

NO. 83815-1

---

**SUPREME COURT OF THE STATE OF WASHINGTON**

---

In re Personal Restraint Petition of:

ERIC SHERIDAN FLINT,

Petitioner.

---

**SUPPLEMENTAL BRIEF OF THE DEPARTMENT OF  
CORRECTIONS**

---

ROBERT M. MCKENNA  
Attorney General

DONNA H. MULLEN, WSBA# 23542  
Assistant Attorney General  
Corrections Division  
P.O. Box 40116  
Olympia, WA 98501-0116  
(360) 586-1445  
donnam@atg.wa.gov

ORIGINAL

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

10 JAN 19 PM 3:33

BY RONALD A. CARPENTER

*RC*  
CLERK

**TABLE OF CONTENTS**

I. ISSUE PRESENTED .....1

II. INTRODUCTION.....1

III. ARGUMENT .....3

    A. THE COURT OF APPEALS IN *MADSEN* APPLIED  
    AN ERRONEOUS RETROACTIVITY ANALYSIS  
    UNDER THE EX POST FACTO CLAUSE. ....3

    B. THE COURT OF APPEALS APPLIED AN  
    ERRONEOUS ANALYSIS OF “DISADVANTAGE”  
    UNDER THE EX POST FACTO CLAUSE. ....6

IV. CONCLUSION .....8

## TABLE OF AUTHORITIES

### Cases

<i>Accord In re Estate of Burns</i> 131 Wn.2d 104, 928 P.2d 1094 (1997).....	5
<i>California Dep't of Corrections v. Morales</i> 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995).....	6
<i>Collins v. Youngblood</i> 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990).....	6
<i>In re Pers. Restraint of Powell</i> 117 Wn.2d 175, 814 P.2d 635 (1991).....	3, 4
<i>Johnson v. United States</i> 529 U.S. 694, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000).....	3,4
<i>Landgraf v. USI Film Prods.</i> 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).....	4
<i>Lindsey v. Washington</i> 301 U.S. 397, 57 S. Ct. 797, 81 L. Ed. 1182 (1937).....	6
<i>State v. Belgarde</i> 119 Wn.2d 711, 837 P.2d 599 (1992).....	5
<i>State v. Madsen</i> ___ Wn. App. ___, ___ P.3d ___ (2009), WL 4756143 (Dec. 14, 2009) .....	2, 3
<i>State v. Pillatos</i> 159 Wn.2d 459, 150 P.3d 1130 (2007).....	passim
<i>Weaver v. Graham</i> 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).....	7

### Statutes

RCW 9.94A.737.....	passim
--------------------	--------

## **I. ISSUE PRESENTED**

Does former RCW 9.94A.737(2), the three-strikes community custody violation statute, violate the Ex Post Facto Clause of the United States Constitution when applied to an offender whose date of crime occurred before the effective date of the statute?

## **II. INTRODUCTION**

Mr. Flint, an offender convicted of First Degree Robbery committed in 2002, filed an amended personal restraint petition in the Washington Court of Appeals, Division II, challenging the application of former RCW 9.94A.737(2) to his community custody violations. In the amended petition, he alleged that former RCW 9.94A.737(2), requiring the Department of Corrections (hereinafter DOC) to return him to prison for the remainder of his sentence if he was found guilty of a violation at his third community custody hearing, violates the Ex Post Facto Clause of the United States Constitution. The Acting Chief Judge determined that, because RCW 9.94A.737(2) was enacted before Mr. Flint was released from total confinement, Mr. Flint failed to demonstrate that the RCW 9.94A.737(2) was an ex post facto application of the law.

Mr. Flint then filed a motion for discretionary review with this Court, again alleging that RCW 9.94A.737(2) violated the Ex Post Facto Clause. The DOC responded arguing that the statute did not violate the

Ex Post Facto Clause because (1) the statute did not increase the quantum of punishment for his original crime and/or (2) the statute applied prospectively because the precipitating or triggering event for application of the statute applied after the effective date of the statute.

During the pendency of the motion for discretionary review, the Washington Court of Appeals, Division I, decided *State v. Madsen*, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_ (2009), WL 4756143 (Dec. 14, 2009). The Court of Appeals, Division I, held that application of RCW 9.94A.737(2) increased the punishment for Mr. Madsen's original conviction, therefore, the statute violated the Ex Post Facto Clause.

Because the decision in Madsen appeared to be in direct conflict with the Acting Chief, Division II's decision, the Washington Supreme Court Commissioner directed the DOC to file a supplemental memorandum discussing *Madsen* as it related to Mr. Flint's motion for discretionary review.

///

///

///

///

///

### III. ARGUMENT

#### A. THE COURT OF APPEALS IN *MADSEN* APPLIED AN ERRONEOUS RETROACTIVITY ANALYSIS UNDER THE EX POST FACTO CLAUSE.

In *Madsen*, the Court of Appeals, Division I, concluded that the DOC's application of former RCW 9.94A.737(2) to Mr. Madsen, whose crime was committed in 2004, violated the Ex Post Facto Clause. But the court reached that conclusion by applying a retroactivity analysis that conflicts with decision of this Court.

A new or amended statute violates the Ex Post Facto Clause if it is (1) substantive; (2) retroactive; and (3) disadvantageous to the person affected by it. *State v. Pillatos*, 159 Wn.2d 459, 476, 150 P.3d 1130 (2007), citing *In re Pers. Restraint of Powell*, 117 Wn.2d 175, 185, 814 P.2d 635 (1991). The Court of Appeals, in misplaced reliance on a United States Supreme Court decision, held the DOC retroactively applied former RCW 9.94A.737(2) to Mr. Madsen and thereby altered the standard of punishment that existed when he committed the criminal offense for which he was sentenced.

The court relied on dictum in *Johnson v. United States*, 529 U.S. 694, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000), to conclude that sanctions for violating community custody conditions should be treated not as sanctions for violating community custody conditions, but as part of the

penalty for the initial offense.<sup>1</sup> On that basis, the court concluded that returning Mr. Madsen to prison to serve the remainder of his sentence in confinement after he was found to have committed a third violation of community custody conditions constituted retroactive application of former RCW 9.94A.737(2). Appendix 1 (slip op. at 11).

Contrary to the Court of Appeal's holding, former RCW 9.94A.737(2) did not operate retroactively just because the criminal conduct for which Mr. Madsen was sentenced occurred before that statute was enacted. A statute does not operate retroactively "merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Pillatos*, 159 Wn.2d at 471, quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994). Former RCW 9.94A.737(2) did not attach new legal consequences to conduct occurring before its enactment, and it did not operate retroactively against Mr. Madsen. While the maximum period of confinement and the period of community custody are determined by the sentencing court following conviction (and cannot be changed by the

---

<sup>1</sup> The ex post facto discussion in *Johnson* is dictum. Because district courts had authority to impose an additional term of supervised release under the prior law, "we find that consideration of the *Ex Post Facto* Clause is unnecessary." 529 U.S. at 696.

Department), an offender's opportunity to remain in community custody depends on his or her conduct while in community custody, not on the conduct for which he or she was convicted. This was the law under former RCW 9.94A.737(2) and under its predecessor statute, former RCW 9.94A.737(1). Mr. Madsen's return to confinement resulted from his refusal to comply with community custody conditions, not the conduct for which he was convicted and sentenced.

In *Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007), this Court explained that a statute or amendment is not retroactive merely because it applies to conduct that predated its effective date. *Pillatos*, 159 Wn.2d at 471. Rather, it is considered to be retroactive if the "triggering event" for its application happened before its effective date. *Id.*, citing *State v. Belgarde*, 119 Wn.2d 711, 722, 837 P.2d 599 (1992). *Accord In re Estate of Burns*, 131 Wn.2d 104, 110-11, 928 P.2d 1094 (1997).

In this case, the "triggering event" for the DOC's decision to return Mr. Flint to confinement was his violation of community custody conditions, and the violation leading to his reconfinement occurred *after* the effective date of former RCW 9.94A.737(2).

///

///

///

**B. THE COURT OF APPEALS APPLIED AN ERRONEOUS ANALYSIS OF “DISADVANTAGE” UNDER THE EX POST FACTO CLAUSE.**

The Court of Appeals relied on *Lindsey v. Washington*, 301 U.S. 397, 57 S. Ct. 797, 81 L. Ed. 1182 (1937), for its conclusion that Mr. Madsen was ‘disadvantaged’ because former RCW 9.94A.737(2) replaced the DOC’s discretion whether to return an offender to confinement for violating a community custody condition with a mandatory return to confinement upon the third violation. On that basis, the court held former RCW 9.94A.737(2) “altered the standard of punishment that existed when Mr. Madsen committed his original offense.” Appendix 1 (slip op. at 15). This language is similar to that found in *Pillatos*, 159 Wn.2d at 476.

However, the meaning of “disadvantage” was clarified in *Collins v. Youngblood*, 497 U.S. 37, 41, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990), as the Court explained in *California Dep’t of Corrections v. Morales*, 514 U.S. 499, 506 n.3, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995):

Our opinions in *Lindsey*, *Weaver*, and *Miller* suggested that enhancements to the measure of criminal punishment fall within the *ex post facto* prohibition because they operate to the “disadvantage” of covered offenders. But that language was unnecessary to the results in those cases and is inconsistent with the framework developed in *Collins v. Youngblood*, 497 U.S. 37, 41 (1990). After *Collins*, the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of “disadvantage,” nor, as the dissent seems to suggest, on whether an amendment affects a prisoner’s “opportunity to

take advantage of provisions for early release,” see *post*, at 1607, but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.

*Id.* (Underlining added, citations omitted.) In other words, as this Court recognized explicitly in *Pillatos*, the Ex Post Facto Clause forbids the Legislature from enacting laws that impose punishment for an act that was not punishable when committed or that an increase in the quantum of punishment annexed to the crime when it was committed. *Pillatos*, 159 Wn.2d at 475, citing *Weaver v. Graham*, 450 U.S. 24, 28-29, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981); *Powell*, 117 Wn.2d at 184-85.

Former RCW 9.94A.737(2) did not impose punishment for an act that was not punished when committed. Both that statute and the one it superseded specifically authorized the DOC to return an offender to confinement if he or she violated community custody conditions; the only material difference is that former RCW 9.94A.737(2) made return to confinement mandatory upon the third violation, while the prior statute gave the DOC discretion to return an offender to confinement upon any violation of community custody conditions.

Former RCW 9.94A.737(2) also did not increase the quantum of punishment annexed to the crime for which Mr. Madsen was convicted. Following conviction, the sentencing court determined the maximum

period of confinement and the period of community custody, and the DOC cannot change these. However, Mr. Madsen's opportunity to remain in community custody always depended on his conduct while in community custody, not on the conduct for which he was convicted. That fact did not change when former RCW 9.94A.737(2) was enacted. Mr. Madsen's return to confinement resulted from his refusal to comply with community custody conditions, not from the conduct for which he was convicted and sentenced.

Similarly, Mr. Flint's return to confinement resulted from his refusal to comply with community custody conditions, not from conduct for which he was convicted and sentenced.

#### IV. CONCLUSION

For the above stated reasons, Respondent respectfully requests this Court to deny Mr. Flint's motion for discretionary review.

RESPECTFULLY SUBMITTED this 19th day of January, 2010.

ROBERT M. MCKENNA

Attorney General

*Donna H. Mullen* WSBA # 29115

to DONNA H. MULLEN, WSBA #23542

Assistant Attorney General

Corrections Division

PO Box 40116

Olympia WA 98504-0116

(360) 586-1445

**CERTIFICATE OF SERVICE**

I certify that I served a true and correct copy of the foregoing  
**SUPPLEMENTAL BRIEF OF THE DEPARTMENT OF  
CORRECTIONS** on all parties or their counsel of record as follows:

- US Mail Postage Prepaid
- United Parcel Service, Next Day Air
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by \_\_\_\_\_

TO:

ERIC S. FLINT, DOC# 733044  
AIRWAY HEIGHTS CORRECTIONS  
CENTER M / MA57U  
P.O. BOX 2049  
AIRWAY HEIGHTS, WA 99001-2049

I certify under penalty of perjury that the foregoing is true and  
correct.

EXECUTED this 19th day of January, 2010 at Olympia, WA.

  
\_\_\_\_\_  
DAWN R. WALKER  
Legal Assistant

# **APPENDIX 1**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

STATE OF WASHINGTON,	)	NO. 62143-2-I
	)	
Appellant,	)	
	)	
v.	)	PUBLISHED OPINION
	)	
KURT R. MADSEN,	)	
	)	
Respondent.	)	FILED: December 14, 2009

BECKER, J. -- This appeal concerns a statute directing that when an inmate violates the conditions of community custody a third time, he must be sent back to prison for the remainder of his original sentence. The statute became effective before petitioner Kurt Madsen committed his third community custody violation, but after he committed the crimes for which he was originally sentenced. Punishment for a community custody violation is attributed to the crimes for which a defendant was originally convicted, not to the violation. Because the statute increased the measure of punishment for Madsen's original

conviction, the trial court properly ruled that applying it to Madsen would violate the ex post facto clause.

Madsen was convicted in August 2006 on three counts of felony violation of a no-contact order (domestic violence), based on three telephone calls he placed on September 2, 2004.<sup>1</sup> On August 9, 2006, he was sentenced to confinement in prison for 18 months, to be followed by a term of community custody.

When serving a term of community custody, an offender is subject to certain conditions. Violating the conditions of community custody may lead to sanctions being imposed by the Department of Corrections. RCW 9.94A.737.

Madsen was released to community custody on December 21, 2006, after serving less than five months of his 18-month term of confinement. He violated the conditions of community custody twice<sup>2</sup> before July 2007. In July 2007 the provision that is the subject of this appeal went into effect. Laws of 2007, ch. 483, § 305. It was codified as RCW 9.94A.737(2). The legislature has since revised the statute by deleting the provision. Laws of 2008, ch. 231, § 20. We

---

<sup>1</sup> The facts underlying Kurt Madsen's conviction are presented in the unpublished opinion by which this court affirmed his conviction on direct appeal. State v. Madsen, No. 58662-9-I, 2008 WL 625282, March 10, 2008. We rejected his arguments that he should have been allowed to proceed pro se and that the telephone calls should have been found to encompass the same criminal conduct. The Supreme Court accepted Madsen's petition for review and heard argument on September 15, 2009.

<sup>2</sup> The record does not inform us as to what sanctions were imposed for Madsen's first two violations of community custody.

shall refer to the provision at issue in this case, former RCW 9.94A.737(2), as the 2007 statute.

The 2007 statute made it mandatory that when an offender has committed a third violation of community custody, the Department "shall" return that offender to prison to serve the remainder of the sentence in total confinement:

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 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.

Former RCW 9.94A.737(2) (the 2007 statute).

On April 23, 2008, a hearings officer for the Department found that Madsen had violated the conditions of community custody a third time. Madsen's community corrections officer recommended a sanction of 60 days confinement. This was an authorized sanction under the law as it existed before the 2007 statute went into effect. But the hearings officer applied the 2007 statute, and ordered that Madsen had to serve the remainder of his sentence in prison.

On June 12, 2008, Madsen filed a motion under CrR 7.8(b) in King County Superior Court, asserting that applying the 2007 statute to him violated the ex post facto clause. The court agreed and found that, but for the hearings

officer's erroneous reliance on the 2007 statute, "it is highly probable that a sixty day sanction would have been imposed." The Department does not challenge this finding. Madsen had already served more than 60 days for his third violation. Accordingly, the court ordered the Department to release him from prison. This appeal followed.

Initially, the Department contends that the trial court lacked jurisdiction to consider Madsen's motion. The court considered the motion under CrR 7.8(b). That rule specifically allows the court to relieve a party "from a final judgment, order, or proceeding." CrR 7.8(b). According to the Department, this language limits the trial court to amending a judgment and sentence and shows that the superior court does not have the power to grant post-conviction relief. The Department argues that the only proper means for an offender to appeal the result of a community custody hearing is a personal restraint petition filed in this court under RAP 16.4(b). The Department's interpretation of the rule is contradicted by authority. "The Supreme Court, Court of Appeals and superior court have concurrent jurisdiction in habeas corpus proceedings wherein postconviction relief is sought." Toliver v. Olsen, 109 Wn.2d 607, 609, 746 P.2d 809 (1988). A motion in the trial court under CrR7.8(b) is the functional equivalent of a personal restraint petition in the Court of Appeals. See In re Pers. Restraint of Becker, 143 Wn.2d 491, 499, 20 P.3d 409 (2001). The superior court did not err by considering Madsen's motion under CrR 7.8(b).

On the merits, the Department contends the trial court erred when it concluded that applying the 2007 statute to Madsen violated the ex post facto clause. This court reviews a lower court's ruling on a CrR 7.8 motion for an abuse of discretion. State v. Hardesty, 129 Wn.2d 303, 317, 915 P.2d 1080 (1996). If the court applies the wrong legal standard or bases its ruling on an erroneous view of the law, it abuses its discretion. This court reviews underlying questions of law de novo. State v. Lord, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007).

The ex post facto clause, U.S. Const., art. 1, sec. 9, bars application of a law “that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed.” (Emphasis in original.) Calder v. Bull, 3 Dall. 386, 390, 1 L. Ed. 648 (1798), cited in Johnson v. United States, 529 U.S. 694, 699, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000). “A law violates the ex post facto clause if it: (1) is substantive, as opposed to merely procedural; (2) is retrospective (applies to events which occurred before its enactment); and (3) disadvantages the person affected by it.” In re Pers. Restraint of Powell, 117 Wn.2d 175, 185, 814 P.2d 635 (1991), citing Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990). In this case, the Department admits that former RCW 9.94A.737(2) is substantive, that is, “criminal” or “punitive.” See Forster v Pierce County, 99 Wn. App. 168, 179-80, 991 P.2d 687 (2000). The Department contends, however, that as applied to Madsen the

statute is not retrospective or disadvantageous.

Statutes generally operate prospectively to give fair warning that a violation will result in a specific consequence. State v. Pillatos, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007). Ex post facto problems are avoided when a defendant "is subject to the penalty in place the day the crime was committed. After the fact, the State may not increase the punishment." Pillatos, 159 Wn.2d at 475.

Generally, there is no ex post facto problem when a sentencing statute directs the use of an offender's prior convictions to enhance the sentence for a crime committed after the statute goes into effect. See, e.g., State v. Scheffel, 82 Wn.2d 872, 878-79, 514 P.2d 1052 (1973) (Washington Habitual Traffic Offenders Act was not ex post facto because it applied to petitioners only if they committed a third crime after the law went into effect); In re Williams, 111 Wn.2d 353, 363, 759 P.2d 436 (1988) (use of defendant's prior juvenile convictions to determine his sentence for an adult crime did not constitute additional punishment for the prior conduct); State v. Anghern, 90 Wn. App. 339, 952 P.2d 195 (1998) (rejecting ex post facto challenge to the Persistent Offender Accountability Act because the mandatory sentence of life imprisonment is triggered only upon the third conviction for a most serious offense, and statute was enacted before defendant's third most serious offense). In all these cases, the mandatory penalty was in place the day the offender committed the crime

that triggered it. The statute did not retroactively increase the penalty for the prior offense.

The Department contends that the new mandatory penalty for a third community custody violation should be analyzed in the same way as the sentencing laws in the cases cited above. Under the Department's theory of the case, returning Madsen to prison is a sanction for violating community custody conditions after the new statute went into effect.

The Department, however, fails to come to terms with Johnson, one of two United States Supreme Court cases that are dispositive in this case. Johnson rejected the rationale urged by the Department and held that when a punishment is imposed for violating conditions of supervised release, the punishment is attributed to the original offense. Therefore, the law authorizing the punishment cannot be applied to a person whose original offense occurred before the law was enacted.

Johnson involved a provision of the federal Sentencing Reform Act of 1984. That act, similar to Washington's Sentencing Reform Act of 1981, eliminated parole in favor of supervised release, a form of post-confinement monitoring overseen by the sentencing court. Johnson, 529 U.S. at 696-97. Under section 3583(e)(3) of the federal act, one option for dealing with an offender who violated a condition of supervised release was to revoke the term of supervised release and require the person to serve all or part of the term of

supervised release in prison without credit for time previously served in that status. It was not readily apparent from the text of section 3583(e)(3) that the offender could then be ordered to start a new term of supervised release. In 1994, a newly-enacted provision, section 3583(h), gave district courts the explicit authority to impose a new term of supervised release in this situation.

Cornell Johnson committed a felony in October 1993. He was given a prison sentence, to be followed by a three-year term of supervised release. Upon release from prison in August 1995, he began serving the three-year term of supervised release. Seven months into that term, he violated the conditions of supervised release. The district court revoked his supervised release and imposed a prison term of 18 months. The court additionally ordered that after the 18 month prison term, Johnson would begin a new 12-month term of supervised release. For this last order—the new term of supervised release—the district court did not specify whether it was relying on section 3583(e)(3), which had long been in effect, or section 3583(h), the 1994 statute.

Johnson appealed and challenged the new term of supervised release as an ex post facto application of subsection (h). The Sixth Circuit rejected that argument, having already decided that subsection (h) did not alter the punishment for a defendant's original offense and instead imposed punishment for a defendant's violating the conditions of supervised released after subsection (h) was enacted. United States v. Johnson, 181 F.3d 105, 1999 WL 282679, \*1

(6<sup>th</sup> Cir. 1999), citing United States v. Abbington, 144 F.3d 1003, 1005 (6<sup>th</sup> Cir. 1998), cert. denied, 119 S. Ct. 344 (1998).

Johnson appealed. The Supreme Court granted certiorari to resolve a split among the circuits. The government disagreed with the Sixth Circuit's position on subsection (h) and asked the court instead to affirm by broadly interpreting subsection (e)(3) as authorizing the imposition of a second term of supervised release. The Court decided that the Sixth Circuit's position on subsection (h) was erroneous. The Court held that postrevocation sanctions should be treated as part of the penalty for the initial offense, not as a penalty for violating conditions of supervised release:

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. For that matter, such treatment is all but entailed by our summary affirmance of Greenfield v. Scafati, 277 F.Supp. 644 (Mass. 1967) (three-judge court), summarily aff'd, 390 U.S. 713 (1968), in which a three-judge panel forbade on *ex post facto* grounds the application of a Massachusetts statute imposing sanctions for violation of parole to a prisoner originally sentenced before its enactment. We therefore attribute postrevocation penalties to the original conviction.

(Citations omitted.) Johnson, 529 U.S. at 700-01. The Court ultimately affirmed

the imposition of the new term of supervised release based on subsection(e)(3), as advocated by the government.

The cases the Department relies on here, such as Scheffel, Williams, and Anghern, are not undermined by Johnson. A statute setting the severity of a penalty for a defendant who has prior convictions does not inherently pose an ex post facto problem when applied to a defendant whose prior convictions were for behavior occurring before the statute was enacted. The language quoted above from Johnson applies when an offender who has served a prison term for the prior conviction is then punished for violating conditions of release. Under Johnson such punishment is attributed to the prior conviction, not to the violation. When this is done in Madsen's case, it becomes clear that the 2007 statute was applied to him retrospectively, i.e., it was applied to events (the telephone calls he illegally made in 2004) that occurred before its enactment.

The Department asserts that the 2007 statute is entirely different because it applies to a community custody violation, whereas the statute in Johnson was intended to punish offenders for committing a new crime. This attempt at distinction fails. Supervised release in the federal system and community custody in Washington are systems designed to keep an offender under control after release from prison through monitoring the offender's compliance with specified conditions. As the paragraph from Johnson quoted above indicates, in the federal system—just as in Washington—an offender may be sanctioned for

conduct that violates conditions even though the conduct does not, in itself, amount to a new crime.

The Department also claims that the 2007 statute did not increase the punishment for Madsen's original offense and, therefore, did not disadvantage him. The federal criminal statute reviewed in Johnson authorized a district court to impose a new postrevocation penalty consisting of a second term of supervised release. Our 2007 statute, in contrast, merely required that the offender be returned to prison to complete the term of confinement originally ordered. As the Department points out, before the 2007 statute went into effect, the Department already had statutory authority to send any community custody violator back to prison to serve the remainder of the sentence.

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, less credit for any period actually spent in community custody or in detention awaiting disposition of an alleged violation and subject to the limitations of subsection (3) of this section.

Former RCW 9.94A.737(1). The above-quoted statute was in effect when Madsen committed his felony offenses in 2004. But before July 2007, the sanction of return to prison was optional rather than mandatory, no matter how many violations of community custody conditions the offender committed. It is undisputed that if the hearings officer had not applied the mandatory 2007 statute, it is "highly probable" that Madsen would have been sent back to prison for only 60 days.

This distinction brings us to the second dispositive United States Supreme Court opinion, Lindsey v. Washington, 301 U.S. 397, 57 S. Ct. 797, 81 L. Ed. 1182 (1937). Under Lindsey, a statute increases punishment if it makes mandatory a penalty that formerly was optional.

The law in effect when the Lindsey defendants committed grand larceny prescribed that the court would impose a maximum sentence of 15 years and a minimum sentence of not less than six months. The law in effect when they were sentenced, part of new legislation creating a parole board, required that the court impose a mandatory 15-year sentence.

The Lindseys appealed. The Supreme Court of Washington declared that the amended statute did not inflict greater punishment because the maximum punishment remained the same. Under the law in force when the larceny was committed, the court could pronounce a maximum sentence of not more than 15 years. State v. Lindsey, 187 Wash. 364, 371, 61 P.2d 293 (1937). The United States Supreme Court disagreed with this analysis and ruled that sentencing the defendants under the new statute was an *ex post facto* violation:

The effect of the new statute is to make mandatory what was before only the maximum sentence. Under it the prisoners may be held to confinement during the entire fifteen year period. Even if they are admitted to parole, to which they become eligible after the expiration of the terms fixed by the board, they remain subject to its surveillance and the parole may, until the expiration of the fifteen years, be revoked at the discretion of the board or canceled at the will of the governor. It is true that petitioners might have been sentenced to fifteen years under the old statute. But the *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. The Constitution forbids the application of any new punitive measure to a

crime already consummated, to the detriment or material disadvantage of the wrongdoer. It is for this reason that an increase in the possible penalty is *ex post facto*, regardless of the length of the sentence actually imposed, since the measure of punishment prescribed by the later statute is more severe than that of the earlier.

Lindsey, 301 U.S. at 400-01. See also Miller v. Florida, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987) (petitioner was substantially disadvantaged by retrospective application of revised sentencing guidelines, which foreclosed his ability to challenge imposition of sentence longer than his presumptive sentence under old law). In Miller, the State argued that the change in guidelines was not disadvantageous because the prisoner could not show definitively that he would have gotten a lesser sentence under the old law. That is the same argument the Department makes in the present case, but as the Supreme Court concluded in Miller, it is foreclosed by Lindsey. See also California v. Delgado, 45 Cal. Rptr. 3d 501, 508-11 (2006) (application of statute that removed trial court's discretion to impose a shorter term and imposed mandatory community service conditions violated *ex post facto* prohibitions).

Under Lindsey, sentencing Madsen under the 2007 statute was an *ex post facto* violation. Under the statute in effect when Madsen committed his original offenses, the Department had the discretion to return him to prison for the rest of his term on his first violation of the conditions of community custody or any violation thereafter. Under the 2007 statute, the Department lost that discretion: it became mandatory that an offender be returned to prison for a third

violation. The prescribed measure of his punishment became more severe.

The Department suggests that applying the 2007 statute to Madsen does not violate the ex post facto clause because he had fair notice under the earlier statute that his community custody status could be permanently revoked for even his first or second violation. It is true that giving fair notice is a central concern behind the ex post facto clause. Miller, 482 U.S. at 430. But notice of possible punishment does not ensure that the retrospective application of a law will not violate ex post facto prohibitions. The “sole determination of whether a law is ‘disadvantageous’ is whether the law alters the standard of punishment which existed under prior law.” Ward, 123 Wn.2d 488, 498, 870 P.2d 295 (1994). (Emphasis in original.) As the Lindsey Court held, a law is ex post facto if its effect is to make mandatory a measure of punishment that previously was discretionary. “It is plainly to the substantial disadvantage of petitioners 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 15-year term.” Lindsey, 301 U.S. at 401-02. Similarly here, under the law in effect when Madsen committed his crimes, he had the opportunity to receive a penalty for his third community custody violation that was less onerous than being returned to confinement for the remainder of his term. Application of the 2007 statute would have deprived Madsen of that opportunity.

The Department’s position is not supported by its citation to Rise v.

Oregon, 59 F.3d 1556 (9<sup>th</sup> Cir. 1995), and In re Pers. Restraint of Forbis, 150 Wn.2d 91, 74 P.3d 1189 (2003). The provisions involved in those cases—a statute requiring felons to submit blood samples for a DNA data bank and a policy requiring attendance at anger management classes as a condition of retaining earned-release credits—were held not to be punitive. Rise, 59 F.3d at 1562; Forbis, 150 Wn.2d at 100. Here, because it is undisputed that the 2007 statute is punitive, the only question is whether it altered the standard of punishment.

Following Johnson, we conclude that the penalty imposed upon Madsen was punishment attributable to his original offense. Following Lindsey, we conclude the 2007 statute altered the standard of punishment that existed when Madsen committed his original offense. The Department erred by applying the 2007 statute to Madsen because the effect of doing so violated the prohibition against ex post facto laws. In view of this conclusion, it is unnecessary to address the Department's further argument that the legislature actually intended the new statute to apply retrospectively. See Smith v. Doe, 538 U.S. 84, 92, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003) ("If the intention of the legislature was to impose punishment, that ends the inquiry.")

#### ADDITIONAL EVIDENCE

The Department has moved to supplement the record on appeal with two "exhibits." One is a declaration of the Hearings Unit Administrator to the effect

that before the 2007 statute went into effect, the Department was aware of its authority to return a violator to prison for the remainder of the sentence after even a single community custody violation. The Department states that this document should be included in the record because it “bears directly on the issue of the Department’s having authority at the time of Mr. Madsen’s committing his crime to return him to prison to serve the rest of his term in confinement.” The second document is a chronological history of departmental interactions with Madsen during his time on community custody. The Department states that this document “shows that considering the severity of Mr. Madsen’s violations, the Department could have sent him to confinement to serve the rest of his term there,” prior to the effective date of the 2007 statute. The Department cites RAP 9.10 as authority for adding these materials to the record.

RAP 9.10 allows a party to supplement the record transmitted to this court with materials that are already part of the record that was before the trial court. The materials the Department wishes to add to the record were not before the trial court. The request is thus an attempt to submit additional evidence rather than to correct or complete the record of proceedings below. The submission of additional evidence on review is governed by RAP 9.11, not by RAP 9.10.

Additional evidence is seldom taken on appeal and only if the strict criteria of RAP 9.11 are met. East Fork Hills Rural Ass’n v. Clark County, 92

Wn. App. 838, 845-46, 965 P.2d 650 (1998). The Department does not cite RAP 9.11 and does not attempt to satisfy its criteria. The additional evidence is unnecessary and irrelevant; it is the previous statute that shows that the hearings officer could have imposed the same penalty on Madsen without the 2007 statute. Also, no reason is given why the Department did not make its exhibits part of the record in the trial court. The motion to supplement the record is denied.

The decision of the trial court is affirmed.

Becker, J.

WE CONCUR:

Schindler, CT

Appelwick, J