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Steven J. Samario

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APPLYING WASHINGTON'S SENTENCING REFORM ACT TO MANDATORY LIFE PRISONERS: AN EX POST FACTO VIOLATION

Abstract: Following the 1989 session of the Washington Legislature, the Indeterminate Sentence Review Board (Board) began redetermining the minimum terms of prisoners serving a mandatory life sentence for crimes committed before July 1984. To calculate these new minimum terms, the legislature directed the Board to apply the same sentencing ranges enacted in the Washington Sentencing Reform Act, which took effect July 1, 1984. This Comment analyzes whether the state violated the United States Constitution when it ordered that these minimum terms be redetermined. It concludes that Washington courts should void the state's action because it violates the constitutional prohibition against ex post facto laws.

Alan X. was convicted of first-degree murder in 1973.¹ As required by Washington law, the trial court sentenced Alan to a mandatory life term. The parole statute, however, provided that Alan would be eligible for parole after serving a statutorily mandated minimum term of twenty years, less time earned for good behavior.² Based on this statute, the Board³ informed Alan that he would be eligible for parole consideration in February 1990. In May 1989, the Washington Legislature amended the parole statute for prisoners sentenced to a mandatory life sentence.⁴ Based on the amended parole statute, the Board informed Alan that he was not eligible for parole consideration until 1996. By amending the parole statute, the state delayed by six years Alan's opportunity to even be considered for parole. Alan's question is simple: may the state do this?

The Sentencing Reform Act⁵ (SRA) changed Washington State's sentencing system from an indeterminate sentencing system to a determinate sentencing system.⁶ Whereas the indeterminate sentencing system was designed to rehabilitate prisoners, the SRA is designed to punish prisoners. Because the SRA applies only to crimes committed

1. Alan's story is adapted from a letter by a Washington State prisoner. Letter from prisoner to Professor John Junker, University of Washington School of Law (Dec. 6, 1989) (on file with the *Washington Law Review*) [hereinafter Prisoner's Letter].

2. WASH. REV. CODE ANN. § 9.95.115 (1988).

3. The Washington Legislature changed the name of the Board of Prison Terms and Paroles to the Indeterminate Sentence Review Board. *Id.* § 9.95.001.

4. Substitute House Bill 1457, 51st Leg., Regular Sess., 1989 Wash. Laws 259 (codified at WASH. REV. CODE ANN. §§ 9.95.009, .115 & .0011 (Supp. 1990)).

5. WASH. REV. CODE ANN. §§ 9.94A.010-910 (1988 & Supp. 1990).

6. As opposed to an indeterminate sentencing system, a determinate system states the exact number of years, months, and days of total confinement a prisoner will serve. *Id.* § 9.94A.030(10) (1988).

after June 1984,⁷ Washington State maintains the indeterminate sentencing system to set the sentence length of prisoners who committed crimes before the SRA's effective date.⁸

The Washington Legislature enacted section 9.95.009(2)⁹ (the transition statute) to ensure that similarly situated prisoners under the two sentencing systems would receive approximately the same prison sentence.¹⁰ Before the enactment of Substitute House Bill (SHB) 1457,¹¹ the transition statute required the Board to set minimum terms¹² and parole release dates of certain non-mandatory prisoners¹³ reasonably consistent with the purpose, scope and sentencing ranges of the SRA.¹⁴ SHB 1457 amends the transition statute to require the Board to set minimum terms for mandatory life prisoners.¹⁵ Unlike non-mandatory prisoners, however, the legislature did not require the Board to set the parole release dates of mandatory life prisoners reasonably consistent with the SRA's sentencing standards.

This Comment analyzes whether the Washington Legislature violated the United States Constitution by requiring the Board to set the minimum terms of mandatory life prisoners reasonably consistent with the SRA sentencing ranges. Part I presents an overview of Washington State's two sentencing systems and includes a discussion of how the Washington Supreme Court interpreted the transition statute. Part II discusses how the United States Supreme Court and certain circuit courts have analyzed whether a change in parole criteria violates the ex post facto prohibition. Part III explains why SHB 1457 violates the ex post facto clause of the Constitution. Finally, Part IV concludes that the legislature should allow mandatory life prisoners to serve their sentences as required by the parole statute in effect when they committed their crimes.

7. *Id.* § 9.94A.905.

8. The Board estimates that the indeterminate system will apply to 950 prisoners as of January 1991. TRANSFER STUDY COMM., WASHINGTON STATE INDETERMINATE SENTENCE REVIEW BD., REPORT TO THE LEGISLATURE app. D (1989) [hereinafter 1989 ISRB STUDY].

9. WASH. REV. CODE ANN. § 9.95.009(2) (1988 & Supp. 1990) (originally enacted as the Sentencing Reform Act of 1981, 1981 Wash. Laws 137).

10. *In re George*, 52 Wash. App. 135, 143, 758 P.2d 13, 18 (1988) (citing *In re Rolston*, 46 Wash. App. 622, 625, 732 P.2d 166, 167-68 (1987)).

11. 51st Leg., Regular Sess., 1989 Wash. Laws 259 (codified at WASH. REV. CODE ANN. §§ 9.95.009, .115 & .0011 (Supp. 1990)).

12. The minimum term represents the time an indeterminate prisoner must serve before the Board may consider the prisoner for parole. 1989 ISRB STUDY, *supra* note 8, at 8.

13. This Comment defines non-mandatory prisoners as all indeterminate prisoners except those prisoners sentenced to a mandatory life sentence.

14. WASH. REV. CODE ANN. § 9.95.009(2) (1988).

15. *Id.* § 9.95.009(2) (Supp. 1990).

I. OVERVIEW OF WASHINGTON STATE'S TWO SENTENCING SYSTEMS

A. *The Indeterminate Sentencing System*

The Washington Legislature designed the indeterminate sentencing system to rehabilitate prisoners.¹⁶ This sentencing system assumed that judges, social workers, and the Board could diagnose and cure the causes of individual criminal behavior.¹⁷ To accomplish this goal, the legislature gave the Board broad discretion to determine the length of a prisoner's sentence.¹⁸ The legislature, however, prohibited the Board from paroling prisoners unless they met certain minimum requirements.

The legislature set different minimum requirements for non-mandatory prisoners and mandatory life prisoners. The Board may parole a non-mandatory prisoner if: (1) the prisoner has served the minimum term,¹⁹ (2) the Board determines that the prisoner has been rehabilitated, and (3) the Board determines that the prisoner is a fit subject for release.²⁰ The legislature granted the Board discretion to set the prisoner's minimum term, with a few limited exceptions.²¹ In essence, the Board could consider general deterrence, retribution, or rehabilitation criteria when setting a prisoner's minimum term.²²

Before the passage of SHB 1457 the legislature allowed the Board to parole a mandatory life prisoner if: (1) the prisoner has been continuously confined for a period of twenty consecutive years,²³ (2) the prison warden recommends that the Board parole the prisoner,²⁴ and

16. See *In re Whitesel*, 111 Wash. 2d 621, 626, 763 P.2d 199, 201 (1988).

17. D. BOERNER, SENTENCING IN WASHINGTON 1-1 (1985).

18. The legislature requires the Board to release a prisoner who has served the maximum sentence provided by law. WASH. REV. CODE ANN. § 9.95.100 (1988).

19. *Id.* § 9.95.110.

20. *Id.* § 9.95.100.

21. "Except in those cases wherein the [minimum term] is specifically provided by law . . . , the [Board] is not restricted by any of the provisions of chapter 9.95 RCW as to the minimum duration of confinement" 1961-1962 Op. Wash. Att'y Gen. No. 128, at 3.

22. Under general deterrence theory, the state punishes an individual on the grounds that punishment discourages others from committing crimes. See D. BOERNER, *supra* note 17, § 2.2(b)(2), at 2-16. Under retribution theory, the state punishes an individual because society believes that the prisoner deserves it. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 1.5, at 25-26 (2d ed. 1986). Under a rehabilitation theory, society punishes prisoners by giving them appropriate treatment to eliminate their desire to commit crimes. *Id.* § 1.5, at 24.

23. WASH. REV. CODE ANN. § 9.95.115 (1988). The Board may reduce the 20 year requirement by time earned for good behavior. *Id.*

24. The parole statute required the warden to base the recommendation on whether the prisoner's conduct and work had been meritorious. *Id.* The warden determined whether a prisoner's conduct and work have been meritorious by requiring the prisoner to participate in a Mutual Agreement Program (MAP). *In re Baker*, 44 Wash. App. 116, 117, 720 P.2d 870, 871

(3) the Board determines that the prisoner is rehabilitated and is a fit subject for release.²⁵ The Washington Supreme Court referred to this twenty year requirement as a mandatory minimum term.²⁶ Unlike the statute for paroling non-mandatory prisoners, the legislature did not require the Board to set a minimum term for mandatory life prisoners. In addition, the legislature required the Board to set a minimum term for all prisoners returned to prison for a parole violation.²⁷

B. The Determinate Sentencing System

In response to public dissatisfaction, the Washington Legislature eliminated the indeterminate sentencing system for persons who committed crimes after June 1984.²⁸ The public was dissatisfied with this system for two reasons. First, the public doubted that the indeterminate system rehabilitated prisoners.²⁹ Second, the public was dissatisfied with the wide discrepancies in sentences for prisoners who committed similar crimes.³⁰ Under Washington's indeterminate system, the state gave judges and the Board broad discretion to tailor sentences to meet the needs of individual prisoners.³¹ Sentencing discrepancies resulted for a number of reasons. For instance, different prisoners who committed the same crime required different types of treatments in order to be rehabilitated.³² Furthermore, the state provided judges and the Board with few objective criteria to make an otherwise subjective decision.³³ Finally, indeterminate sentencing allowed the experiences and unconscious biases of judges and Board members to influence the sentencing decisions.³⁴

The legislature designed the SRA to ensure that the punishment for a criminal offense is proportionate to the seriousness of the offense and

(1986). MAP provided that the warden would recommend the prisoner for parole as long as the prisoner successfully completed specified goals. See Prisoner's Letter, *supra* note 1 (attached MAP contract).

25. WASH. REV. CODE ANN. § 9.95.100 (1988).

26. *Baker v. Morris*, 84 Wash. 2d 804, 805, 529 P.2d 1091, 1092 (1974).

27. WASH. REV. CODE ANN. § 9.95.125 (1988). See also WASHINGTON STATE INDETERMINATE SENTENCE REVIEW BD., POLICIES AND PROCEDURES MANUAL § 6.420 (1987) [hereinafter POLICY MANUAL].

28. D. BOERNER, *supra* note 17, at 1-1.

29. *Id.* § 2.2(b)(2), at 2-12.

30. *Id.* § 2.2(b)(1), at 2-10, 11.

31. *Id.* at 1-1.

32. See *id.*

33. *Id.*

34. *Id.* § 2.2(b)(1), at 2-10, 11.

the offender's criminal history.³⁵ To accomplish this goal, the legislature developed a sentencing matrix, which assigned presumptive sentencing ranges based on the severity of a prisoner's crime and the seriousness of the prisoner's criminal history.³⁶ On the vertical axis of the matrix, the legislature classified the severity of a crime into fourteen levels.³⁷ On the horizontal axis of the matrix, the legislature established offender score categories ranging from zero to nine or more.³⁸ The court calculates an offender score based on the defendant's criminal history.³⁹ A prisoner's presumptive sentence range represents the intersection on the sentencing matrix between the vertical axis (the seriousness of the offense) and the horizontal axis (the offender score). The judge has discretion to set a sentence within the presumptive range.⁴⁰

C. The Legislature Attempted To Eliminate Discrepancies Between the Time Served by Inmates Under the Two Systems

1. The Transition Statute

The transition statute purportedly eliminated the discrepancies between the time served by inmates under the indeterminate and SRA systems.⁴¹ For non-mandatory prisoners, the transition statute requires the Board to make minimum term and parole release decisions reasonably consistent with the SRA ranges.⁴² The transition statute reduced the discrepancies between the two sentencing systems by limiting the Board's discretion to set minimum term and parole release dates. Before the transition statute, the legislature gave the Board broad discretion to set minimum term and parole release dates for non-mandatory prisoners.⁴³ The Washington Supreme Court interpreted the transition statute to limit the Board's discretion to set minimum terms and parole release dates for non-mandatory prison-

35. WASH. REV. CODE ANN. § 9.94A.010(1) (1988); *see also* State v. Rice, 98 Wash. 2d 384, 393, 655 P.2d 1145, 1151 (1982) ("Punishment is the paramount purpose of the [SRA].").

36. WASH. REV. CODE ANN. § 9.94A.310 (1988).

37. *Id.*

38. *Id.*

39. *Id.* § 9.94A.330.

40. *Id.* § 9.94A.120.

41. Before the enactment of SHB 1457, the transition statute applied only to non-mandatory prisoners. *Id.* § 9.95.009(2). Non-mandatory prisoners welcomed the transition statute because it reduced the minimum term of these prisoners an average of 32 months. WASHINGTON STATE INDETERMINATE SENTENCE REVIEW BD., REPORT TO THE LEGISLATURE 7 (1988).

42. WASH. REV. CODE ANN. § 9.95.009(2) (1988).

43. *See* D. BOERNER, *supra* note 17, at 1-1.

ers.⁴⁴ In *Addleman v. Board of Prison Terms & Parole*,⁴⁵ the court interpreted the reasonably consistent standard to mean that decisions outside the SRA ranges should be the exception and not the rule.⁴⁶

2. SHB 1457

The legislature passed SHB 1457 to ensure that the SRA sentencing ranges are applied to mandatory life prisoners.⁴⁷ This amendment affects mandatory life prisoners in three ways. First, it requires the Board to set a minimum term for mandatory life prisoners.⁴⁸ Second, it amends the transition statute to require that the Board set the minimum term of mandatory life prisoners reasonably consistent with the SRA sentencing ranges.⁴⁹ Third, it eliminates the requirement that the warden recommend the prisoner for parole.⁵⁰ The following sections discuss whether SHB 1457 violates the ex post facto prohibition.

II. AN OVERVIEW OF THE CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO LAWS

The Constitution of the United States prohibits the states from enacting ex post facto laws.⁵¹ According to the United States Supreme Court, the framers intended the prohibition to prevent oppressive government conduct and to ensure that people may rely on the laws in effect when deciding whether to act.⁵² The Court has held that a criminal statute⁵³ violates the ex post facto prohibition if it is both retro-

44. See *In re Myers*, 105 Wash. 2d 257, 262, 714 P.2d 303, 306 (1986).

45. 107 Wash. 2d 503, 730 P.2d 1327 (1986).

46. *Id.* at 511, 730 P.2d at 1332.

47. 51st Leg., Regular Sess., 1989 Wash. Laws 259 (codified at WASH. REV. CODE ANN. §§ 9.95.009, .115 & .0011 (Supp. 1990)).

48. WASH. REV. CODE ANN. § 9.95.116(1) (Supp. 1990).

49. *Id.* § 9.95.009(2).

50. *Id.* § 9.95.115.

51. "No State shall . . . pass any . . . ex post facto Law . . ." U.S. CONST. art. I, § 10, cl. 1. The Constitution also prohibits the federal government from enacting ex post facto laws. U.S. CONST. art. I, § 9, cl. 3. The United States Supreme Court interprets the federal and state ex post facto prohibition in the same manner. Annotation, *Supreme Court's Views as to What Constitutes an Ex Post Facto Law Prohibited by Federal Constitution*, 53 L. Ed. 2d 1146, 1150 (1978). In addition, the Washington State Constitution prohibits ex post facto laws. WASHINGTON CONST. art. 1, § 23. The Washington Supreme Court interprets the state's ex post facto prohibition in the same manner as the United States Supreme Court. See *Addleman v. Board of Prison Terms & Paroles*, 107 Wash. 2d 503, 506, 730 P.2d 1327, 1329-30 (1986).

52. *Weaver v. Graham*, 450 U.S. 24, 28-29 (1981).

53. The ex post facto prohibition applies only to criminal statutes. Annotation, *supra* note 51, at 1150.

spective⁵⁴ and disadvantageous to a prisoner.⁵⁵ Regardless, the Court stated that a retrospective statute is not unconstitutional if it only changes modes of procedures, or if the retrospective statute has an ameliorating effect.⁵⁶

A. When a Retrospective Amendment to a Parole Statute Is Disadvantageous: The General Rule

A retrospective amendment to a parole statute is disadvantageous to a prisoner if it reduces the prisoner's opportunity to receive a shorter prison sentence.⁵⁷ In *Weaver v. Graham*, Florida attempted to retrospectively apply an amendment to a gain-time statute.⁵⁸ The amended statute reduced the number of gain-time days available to prisoners solely for good behavior.⁵⁹ The United States Supreme Court held that the retrospective application of an amended gain-time statute was disadvantageous to Florida prisoners.⁶⁰ The Court noted that the amended statute reduced the number of monthly gain-time credits available to prisoners who obey prison rules and adequately perform assigned tasks.⁶¹ The Court reasoned that the retrospective statute was disadvantageous to Weaver because it reduced Weaver's opportunity to shorten his time in prison simply by obeying rules and performing assigned tasks.⁶²

B. Circuit Court Tests To Determine Whether the Retrospective Application of Allegedly Stricter Parole Criteria Is Disadvantageous to Prisoners

The United States Supreme Court has held that amendments to parole statutes that clearly delay a prisoner's opportunity for parole

54. See *infra* note 93.

55. *Miller v. Florida*, 482 U.S. 423, 430 (1987).

56. *Dobbert v. Florida*, 432 U.S. 282, 292 (1977).

57. *Weaver v. Graham*, 450 U.S. 24 (1981). In 1976, Weaver committed a crime in Florida. *Id.* at 25. At that time, a Florida statute provided that prisoners may earn gain-time credits for good conduct. *Id.* at 26. The gain-time provision allowed prisoners to reduce their prison sentence by the total amount of gain-time credits earned. *Id.* The statute provided for a credit of five days per month for the first two years served, 10 days per month for the third and fourth year served, and 15 days per month for any remaining years. *Id.*

In 1978, the Florida Legislature reduced the amount of gain-time credits available for good conduct. *Id.* The amended statute provided for a gain-time credit of three days per month for the first two years served, six days per month for the third and fourth year served, and nine days per month for any remaining years served. *Id.*

58. *Id.* at 27.

59. *Id.* at 26.

60. *Id.* at 35-36.

61. *Id.* at 33-34.

62. *Id.*

are detrimental to a prisoner.⁶³ The Court has not determined whether a retrospective statute violates the ex post facto prohibition when the statute requires an administrative agency to make parole decisions using different parole criteria. The circuit courts have analyzed this problem using various approaches.

1. *The Garrison Test*

In *Marshall v. Garrison*,⁶⁴ the Fourth Circuit compared the practical operation of the new and old parole statutes to determine whether the retrospective application of different parole criteria disadvantaged prisoners.⁶⁵ When Marshall committed his crime, the federal parole statute required that the Federal Parole Commission set parole dates based solely on when the prisoner would be rehabilitated.⁶⁶ The amended parole statute required the Federal Parole Commission to consider the severity of the prisoner's offense.⁶⁷ The *Garrison* court held that the retrospective application of the amended parole statute violated the ex post facto prohibition.⁶⁸ The court reasoned that the retrospective application of the statute was detrimental to Marshall because it lengthened the period of time Marshall must spend in prison by making parole more difficult to obtain.⁶⁹ Parole was more difficult to obtain because the retrospective statute prescribed that the Federal Parole Commission consider additional criteria when making parole decisions.⁷⁰

63. *Devine v. New Mexico Dep't of Corrections*, 866 F.2d 339, 343 n.7 (10th Cir. 1989) (citing *Weaver v. Graham*, 450 U.S. 24 (1981)).

64. 659 F.2d 440 (4th Cir. 1981). Decisions in other circuits suggest that the ex post facto prohibition could be used to invalidate a statute that delayed a prisoner's opportunity for parole. See, e.g., *Benites v. United States Parole Comm'n*, 595 F.2d 518 (9th Cir. 1979); *Love v. Fitzharris*, 460 F.2d 382, 384-85 (9th Cir. 1972), *vacated as moot*, 409 U.S. 1100 (1973).

65. *Marshall*, 659 F.2d at 442.

66. *Id.* at 443.

67. In 1973, the court sentenced Marshall to 15 years in prison after he pleaded guilty to various crimes. *Id.* at 441. Because Marshall was a minor, the court sentenced him under the Federal Youth Corrections Act (FYCA). *Id.* In 1976, Congress amended the FYCA to require the Parole Commission to consider "factors of general deterrence and retribution" when making parole decisions for persons sentenced under the FYCA. *Id.* at 443. In 1979, the Federal Parole Commission set Marshall's parole date for January 1983. *Id.* at 441. The Commission based the decision on three factors, one of which was the severity of the crimes to which Marshall pleaded guilty. *Id.*

68. *Id.* at 444.

69. *Id.* at 445.

70. *Id.*

2. *The Heirens Test*

In *Heirens v. Mizell*,⁷¹ the Seventh Circuit compared the practical operation of a new parole statute to administrative guidelines issued under the old parole statute to determine if a change in a parole statute was disadvantageous to a prisoner.⁷² When Heirens committed his crimes, the Illinois parole statute did not require the Parole Board to consider any specific criteria when making parole decisions.⁷³ In 1972, the Illinois Legislature enacted a new parole statute that prohibited the Parole Board from paroling a prisoner if it determined that any one of three criteria existed.⁷⁴ Heirens objected when the Parole Board denied him parole based solely on the second criterion.⁷⁵ The *Heirens* court held that the retrospective application of the new parole statute did not violate the ex post facto prohibition.⁷⁶ Despite the differences between the new and old parole statutes, the court reasoned that the new parole statute was not disadvantageous to Heirens because it only codified the Parole Board's prior practice and procedure.⁷⁷

C. *Certain Procedural Changes in Criminal Statutes Are Not Disadvantageous to Prisoners*

In *Paschal v. Wainwright*,⁷⁸ the Eleventh Circuit held that the retrospective application of a criminal statute is not disadvantageous to prisoners when the change in law is procedural and does not affect substantive matters.⁷⁹ When Paschal committed his crime, Florida's parole statute allowed the Parole Commission to consider a prisoner for parole at any time.⁸⁰ In 1978, the Florida Legislature amended its parole statute to require that the Parole Commission develop objective

71. 729 F.2d 449 (7th Cir.), cert. denied, 469 U.S. 842 (1984). Only the Seventh Circuit has followed the *Heirens* holding. See, e.g., *Taylor v. Taylor*, 595 F. Supp. 602 (N.D. Ill. 1984).

72. *Heirens*, 729 F.2d at 459.

73. *Id.* at 460.

74. The new parole statute prohibited the Parole Board from releasing a prisoner if: (1) a substantial risk exists that the prisoner will violate parole conditions, (2) releasing the prisoner would deprecate the seriousness of the crime, or (3) releasing the prisoner would have a substantially adverse effect on institutional discipline. *Id.*

75. *Id.* at 452. Under the second criteria, the Parole Board could not parole a prisoner if "his release at that time would deprecate the seriousness of his offense." *Id.* at 457.

76. *Id.* at 463.

77. *Id.*

78. 738 F.2d 1173 (11th Cir. 1984); see also *Johnson v. Wainwright*, 772 F.2d 826 (11th Cir. 1985).

79. *Paschal*, 738 F.2d at 1176.

80. *Id.* at 1175. The Parole Commission considered Paschal for parole six times between the years 1974 and 1979. *Id.* at 1174-75.

parole guidelines.⁸¹ After the amendment, the Parole Commission used the guidelines to set Paschal's presumptive release date for March 1993.⁸² Paschal argued that the retrospective application of the guidelines disadvantaged him because it prevented the Parole Commission from considering him for parole at any time.⁸³ The *Paschal* court held that the amended parole statute was not disadvantageous to Paschal because the change was procedural and served only to clarify the exercise of administrative discretion.⁸⁴ The court had two justifications for its decision. First, the court reasoned that the amendments to the parole statute were procedural because they did not require the Parole Board to make parole decisions using different criteria.⁸⁵ Second, the court reasoned that the changes were procedural because they did not limit the discretion of the Parole Commission to grant parole.⁸⁶

D. *The Ameliorating Effects Test*

Even if a particular change in a statute is disadvantageous, the ameliorating effects test requires a court to compare the old and new statutes in toto to determine if the new statute may be fairly characterized as more onerous.⁸⁷ When a court applies this test, the court does not consider an effect ameliorating unless it compensates for the harm caused by the new statute. In *Weaver v. Graham*,⁸⁸ the United States Supreme Court held that the retrospective application of a new gain-time statute was detrimental to prisoners because it reduced the prisoners' opportunity to shorten their time in prison simply by obeying rules.⁸⁹ The Court rejected Florida's argument that the new statute was not disadvantageous to prisoners because it provided additional opportunities for the prisoners to obtain gain-time credits.⁹⁰ Instead, the Court reasoned that the new gain-time provisions did not have an

81. *Id.* at 1175. These guidelines created presumptive parole release dates based on the seriousness of the offense committed and the likelihood of a favorable parole outcome. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 1179.

85. *Id.* at 1178. Though the new parole statute required the Parole Board to place primary weight on two of the former parole criteria, it appears that the Parole Board still had discretion to make parole decisions based on any of the former criteria.

86. *Id.*

87. *Dobbert v. Florida*, 432 U.S. 282, 293 (1977).

88. *Weaver v. Graham*, 450 U.S. 24 (1981).

89. *Id.* at 33-34.

90. *Id.* at 34-35. The new statute provided that a prisoner may receive additional gain-time credit if the prisoner satisfies both the good-conduct requirement and special gain-time category requirements. *Id.* at 34 n.18.

ameliorating effect because prisoners were not compensated for the reductions of gain-time available solely for good conduct.⁹¹

III. SHB 1457 VIOLATES THE EX POST FACTO PROHIBITION

SHB 1457 is an unconstitutional ex post facto law because it is both retrospective and disadvantageous to mandatory life prisoners.⁹² Because SHB 1457 is clearly retrospective,⁹³ this section examines two possible theories under which this amendment may be disadvantageous to mandatory life prisoners. First, SHB 1457 may be disadvantageous because it requires the Board to set minimum terms for mandatory life prisoners. This analysis, however, applies only to mandatory life prisoners whom the Board has not paroled. The parole statute always required the Board to set minimum terms for mandatory life prisoners whom the Board returned to prison after a parole violation.⁹⁴ Second, it may be disadvantageous because it changes the criteria by which the Board sets minimum terms. In addition, this section examines whether SHB 1457 is merely a procedural change which does not effect matters of substance. Finally, this section examines whether this amendment has any ameliorating effects.

A. *Requiring the Board To Set Minimum Terms for Mandatory Life Prisoners Is Disadvantageous to These Prisoners*

SHB 1457 is disadvantageous to mandatory life prisoners because it requires the Board to set new minimum terms for them. In *Weaver v. Graham*,⁹⁵ the United States Supreme Court held that a retrospective gain-time statute was disadvantageous to prisoners because it reduced the opportunity of these prisoners to receive a shorter prison sentence.⁹⁶ The Court reasoned that the retrospective gain-time statute limited the prisoner's opportunity to receive a shorter prison sentence

91. *Id.* at 35.

92. *Id.* at 28–29.

93. A sentencing statute is retrospective if it applies to prisoners convicted of acts committed before the statute's effective date. *Id.* at 31. Because SHB 1457 is retrospective, this Comment will only briefly discuss this issue. The legislature enacted SHB 1457 in 1989. See Substitute House Bill 1457, 51st Leg., Regular Sess., 1989 Wash. Laws 259 (codified at WASH. REV. CODE ANN. § 9.95.009, .115 & .0011 (Supp. 1990)). This amendment applies to prisoners who were sentenced to a mandatory life sentence for crimes committed before July 1984. WASH. REV. CODE ANN. § 9.95.009(2) (Supp. 1990). SHB 1457 is retrospective because it applies to prisoners convicted for crimes committed before the amendment's effective date.

94. WASH. REV. CODE ANN. § 9.95.125 (1988).

95. 450 U.S. 24 (1981).

96. *Id.* at 33–35.

because it reduced the number of gain-time days available to prisoners solely for good behavior.⁹⁷ Likewise, SHB 1457 is disadvantageous to mandatory life prisoners because it reduces their opportunity to receive a shorter prison sentence. Alan's story illustrates this point.⁹⁸ Before the passage of this amendment, the Board informed Alan that it would consider him for parole in February 1990. This date represented the end of the statutorily mandated minimum term of twenty years, less time earned for good behavior. As required by SHB 1457, the Board now must set a new minimum term for Alan. Under this new minimum term, the Board will not consider him for parole until 1996. In effect, Alan will have to wait an additional six years before the Board will consider him for parole. Under the pre-SRA system, the Board might have paroled him at any time between 1990 and 1996.⁹⁹ Therefore, SHB 1457 is disadvantageous to mandatory life prisoners.

*B. SHB 1457 Is Disadvantageous to Mandatory Life Prisoners
Because It Restricts the Criteria the Board May Use To Set
Minimum Terms*

1. SHB 1457 Fails the Garrison Test

SHB 1457 is adverse to mandatory life prisoners because the practical effect of this amendment is to prevent the Board from setting a minimum term based on its estimate of the earliest possible date the prisoner will be rehabilitated. When examining whether a change in parole criteria was disadvantageous to prisoners, the Fourth Circuit in *Marshall v. Garrison* compared the practical operation of new and old parole statutes to determine whether the retrospective application of different criteria disadvantaged prisoners.¹⁰⁰ The *Garrison* court concluded that the retrospective application of the new parole criteria was disadvantageous to the prisoner because it increased the period of time

97. *Id.*

98. See *supra* note 1 and accompanying text.

99. The Board reported to the legislature that SHB 1457 would have the practical effect of delaying the opportunity of mandatory life prisoners to be paroled. See 1989 ISRB STUDY, *supra* note 8, at 8. The Board noted that under the old indeterminate system mandatory life prisoners received an automatic 20 year minimum term. *Id.* Though the minimum term is set at 20 years, a prisoner's first opportunity for a parole review is at 13 years and four months, assuming that the prisoner obtains all the available gain-time credit. *Id.* Under the SRA sentencing ranges, the Board noted that a mandatory life prisoner without a criminal history would receive a minimum term with the low end at 20 years. *Id.* Because most of these prisoners have a criminal history, the Board stated that most mandatory life prisoners would receive a minimum term well over 20 years. *Id.* Despite this fact, the Board recommended that the legislature amend the transition statute to include mandatory life prisoners. *Id.*

100. *Marshall v. Garrison*, 659 F.2d 440, 442 (4th Cir. 1981).

the inmate must spend in prison by making parole more difficult to obtain.¹⁰¹

Similarly, SHB 1457 will lengthen the period of time mandatory life prisoners must spend in prison by limiting the criteria by which the Board may set minimum terms. Before the passage of SHB 1457 and except as specifically provided for by law, the parole statute allowed the Board to set minimum terms based on general deterrence, retribution, or rehabilitation criteria.¹⁰² Under the transition statute, the legislature required the Board to set the minimum terms of mandatory life prisoners reasonably consistent with the SRA sentencing ranges.¹⁰³ Yet the legislature designed the SRA sentencing ranges to punish prisoners, which means that it considers only a retribution criterion.¹⁰⁴ By requiring the Board to set minimum terms reasonably consistent with the SRA sentencing ranges, the legislature prevents the Board from setting a minimum term based on the earliest possible date the prisoner could have been rehabilitated. Because a minimum term based on a rehabilitation criterion may be less than a minimum term set reasonably consistent with the SRA, the practical effect of SHB 1457 is to increase prisoners' sentences by delaying their opportunity for parole. Consequently, SHB 1457 is disadvantageous to mandatory life prisoners because it makes parole more difficult to obtain.¹⁰⁵

In addition, SHB 1457 is disadvantageous to mandatory life prisoners because it requires the prisoner to satisfy the requirements of both the indeterminate and determinate sentencing system. Before the passage of SHB 1457, the Board could consider a mandatory life prisoner for parole after the prisoner had served the mandatory minimum term of twenty years.¹⁰⁶ SHB 1457 amends the transition statute to require the Board to set the minimum term of a mandatory life prisoner reasonably consistent with the SRA sentencing ranges.¹⁰⁷ Because minimum term decisions outside the SRA sentencing ranges are the exception,¹⁰⁸ the state is requiring mandatory life prisoners to satisfy the sentencing requirements of the SRA before the Board will even

101. *Id.* at 445.

102. See 1961–1962 Op. Wash. Att'y Gen. No. 128, at 3.

103. See *supra* note 49 and accompanying text.

104. See *supra* note 35 and accompanying text.

105. A mandatory life prisoner is not required to show that the Board would have considered rehabilitation when it set the prisoner's minimum term. The Supreme Court has held that an increase in the possible sentence a prisoner must serve is an ex post facto violation. *Lindsey v. Washington*, 301 U.S. 397, 401 (1937).

106. See *supra* notes 23–25 and accompanying text.

107. See *supra* note 49 and accompanying text.

108. See *supra* text accompanying notes 45–46.

consider them for parole. Yet the transition statute does not require the Board to set parole release dates of mandatory life prisoners reasonably consistent with the SRA.¹⁰⁹ The Board sets the parole release date for mandatory life prisoners based on whether the prisoner is rehabilitated, without reference to the SRA sentencing ranges.¹¹⁰ SHB 1457 has the practical effect of requiring mandatory life prisoners to satisfy the full sentencing requirements of both the indeterminate and SRA sentencing systems.

Requiring the prisoner to satisfy the requirements of both sentencing systems is disadvantageous because it will either increase or have no effect on the length of time a mandatory life prisoner spends in prison. SHB 1457 would increase the prison sentence of a mandatory life prisoner if the Board would have paroled the prisoner except for the fact that the prisoner's minimum term is now reasonably consistent with the SRA ranges. This amendment would have no effect on the prisoner's sentence if the Board would have refused the prisoner parole even after the expiration of the prisoner's new minimum term. In either case, this amendment will never result in a mandatory life prisoner receiving a shorter sentence. Therefore, SHB 1457 violates the ex post facto prohibition.

2. *The Seventh Circuit Approach: The Heirens Test*

a. *The Court Should Not Apply the Heirens Test*

Washington courts should not use the *Heirens* test because it is inconsistent with the theory of the ex post facto prohibition. In *Heirens v. Mizell*,¹¹¹ the Seventh Circuit compared the parole criteria under a new statute with administrative guidelines issued under the old statute.¹¹² The *Heirens* court held that the retrospective application of facially different parole statutes was not disadvantageous to prisoners.¹¹³ The court reasoned that the new parole statute did not

109. As amended by SHB 1457, the transition statute applies differently to non-mandatory prisoners and mandatory life prisoners. For non-mandatory prisoners, the transition statute requires the Board to set both the minimum term and parole release dates reasonably consistent with the SRA sentencing ranges. WASH. REV. CODE ANN. § 9.95.009(2) (Supp. 1990). For mandatory life prisoners, the transition statute only requires the Board to set the minimum term reasonably consistent with the SRA ranges. *Id.*

110. The Board did not want the parole release decisions of mandatory life prisoners to be subject to the transition statute. 1989 ISRB STUDY, *supra* note 8, at 7. The Board wanted to retain plenary authority to deny these prisoners parole because it considers these prisoners the state's most serious, violent and dangerous felony offenders. *Id.* at 2, 7.

111. 729 F.2d 449 (7th Cir.), *cert. denied*, 469 U.S. 842 (1984).

112. *Id.* at 459.

113. *Id.*

violate the ex post facto prohibition because it merely codified the Parole Board's administrative practice.¹¹⁴ There are many reasons, however, why a court should not consider administrative guidelines when reviewing a law for an ex post facto infirmity. First, a substantive difference exists between a statute and administrative guidelines.¹¹⁵ Although an agency is required to comply with the requirements of a statute, it may ignore or modify its own guidelines.¹¹⁶ Second, the framers intended the ex post facto prohibition to prevent legislative abuses.¹¹⁷ The legislature may intimidate a broad range of people who oppose certain economic and social policies by passing retrospective penal statutes. The ex post facto prohibition prevents this abusive behavior. An administrative agency, however, may not intimidate a broad range of people because an agency's power is limited by statute.¹¹⁸ Furthermore, though an agency may target a person or corporation that falls within its power, the legislature or courts may always intercede on behalf of the complaining party.¹¹⁹ Finally, the ex post facto analysis should not be extended to administrative guidelines because it would discourage the agency from drafting formal guidelines.¹²⁰ In order to avoid potential litigation, the agency might make parole decisions based solely on general standards articulated in the sentencing statute. Yet decisions made without reference to specific criteria create the potential for arbitrary and capricious actions. Without detailed guidelines, a prisoner would have difficulty showing that a parole decision was the product of impermissible considerations. Therefore, Washington courts should not apply the *Heirens* test because policy considerations dictate that an ex post facto analysis should not consider administrative guidelines.

114. *Id.* The Seventh Circuit has suggested that *Heirens* is poorly reasoned. See *Prater v. United States Parole Comm'n*, 802 F.2d 948, 963 (7th Cir. 1986) (Swygert, J., dissenting).

115. Annotation, *United States Parole Commission Guidelines for Federal Prisoners*, 61 A.L.R. FED. 135, 156-59 (1983).

116. See *Warren v. United States Parole Comm'n*, 659 F.2d 183, 193 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 950 (1982); see also *Ruip v. United States*, 555 F.2d 1331, 1335 (6th Cir. 1977) (noting that guidelines do not have the characteristics of law, being flexible rather than fixed and rigid).

117. In *Calder v. Bull*, Justice Chase noted that the ex post facto prohibition "very probably arose from the knowledge, that the Parliament of Great Britain claimed and exercised a power to pass such laws With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice." 3 U.S. (3 Dall.) 386, 389 (1798).

118. See W. FOX, UNDERSTANDING ADMINISTRATIVE LAW § 17 (1986).

119. *Id.* at § 9-10.

120. *Prater v. United States Parole Comm'n*, 802 F.2d 948, 953 (7th Cir. 1986).

b. Even Under the Heirens Test, SHB 1457 Is Still Disadvantageous to Mandatory Life Prisoners

Even if a Washington court uses the *Heirens* test, SHB 1457 is disadvantageous to mandatory life prisoners because the amended transition statute does not codify the Board's previous guidelines. First, the former parole guidelines stated that the Board does not fix minimum terms for mandatory life prisoners.¹²¹ SHB 1457, however, requires the Board to set a minimum term for mandatory life prisoners.¹²² Second, under the Board's former guidelines, the Board had broad discretion to consider many factors when setting a prisoner's minimum term.¹²³ These guidelines stated that the Board sets minimum terms based on the prisoner's behavior in criminal acts leading to the current incarceration, and the prisoner's record of criminal convictions and parole revocations.¹²⁴ In addition, the Board had the authority to disregard the guidelines provided that it gave written reasons for such decisions.¹²⁵ The guidelines provide examples of when the Board may use its discretion to reduce a minimum term, such as when a prisoner makes substantial progress toward being rehabilitated.¹²⁶ Nevertheless, SHB 1457 requires that the Board set the minimum terms of mandatory life prisoners reasonably consistent with the SRA sentencing ranges.¹²⁷ Consequently, SHB 1457 does not codify the Board's prior guidelines because the SRA sentencing ranges exclude rehabilitation as a criteria for making minimum term decisions.

3. Procedural Changes in Parole Statutes: The Paschal Test

SHB 1457 is a substantive change in the parole statute because it alters the criteria under which the Board makes parole decisions. SHB 1457 is distinguishable from *Paschal v. Wainright*,¹²⁸ where the Eleventh Circuit held that a retrospective application of a criminal statute was not disadvantageous to prisoners when the change in law

121. POLICY MANUAL, *supra* note 27, § 2.050. The former parole guidelines, however, required the Board to set minimum terms for mandatory life prisoners who were returned to prison because of parole violations. *Id.* § 6.420.

122. WASH. REV. CODE ANN. § 9.95.116(1) (Supp. 1990).

123. WASHINGTON STATE BOARD OF PRISON TERMS AND PAROLES, GUIDELINES FOR FIXING OF MINIMUM TERMS AND RECONSIDERATION OF LENGTH OF CONFINEMENT 1 (1983).

124. *Id.*

125. *Id.*

126. MANAGEMENT INFORMATION SECTION, WASHINGTON STATE BD. OF PRISON TERMS AND PAROLES, REASONS FOR OUTSIDE GUIDELINE DECISIONS (1980) (reason No. 22).

127. See *supra* note 49 and accompanying text.

128. 738 F.2d 1173 (11th Cir. 1984).

did not affect matters of substance.¹²⁹ The court reasoned that the change in law was procedural because it did not require the Parole Commission to use different criteria when making parole decisions, and because it did not limit the Board's discretion to make parole decisions.¹³⁰ In contrast, SHB 1457 affects substantive matters. First, the Board must now make minimum term decisions reasonably consistent with the SRA sentencing ranges. This amendment requires the Board to use different parole criteria when making parole decisions.¹³¹ Second, the Washington Supreme Court held that the transition statute limits the Board's discretion to set minimum terms.¹³² Under the transition statute, the court stated that Board decisions falling outside the SRA ranges should be the exception and not the rule.¹³³

4. *The Ameliorating Effects Test*

Eliminating the warden certification requirement does not qualify as an ameliorating effect because it does not compensate mandatory life prisoners for the harm caused by SHB 1457. In *Weaver v. Graham*,¹³⁴ the United States Supreme Court compared an old and new gain-time statute in toto to determine if the new statute may be fairly characterized as more onerous.¹³⁵ Though the new gain-time statute provided additional ways to earn gain-time, the Court held that these new gain-time provisions did not qualify as an ameliorating effect because they did not compensate for the reduction of gain-time available solely for good conduct.¹³⁶

Likewise, the elimination of the certification requirement does not qualify as an ameliorating effect because it does not compensate mandatory life prisoners for the harm caused by the new minimum term requirement. SHB 1457 delays the opportunity of a mandatory life prisoner to be considered for parole by requiring the Board to set minimum terms for these prisoners,¹³⁷ and by requiring the Board to set minimum terms reasonably consistent with the SRA sentencing ranges.¹³⁸ Because the length of the delay depends on the application

129. *Id.* at 1176.

130. *Id.* at 1178.

131. See *supra* notes 123–27 and accompanying text.

132. *In re Myers*, 105 Wash. 2d 257, 262, 714 P.2d 303, 306 (1986).

133. *Addleman v. Board of Prison Terms & Paroles*, 107 Wash. 2d 503, 511, 730 P.2d 1327, 1332 (1986).

134. 450 U.S. 24 (1981).

135. *Id.* at 30–31.

136. *Id.* at 35–36.

137. See *supra* note 48 and accompanying text.

138. See *supra* note 49 and accompanying text.

of the SRA sentencing ranges, mandatory life prisoners have no opportunity to shorten their new minimum term. Yet the mandatory life prisoner could influence whether the warden recommended the prisoner for parole. Alan's story illustrates this point. Before the passage of SHB 1457, Alan participated in the MAP program.¹³⁹ In Alan's agreement, the Department of Corrections stated that it would recommend Alan for parole upon his successful completion of specified objectives.¹⁴⁰ The agreement required Alan to satisfy the objectives one year before the expiration of his twenty year minimum term.¹⁴¹ In essence, Alan determined whether the warden would recommend him for parole. Nevertheless, Alan's agreement became useless when the legislature eliminated the certification requirement. The elimination of the certification requirement does not compensate for the harm caused by this amendment because prisoners like Alan have no opportunity to reduce the newly set minimum terms.

IV. CONCLUSION

Washington courts should hold that SHB 1457 violates the constitutional prohibition against ex post facto laws. SHB 1457 violates the ex post facto prohibition because it is both retrospective and disadvantageous to prisoners. In addition, SHB 1457 is not a procedural change in the law, and it does not have any ameliorating effects. Because applying SRA sentencing ranges to mandatory life prisoners is unconstitutional, Washington State should allow these prisoners to serve their sentences as required by the parole statute in effect when they committed their respective crimes. The legislature always has the power to reduce a prisoner's sentence. The legislature, however, clearly lacks the power to increase the sentences of mandatory life prisoners by delaying their opportunity for parole. Any other result is simply unfair.

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139. See Prisoner's Letter, *supra* note 1 (attached MAP contract).

140. See *supra* note 24 (discussing MAP).

141. Alan's agreement stated that Alan must satisfy the objectives by March 1989. See Prisoner's Letter, *supra* note 1 (attached MAP contract). Alan's minimum term expired February 1990. *Id.* The agreement does not indicate whether Alan satisfied the objectives. *Id.*