and would strengthen family ties. Although I would not be opposed to a placement at, say, SBPCC, or one of the Milw. or Kenosha facilities. I feel it is imperative to return to minimum in order to protect my liberty interest in maintaining my parolability.

If for some reason you cannot find it in your heart to return me to minimum, please transfer me back to FLCI where I can at least get a job and have some sense of normalcy in life.

Thank you once again for your time and consideration.

Sincerely,
Ron Schilling
Ron Schilling

Enclosures

cc: ✓file

Ex: V-1,3