

No. 83815-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF:

ERIC SHERIDAN FLINT

ON REVIEW FROM THE COURT OF APPEALS, DIVISION TWO

SUPPLEMENTAL BRIEF OF PETITIONER

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TABLE OF CONTENTS

A. INTRODUCTION 1

B. ISSUES PRESENTED 2

C. STATEMENT OF THE CASE 3

D. ARGUMENT 6

1. This Court should follow Division One’s well-reasoned opinion in *State v. Madsen* and hold that application of ESSB 6157 to those who committed their crimes before the law went into effect violates the ex post facto clause. 7

 a. The ex post facto clause prohibits retrospective application of a law that disadvantages a defendant..... 7

 b. The application of the amendment to Mr. Flint was retrospective..... 8

 c. The application of the amendment to Mr. Flint disadvantaged him. 13

2. DOC misapplied the statute because the legislature did not intend the amendment to be retroactive and it is neither curative nor remedial. 19

3. Mr. Flint is entitled to obtain earned early release time credits on the remainder of his sentence..... 21

E. CONCLUSION 23

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>In re Detention of Elmore</u> , 162 Wn.2d 27, 168 P.3d 1285 (2007).....	20, 21
<u>In re the Personal Restraint of Cashaw</u> , 123 Wn.2d 138, 866 P.2d 8 (1994)	6
<u>In re the Personal Restraint of Powell</u> , 117 Wn.2d 175, 814 P.2d 635 (1991).....	8
<u>In re the Personal Restraint of Smith</u> , 139 Wn.2d 199, 986 P.2d 131 (1999).....	16, 23
<u>Standlee v. Smith</u> , 83 Wn.2d 405, 518 P.2d 721 (1974).....	11
<u>State v. Cruz</u> , 139 Wn.2d 186, 985 P.2d 384 (1999).....	19, 20, 21
<u>State v. Dupard</u> , 93 Wn.2d 268, 609 P.2d 961 (1980).....	11
<u>State v. Eilts</u> , 94 Wn.2d 489, 617 P.2d 993 (1980).....	11
<u>State v. King</u> , 130 Wn.2d 517, 925 P.2d 606 (1996).....	11
<u>State v. Pillatos</u> , 159 Wn.2d 459, 150 P.3d 1130 (2007).....	10, 18
<u>State v. Smith</u> , 144 Wn.2d 665, 30 P.3d 1245 (2002)	19, 20
<u>State v. Watson</u> , 160 Wn.2d 1, 154 P.3d 909 (2007).....	12
<u>State v. Whitaker</u> , 112 Wn.2d 341, 771 P.2d 332 (1989).....	11

Washington Court of Appeals Decisions

<u>State v. Madsen</u> , 153 Wn. App. 471, 228 P.3d 24 (2009), <u>review denied</u> , 168 Wash.2d 1034, 230 P.3d 1061 (2010)	passim
<u>State v. Prado</u> , 86 Wn.App. 573, 937 P.2d 636 (1997).....	11

United States Supreme Court Decisions

<u>Calder v. Bull</u> , 3 Dall. 386, 1 L.Ed. 648 (1798).....	8
<u>California v. Morales</u> , 514 U.S. 499, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995).....	17, 18
<u>Carmell v. Texas</u> , 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000) 7	
<u>Johnson v. United States</u> , 529 U.S. 694, 120 S.Ct. 1795, 146 L.Ed.2d 727 (2000).....	6, 8, 9
<u>Lindsey v. Washington</u> , 301 U.S. 397, 57 S.Ct. 797, 799, 81 L.Ed. 1182 (1937).....	passim
<u>Miller v. Florida</u> , 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987) 14, 15, 18, 19	
<u>Weaver v. Graham</u> , 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981)	passim

Decisions of Other Jurisdictions

<u>Commonwealth v. Cory</u> , 454 Mass. 559, 911 N.E.2d 187 (Mass. 2009) 10, 16	
<u>Commonwealth v. Davis</u> , 380 Mass. 1, 401 N.E.2d 811 (1980)	16
<u>People v. Delgado</u> , 140 Cal.App.4 th 1157, 45 Cal.Rptr.3d 501 (2006) ...	18, 19
<u>United States v. Paskow</u> , 11 F.3d 873 (9 th Cir. 1993).....	12
<u>Williams v. Roe</u> , 421 F.3d 883 (9 th Cir. 2005)	18

Constitutional Provisions

Const. art I, § 23.....	7
U.S. Const. art. I, § 10.....	7

Statutes

Laws of 2007, ch. 483, § 305..... 4, 13, 20, 21
RCW 9.94A.737(1) (2004) 4
RCW 9.94A.737(2) (2007) passim

Rules

RAP 16.4..... 6

A. INTRODUCTION

Eric Flint committed his crimes in 2002. Nevertheless, the Department of Corrections (“DOC”) applied a 2007 statutory amendment to sanction him to 647 days of incarceration for a community custody violation – more than 20 times what the community corrections officer (“CCO”) had recommended. The statutory amendment requires DOC to incarcerate an individual for the remainder of his term upon a third violation, making what was once a little-used discretionary sanction mandatory.

Mr. Flint filed a personal restraint petition (“PRP”) in Division Two of the Court of Appeals, arguing that the application of the amendment to him violated the ex post facto clause. Division Two denied relief, but Division One granted relief to another defendant on the same ground argued by Mr. Flint. State v. Madsen, 153 Wn. App. 471, 475, 228 P.3d 24 (2009), review denied, 168 Wn.2d 1034, 230 P.3d 1061 (2010). Following Supreme Court precedent, Division One recognized that the triggering event for ex post facto analysis is the original crime, not the violation of supervised release, and that an amendment that changes a maximum penalty from discretionary to mandatory increases the punishment and violates the ex post facto clause. This Court should follow Division One’s thorough, well-reasoned opinion in Madsen.

B. ISSUES PRESENTED

1. The ex post facto clause prohibits retrospective application of a law that disadvantages a defendant. Under settled decisions of this Court and the United States Supreme Court, a law operates retrospectively if it was enacted after the defendant's original crime of conviction (even if it was enacted before the relevant probation violation), and it disadvantages the defendant if it changes the maximum sanction from discretionary to mandatory. RCW 9.94A.737(2) (2007), which was enacted after petitioner Eric Flint's crime of conviction, amended the maximum penalty from discretionary to mandatory for third-time violators of community custody conditions. After Mr. Flint committed a third community custody violation, instead of imposing the 30-day sanction proposed by the community corrections officer, DOC ordered him to serve 647 days as mandated by RCW 9.94A.737(2) (2007). Did DOC's application of the statutory amendment to Mr. Flint violate the constitutional prohibition on ex post facto laws?

2. A legislative amendment should not be applied retroactively unless (a) the legislature clearly intended retroactive application, (b) the amendment is curative, or (c) the amendment is remedial. Did DOC improperly apply RCW 9.94A.737(2) (2007) to Eric Flint where the

statute contains no statement of intent for retroactive application, and the amendment is substantive, rather than curative or remedial?

3. DOC policy dictates that “Community Custody Violators confined in a Department facility for sanction time are eligible for ERT [Earned Release Time] credits at the rate of 33 percent.” Eric Flint is confined in a Department facility as a sanction for community custody violations. Is he eligible for ERT credits at the rate of 33 percent?¹

C. STATEMENT OF THE CASE

In 2002, petitioner Eric Flint pled guilty to first-degree robbery and possession of a controlled substance in Kitsap County Superior Court. He was sentenced to 100 months’ confinement and 18-36 months of community custody.² Mr. Flint earned early release and began serving his term of community custody on August 27, 2007.³

After Mr. Flint was released from total confinement and was serving his term of community custody, the Legislature passed ESSB 6157, which amended RCW 9.94A.737 to add subsection (2):

If an offender has not completed his or her maximum term of total confinement and is subject to a third violation hearing for any violation of community custody and is found to have committed the violation, the department

¹ Mr. Flint raised additional issues in his pro se motion for discretionary review, and will rest on his arguments in that brief and his briefing before the Court of Appeals for those issues.

² Exhibit 1, Attachment A to State’s response to PRP (judgment and sentence).

³ Order Dismissing Petition at 1.

shall return the offender to total confinement in a state correctional facility to serve up to the remaining portion of his or her sentence, unless it is determined that returning the offender to a state correctional facility would substantially interfere with the offender's ability to maintain necessary community supports or to participate in necessary treatment or programming and would substantially increase the offender's likelihood of reoffending.

Laws of 2007, ch. 483, § 305; RCW 9.94A.737(2) (2007) (emphasis added).⁴ Previously, the statute had allowed for such a penalty, but had not required it. RCW 9.94A.737(1) (2004) (“If an offender violates any condition or requirement of community custody, the department **may** transfer the offender to a more restrictive confinement status to serve up to the remaining portion of the sentence ...”) (emphasis added).

DOC sanctioned Mr. Flint to 14 days of confinement for community custody violations following a hearing in April of 2008, and 13 days of confinement for violations following a hearing in November of 2008.⁵

DOC held a third community-custody violation hearing on February 12, 2009.⁶ The Community Corrections Officer recommended a sanction of 30 days for the alleged violations.⁷ Mr. Flint admitted to the violations and expected to serve 30 days. However, the hearing officer

⁴ This subsection has since been recodified at RCW 9.94A.714(1).

⁵ Order Dismissing Petition at 1.

⁶ *Id.* at 2.

⁷ Amended Personal Restraint Petition at 2.

applied RCW 9.94A.737(2) (2007) and sentenced him to total confinement for the remainder of his term – 647 days.⁸ Neither Mr. Flint nor his CCO were aware of this possibility at the time he pled guilty to the violations.⁹ The CCO “did not agree” with the sanction.¹⁰

Mr. Flint filed a personal restraint petition in Division Two of the Court of Appeals, arguing, *inter alia*, that the application of the statutory amendment to him violated the prohibition on *ex post facto* laws, because Mr. Flint committed his crimes before the new law went into effect. The Acting Chief Judge dismissed the petition as “frivolous” on October 5, 2009. This was so even though a King County Superior Court judge had already granted relief to an inmate on the same ground argued by Mr. Flint. Madsen, 153 Wn. App. at 475. DOC had not alerted Division Two to the King County case.

On December 14, 2009, Division One of the Court of Appeals affirmed the King County Superior Court and held that application of RCW 9.94A.737(2) (2007) to those who committed their crimes before the law went into effect violated the *ex post facto* clause. Madsen, 153 Wn. App. at 484. In so holding, the court followed binding precedent from the

⁸ State’s Response to PRP at 4; Appendix C to Motion for Discretionary Review (DOC Regional Appeals Panel Decision states sanction was imposed pursuant to ESSB 6157).

⁹ Amended PRP at 2-3.

¹⁰ Motion for Discretionary Review at 3.

United States Supreme Court. Id. (citing Johnson v. United States, 529 U.S. 694, 120 S.Ct. 1795, 146 L.Ed.2d 727 (2000); Lindsey v. Washington, 301 U.S. 397, 57 S.Ct. 797, 799, 81 L.Ed. 1182 (1937)).

D. ARGUMENT

An appellate court will grant relief to an individual who has filed a personal restraint petition if the petitioner is under "restraint" and the restraint is unlawful. RAP 16.4(a). Where, as here, there has been no previous or alternative avenue for relief, no additional threshold requirements apply. In re the Personal Restraint of Cashaw, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994).

A petitioner is under restraint if he is incarcerated. RAP 16.4(b).

RAP 16.4(b). The restraint is unlawful if, inter alia:

The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington.

RAP 16.4(c)(2).

Mr. Flint is incarcerated and his restraint is unlawful because the application of ESSB 6157 to him violates the ex post facto clause, as explained below. Accordingly, this Court should grant Mr. Flint's personal restraint petition.

1. This Court should follow Division One's well-reasoned opinion in State v. Madsen and hold that application of ESSB 6157 to those who committed their crimes before the law went into effect violates the ex post facto clause.

a. The ex post facto clause prohibits retrospective application of a law that disadvantages a defendant. The federal and state constitutions prohibit ex post facto laws. U.S. Const. art. I, § 10; Const. art I, § 23. The framers considered these provisions to be "perhaps greater securities to liberty and republicanism than any the Constitution contains." Carmell v. Texas, 529 U.S. 513, 521, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000) (quoting The Federalist No. 44, p. 282 (C. Rossiter ed. 1961) (J. Madison)). The ex post facto clause "was designed as an additional bulwark in favour of the personal security of the subject, to protect against the favorite and most formidable instruments of tyranny, that were often used to effect the most detestable purposes." Carmell, 529 U.S. at 532 (internal citations omitted). Its purpose was "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." Weaver v. Graham, 450 U.S. 24, 28, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

The ex post facto clause "bars application of a law 'that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.'" Johnson v. United States, 529 U.S. 694,

699, 120 S.Ct. 1795, 146 L.Ed.2d 727 (2000) (quoting Calder v. Bull, 3 Dall. 386, 390, 1 L.Ed. 648 (1798)). A law violates the ex post facto clause if it: (1) is substantive, as opposed to merely procedural; (2) operates retrospectively, and (3) disadvantages the person affected by it; i.e., alters the standard of punishment. In re the Personal Restraint of Powell, 117 Wn.2d 175, 185, 814 P.2d 635 (1991).

Here, DOC concedes that ESSB 6157 is substantive and not merely procedural. Madsen, 153 Wn. App. at 476; Answer to Motion for Discretionary Review at 7-12. Thus, that prong of the analysis is not at issue. But DOC wrongly argues that the statutory amendment does not operate retrospectively and does not increase the punishment. Id. As explained in Madsen, DOC is wrong.

b. The application of the amendment to Mr. Flint was retrospective. A law operates retroactively for purposes of ex post facto analysis if it was enacted after the defendant's original crime of conviction, even if it punishes violations of conditions of supervised release. Johnson, 529 U.S. at 701; Madsen, 153 Wn. App. at 477-79. In Johnson, the Supreme Court rejected the Sixth Circuit's theory that the relevant event was the violation of post-release conditions, explaining:

While this understanding of revocation of supervised release has some intuitive appeal, the Government disavows it, and wisely so in view of the serious

constitutional questions that would be raised by construing revocation and reimprisonment as punishment for the violation of the conditions of supervised release. Although such violations often lead to reimprisonment, the violative conduct need not be criminal and need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt. Where the acts of violation are criminal in their own right, they may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of supervised release were also punishment for the same offense. Treating postrevocation sanctions as part of the penalty for the initial offense, however (as most courts have done), avoids these difficulties. ... We therefore attribute postrevocation penalties to the original conviction.

Johnson, 529 U.S. at 700-01 (internal citations omitted).

The concerns expressed in Johnson do not exist when examining recidivist statutes, whose increased penalties apply to the most recent crime, not a mere violation. Madsen, 153 Wn. App. at 476-79. Thus, cases rejecting ex post facto challenges to persistent offender statutes and offender score schemes are inapposite. Id. at 476-77.

DOC's theory – that ESSB 6157 is not ex post facto because it was enacted before Mr. Flint's third community custody violation – is precisely the theory the Supreme Court rejected in Johnson. DOC's contention that the Johnson rule is mere dictum is disingenuous. Supplemental Answer at 3. On the contrary, the reason the Supreme Court granted certiorari in Johnson was to resolve a circuit split on the question of whether the triggering event for ex post facto purposes is the original

crime or the later violation of supervised release. Johnson, 529 U.S. at 698-99. The Court devoted its first section of analysis to answering the question, and held that postrevocation penalties must be attributed to the original conviction. Id. at 701.

The Massachusetts Supreme Court applied Johnson to find an ex post facto violation in Commonwealth v. Cory, 454 Mass. 559, 911 N.E.2d 187 (Mass. 2009). There, the legislature passed a law requiring any person placed on probation following conviction for a sex offense to wear a GPS tracking device. Id. at 559. A superior court judge ruled there was no ex post facto violation in applying the requirement to an individual who committed his original crime before the statute's enactment, because "the commencement of probation is the triggering event." Id. at 561. The Supreme Court reversed, citing Johnson. Id. at 564. "Because the defendant committed and was convicted of his qualifying offense before § 47 was enacted, the statute may not be applied to him." Id. at 560.

DOC implies that this Court has flouted binding precedent by holding that the "triggering event" for determining retroactivity under the ex post facto clause is the community custody violation rather than the original crime. Supplemental Answer of DOC at 4-5 (citing State v. Pillatos, 159 Wn.2d 459, 471, 150 P.3d 1130 (2007)). This Court did no such thing. Although a later portion of the Pillatos opinion discusses the

ex post facto clause, the section of the opinion DOC quotes addresses a statutory construction issue, not an ex post facto challenge. See Pillatos, 159 Wn.2d at 471. And the reason this Court rejected the ex post facto challenge in Pillatos was that the law at issue there was merely procedural rather than substantive, which DOC concedes is not the case here. Id. at 476.

Consistent with Johnson, this Court has repeatedly held that incarceration for a violation of community supervision constitutes punishment for the original crime:

Watson argues that it is unclear whether incarceration due to violating conditions of community custody is a result of his original sex offense. Case law in Washington provides a clear answer to this. Incarceration for probation violations “relates back to the original conviction for which probation was granted.” State v. Eilts, 94 Wn.2d 489, 494 n. 3, 617 P.2d 993 (1980); see also State v. King, 130 Wn.2d 517, 522, 925 P.2d 606 (1996); State v. Whitaker, 112 Wn.2d 341, 342, 771 P.2d 332 (1989). It is not the result of merely the probation violation, but rather “should be deemed punishment for the original crime.” State v. Prado, 86 Wn.App. 573, 578, 937 P.2d 636 (1997); cf. State v. Dupard, 93 Wn.2d 268, 276, 609 P.2d 961 (1980) (“Parole revocation ... is a ‘continuing consequence’ of the original conviction.” (citations omitted)); Standlee v. Smith, 83 Wn.2d 405, 407, 518 P.2d 721 (1974) (“Parole is revoked ... as part of the continuing consequences of the crime for which parole was granted.”). Thus, the case law presumptively available to Watson explains in no uncertain terms that incarceration on probation violations is a result of the original conviction for which probation was granted. In this case, that means that Watson's 60 days in custody

for violation of his community custody conditions were a result of his sex offense....

State v. Watson, 160 Wn.2d 1, 9, 154 P.3d 909 (2007).¹¹ The Ninth

Circuit has similarly held:

[I]t is beyond dispute that the ex post facto clause is violated when a parole violator is punished in a way that adversely affects his ultimate release date and the law that authorizes the punishment was adopted after the violator committed the underlying offense, but before he violated the terms of his parole.

United States v. Paskow, 11 F.3d 873, 883 (9th Cir. 1993).

The rule stated in Johnson, Watson, and Paskow is the law.

Division One of the Court of Appeals properly concluded that the amendment to RCW 9.94A.737 applied retrospectively to people like Mr. Flint because it was enacted after the commission of the original crimes.

Madsen, 153 Wn. App. at 473.

¹¹ As Mr. Flint noted in his reply, DOC inadvertently acknowledges this point in a different section of its Answer: "modification of sentences due to violations of community supervision should be deemed punishment for the original crime." Answer at 14 (citing State v. DeBello, 92 Wn. App. 723, 727, 964 P.2d 1192 (1998)).

c. The application of the amendment to Mr. Flint disadvantaged him. Whether a state statute disadvantages a defendant for purposes of ex post facto analysis is a federal question. Weaver, 450 U.S. at 33. A law violates the ex post facto clause “not only if it alters the length of the sentence, but also if it changes the maximum sentence from discretionary to mandatory.” Weaver, 450 U.S. at 32 n. 17 (citing Lindsey, 301 U.S. at 401).

Here, the amendment changed the maximum sentence from discretionary to mandatory upon a third community custody violation. Laws of 2007, ch. 483, § 305; RCW 9.94A.737(2) (2007). But for the hearing officer’s reliance on the amendment, it is highly probable that a 30-day sanction would have been imposed upon Mr. Flint instead of a 647-day sanction. The law therefore disadvantaged Mr. Flint by substantially increasing the punishment, and its application to him violated the ex post facto clause. Weaver, 450 U.S. at 32 n. 17; Lindsey, 301 U.S. at 401.

DOC argues that Mr. Flint was not disadvantaged by the retrospective application of the amendment (i.e., that the amendment did not increase the quantum of punishment) because “the only material difference is that [RCW 9.94A.737(2) (2007)] made return to confinement mandatory upon the third violation, while the prior statute gave the DOC

discretion to return an offender to confinement.” Supplemental Answer at 7. DOC again ignores binding precedent. As stated above, even if an individual could have received the same penalty under the prior scheme, an amendment that “changes the maximum sentence from discretionary to mandatory” disadvantages a defendant and violates the ex post facto clause. Weaver, 450 U.S. at 32 n. 17; Lindsey, 301 U.S. at 401.

In Lindsey, for example, the law in effect when the defendants committed their crimes prescribed a sentence of as little as six months and as much as 15 years. 301 U.S. at 398. Prior to sentencing, a new law went into effect mandating a sentence of 15 years. Id. at 398-99. After being sentenced to 15 years under the new law, the defendants claimed an ex post facto violation but the State argued there was no constitutional issue because the court had the discretion to impose a 15-year sentence under the previous law. The Supreme Court disagreed, finding that because “[t]he effect of the new statute is to make mandatory what was before only the maximum ... the measure of punishment prescribed by the later statute is more severe than that of the earlier.” Id. at 400-01. Accordingly, the application of the new law to the defendants violated the ex post facto clause. Id. at 402.

Another U.S. Supreme Court case, Miller v. Florida, is also instructive. 482 U.S. 423, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987). There,

the presumptive sentence range for the defendant's crime at the time he committed it was 3 ½ to 4 ½ years. Id. at 424. The Florida Legislature subsequently changed the range to 5 ½ to 7 years. Id. At sentencing, the State of Florida argued that the court should impose a sentence of seven years – either by applying the new statute, or by applying the old statute and departing from the standard range. Id. at 428. The court imposed a seven-year sentence, “within the new guidelines.” Id.

On appeal, the defendant argued that his seven-year sentence violated the prohibition on ex post facto laws. The State of Florida made the same argument DOC makes here: that the defendant was not disadvantaged by the new law, because the judge could have imposed a seven-year sentence under the prior law (by departing from the presumptive range and imposing an exceptional sentence). Id. at 432. The Supreme Court rejected this argument, reiterating that “one is not barred from challenging a change in the penal code on ex post facto grounds simply because the sentence he received under the new law was not more onerous than that which he might have received under the old.” Id. (emphasis added). “It is plainly to the substantial disadvantage of [defendants] to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the [maximum] term.” Id. (quoting Lindsey, 301 U.S. at 401-02).

Commonwealth v. Cory is on point with respect to this prong of the analysis just as it is with the retroactivity prong. In Cory, the legislature made mandatory a penalty that was once discretionary. Citing Lindsey and Miller, the Massachusetts Supreme Court noted: “The fact that sentencing judges prior to the enactment of § 47 had the discretionary power to impose GPS monitoring as a condition of probation does not affect our analysis.” Cory, 454 Mass. at 572. “[L]egislation which would have the effect of changing a discretionary sentence to a mandatory one could not be validly enforced with respect to crimes antedating the law.” Id. at 573 (quoting Commonwealth v. Davis, 380 Mass. 1, 15, 401 N.E.2d 811 (1980)).

DOC appears to argue that increases in community custody sanctions can never violate the ex post facto clause because they are not part of the original sentence and do not amend the “maximum period of confinement” allowed by the underlying sentence. Supplemental Answer at 4-5, 7-8; see Madsen, 153 Wn. App. at 480. This argument is foreclosed by this Court’s decision in Smith and the U.S. Supreme Court’s decision in Weaver. Smith involved a statutory amendment that capped earned early release time at 15% for certain types of crimes. In re the Personal Restraint of Smith, 139 Wn.2d 199, 201, 986 P.2d 131 (1999). Although the law did not change the maximum underlying sentence, this

Court held that “the amended law effects a substantive change in the statute that increases the quantum of punishment” and therefore “may [not] be applied retroactively to petitioners.” Id. at 207-08.

Similarly, the U.S. Supreme Court addressed a Florida statute that altered the availability of “gain time for good conduct” and was applied to individuals who committed their crimes before the statute’s enactment. Weaver, 450 U.S. at 25. Like DOC here, the government argued there was no ex post facto violation because good-time provisions are “no part of the original sentence and thus no part of the punishment annexed to the crime at the time petitioner was sentenced.” Id. at 31. The Supreme Court rejected this argument and recognized that “punitive conditions outside the sentence” are subject to ex post facto challenges. Id. at 32. The amendment to the good-time statute “substantially alters the consequences attached to a crime already completed, and therefore changes the quantum of punishment.” Id. at 33. The same is true here. Although the community-custody sanction did not change the maximum underlying sentence, it substantially altered the consequences attached to a crime already completed, and therefore changed the quantum of punishment.

DOC’s reliance on California v. Morales is unavailing. Supplemental Answer at 6-7 (quoting California v. Morales, 514 U.S. 499, 506 n.3, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995)). There, as in Pillatos,

the issue was whether the amendment in question was procedural or substantive. Morales, 514 U.S. at 508 (holding no ex post facto violation where the amendment in question “simply alters the method to be followed in fixing a parole release date under identical substantive standards”); see also Pillatos, 159 Wn.2d at 476 (holding no ex post facto violation where legislature changed procedure for imposing exceptional sentences, but did not change the sanctions themselves). Indeed, the Morales Court reaffirmed Weaver, Lindsey, and Miller, and simply distinguished them on the procedural/substantive prong.¹² Morales, 514 U.S. at 507-08; see also People v. Delgado, 140 Cal.App.4th 1157, 45 Cal.Rptr.3d 501 (2006) (distinguishing Morales and applying Weaver, Lindsey, and Miller to find ex post facto violation); Williams v. Roe, 421 F.3d 883 (9th Cir. 2005) (same).

DOC concedes that the amendment at issue here is substantive, not procedural. Madsen, 153 Wn. App. at 476; Answer to Motion for Discretionary Review at 7-12. That prong of the ex post facto analysis is not at issue in this case. Accordingly, as Division One recognized, Morales and Pillatos are inapposite, and Lindsey and its progeny control. Madsen, 153 Wn. App. at 481-84. Because ESSB 6157 changed a penalty from discretionary to mandatory, it increased the punishment and violated

¹² The Morales Court also stated it preferred the phrase “increases the penalty” to “disadvantages,” but the analysis is the same. Id.

the ex post facto clause as applied to Mr. Flint. Miller, 482 U.S. at 432; Weaver, 450 U.S. at 32 n.17; Lindsey, 301 U.S. at 401; Madsen, 153 Wn. App. at 481-84; Delgado, 140 Cal.App.4th at 1167-69; Williams, 421 F.3d at 887.

2. DOC misapplied the statute because the legislature did not intend the amendment to be retroactive and it is neither curative nor remedial.

While DOC's application of the amendment to Mr. Flint violated the ex post facto clause, the amendment itself is facially constitutional because it does not purport to be retroactive. This Court may therefore grant relief on the additional and independent basis that DOC misapplied the statute. See State v. Cruz, 139 Wn.2d 186, 190, 985 P.2d 384 (1999) (where legislation is not retroactive, court need not reach question of whether its retroactive application would violate the ex post facto clause).

Largely because of constitutional ex post facto concerns, statutes are presumed to apply prospectively only. State v. Smith, 144 Wn.2d 665, 673, 30 P.3d 1245 (2002). This presumption "is an essential thread in the mantle of protection that the law affords the individual citizen." Cruz, 139 Wn.2d at 190 (citations omitted). It "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." Id.

A statutory amendment should not be applied retroactively unless (1) the Legislature evinces a clear intent for retrospective application, (2) the amendment in question is curative, or (3) the amendment is remedial. In re Detention of Elmore, 162 Wn.2d 27, 35-36, 168 P.3d 1285 (2007).

The Legislature did not evince any intent – let alone a clear intent – for retrospective application of the amendment to former RCW 9.94A.737. Laws of 2007, ch. 483, § 305. In Smith, this Court found there was no clear legislative intent for retroactive application of RCW 9.94A.345 even though the “intent” section of the new statute stated, “RCW 9.94A.345 is intended to cure any ambiguity that might have led to the Washington Supreme Court’s decision in State v. Cruz.” Smith, 144 Wn.2d at 672. The Court acknowledged that the Legislature expressed “discontent” with Cruz, which held the same statute did not apply retroactively. But it noted, “RCW 9.94A.345 does not contain an explicit legislative command that the 1997 amendment applies retroactively.” Id (emphasis added). Here, there is neither an explicit nor an implicit legislative command that the 2007 amendment to RCW 9.94A.737 applies retroactively.

Nor was this amendment curative. A curative amendment is one that clarifies or technically corrects an ambiguous statute. Cruz, 139 Wn.2d at 192. A “substantive change is not curative.” Smith, 144 Wn.2d

at 674. The change to RCW 9.94A.737, like the amendments in Cruz and Smith, did not clarify an existing law, but effected a substantive change. It left the prior version of the statute intact, and added a more onerous punishment for three-time violators. Laws of 2007, ch. 483, § 305.

Finally, the amendment to RCW 9.94A.737 was not remedial. “A remedial change is one that relates to practice, procedures, or remedies, and does not affect a substantive or vested right.” Cruz, 139 Wn.2d at 192. DOC concedes the amendment at issue in this case is not procedural. Madsen, 153 Wn. App. at 476; Answer to Motion for Discretionary Review at 7-12. Accordingly, as in Cruz, Smith, and Elmore, the legislation is not remedial and may not be applied retroactively. DOC’s application of the statute to Mr. Flint was improper, and relief may be granted on this basis in addition to or instead of the ex post facto basis.

3. Mr. Flint is entitled to obtain earned early release time credits on the remainder of his sentence.

Mr. Flint contends that if he is returned to DOC confinement for up to the remainder of his sentence, he is still “eligible for ERT [Earned Release Time] credits at the rate of 33 percent” pursuant to DOC Policy 350.100(IX)(A)(2) governing “Community Custody Violators.” Motion for Discretionary Review at 11. The Department does not dispute that Mr. Flint was returned to prison “due to violations of community custody.”

Response at 17. As a community custody violator, therefore, Mr. Flint falls squarely within the plain language of this provision.

DOC argues, however, that the provisions of its Policy 350.100(I)(B)(2), which prohibits offenders from earning “good conduct time” where they are “serving time as a result of lost earned time or lost good conduct time,” should apply here to preclude the Mr. Flint from earning good time upon his return to confinement. On the contrary, this provision’s specific reference to “lost earned time” and “lost good conduct time” reflects the use of terms of art. They refer to those specific sanctions imposed pursuant to DOC 350.100(I)(E)-(H) and (II) and DOC Policy 320.150 for serious prison or work release violations.¹³

The hearing officer in Mr. Flint’s case did not invoke the sanction provisions of this particular DOC Policy to take away some portion of his earned or good conduct time.¹⁴ Instead, the hearing officer invoked the language of RCW 9.94A.737(2) (2007) to “send Mr. Flint back to prison to serve the remaining portion of his sentence.” Response, Appendix B at

¹³ Subsection (I)(F) provides, “Good conduct time lost as a result of disciplinary action for a serious infraction(s) will not be certified by the Superintendent/Community Corrections Supervisor (CCS).” Subsection (I)(E) provides, “The following offenders may lose their uncertified or un-validated good conduct time if found guilty of a serious infraction...”

¹⁴ For example, the sanction for failing to provide urine samples as ordered could have included the “[l]oss of up to 135 days good time credits” or the “[l]oss of 136-270 days good conduct time credits” with the Superintendent’s approval. DOC Policy 320.150, Appendix 1 at 2. Similar sanctions were available for the possession of drug paraphernalia (“[l]oss of up to 270 days good conduct time credits” *Id.* at 1.

6 (Community Custody Hearing Report). As such, Mr. Flint was then a “Community Custody Violator[] confined in a Department facility for sanction time [] eligible for ERT credits at the rate of 33 percent.” DOC 350.100(IX)(2).

Mr. Flint’s continued eligibility for earned release time is consistent with RCW 9.94A.737(2) (2007) because the statute directs that the offender “shall return” to total confinement, but does not require he serve the entire sentence because it contemplates instead that he may serve “up to the remaining portion of his or her sentence.” (Emphasis added.) The statute itself does not direct that the offender serve the entirety of the sentence, only that the sanction must include a portion of total confinement. It certainly does not by its terms then bar the use of earned release time to continue encouraging positive behavior by offenders.

Finally, to the extent there is any ambiguity or uncertainty regarding the scope and application of the statutes, codes and policies, the rule of lenity requires the rejection of the Department’s expansive interpretation. See Smith, 139 Wn.2d at 203-06.

E. CONCLUSION

For the reasons set forth above and in his Motion for Discretionary Review, Personal Restraint Petition, and other briefing, petitioner Eric

Flint asks this Court to reverse the Court of Appeals and grant his personal restraint petition.

DATED this 27th day of July, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lila J. Silverstein", written over a horizontal line.

Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT PETITION OF)
)
)
ERIC FLINT,) NO. 83815-1-I
)
)
Petitioner.)

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