In the Matter of the Personal Restraint Petition of Flint (Eric Sheridan)

No. 83815-1

Stephens J. (dissenting)—Contrary to the majority's conclusion, this case is controlled by *Johnson v. United States*, 529 U.S. 694, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000). *Johnson* makes it clear that the triggering event for application of a statute revoking community custody is the date of the offender's underlying offense, not the time of his violation. Hence, I would hold that the statute at issue here, former RCW 9.94A.737(2) (2007), was impermissibly applied to Eric Flint retroactively. Like the *Johnson* Court, I would end my analysis there and would not reach the question of whether Flint was subjected to an ex post facto punishment. I also would not consider whether the statute impairs Flint's vested rights or if it imposes new consequences for completed events. Accordingly, I dissent.

Flint committed his offense in 2002. He violated his conditions of confinement for the third time in 2008. The Court of Appeals reasoned that former RCW 9.94A.737(2) was "enacted before he was released from total confinement and so applied throughout his term of community custody." Order Dismissing

Petition (Wash. Ct. App. Oct. 5, 2009) at 2. The majority agrees. Majority at 9.

The United States Supreme Court reviewed an almost identical question in *Johnson*, 529 U.S. 694. In 1994, Congress amended federal law to give district courts the express authority to impose an additional term of supervised release upon an offender who was returned to confinement after a violation of community custody. *Id*. at 698. Johnson received such a term to follow confinement after his community custody was revoked. He argued application of the 1994 provision, 18 U.S.C. § 3583(h), was an ex post facto violation. The lower court disagreed and "disposed of the *ex post facto* challenge by applying its earlier cases holding the application of § 3583(h) not retroactive at all: revocation of supervised release 'imposes punishment for defendants' new offenses for violating the conditions of their supervised release.'" *Id.* at 699-700 (quoting *United States v. Page*, 131 F.3d 1173, 1176 (6th Cir. 1997)). The United States Supreme Court granted certiorari to resolve a split among the circuit courts on whether application of the statute was retroactive if the underlying offense was committed before the statute's effective date. *Id*. at 699.

The Court rejected the view that postrevocation penalties are attributable to a violation of the terms of supervised release. *Id.* at 701. The Court explained:

> On this theory, that is, if the violation of the conditions of supervised release occurred after the enactment of § 3583(h), as Johnson's did, the new law could be given effect without applying it to events before its enactment.
>
> *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. See 18 U.S.C. § 3583(e)(3) (1988 ed., Supp. V). 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.

Id. at 700 (emphasis added). Because the 1994 amendment imposed a penalty for the original offense, the Court in *Johnson* invoked the "longstanding presumption" that it applied only to cases in which the initial offense occurred after its effective date. *Id.* at 702.

Johnson is entirely on point. In light of that case, it is clear that the Department of Corrections (DOC) mistakenly applied the 2007 statute retroactively to an offense committed in 2002. The majority's attempt to marginalize *Johnson* is unconvincing. It states that *Johnson* is different because the federal law at issue there imposed additional punishment: a second term of earned early release following incarceration. Majority at 14. But, *Johnson*'s conclusion that § 3583(h) did not apply retroactively had nothing to do with whether that statute authorized a new punishment. It turned solely on identifying the proper triggering event. *Johnson*, 529 U.S. at 702.

The *Johnson* Court's later discussion of whether the 1994 amendment increased the measure of punishment for Johnson's violation of supervised release was entirely separate from its discussion of retroactivity. *Id.* at 701. "Since

postrevocation penalties relate to the original offense, to sentence Johnson to a further term of supervised release under § 3583(h) would be to apply this section retroactively (and to raise the remaining *ex post facto* question, whether that application makes him worse off)." *Id*. The Court concluded it was unnecessary to reach this question. *Id.* at 702 ("Given this conclusion [nonretroactivity], the case does not turn on whether Johnson is worse off under § 3583(h) than he previously was under § 3583(e)(3), as subsection (h) does not apply, and the *ex post facto* question does not arise.").

Johnson provides clear direction regarding the triggering event for a statute revoking community custody following community custody violations. The majority nevertheless insists that the triggering event for application of former RCW 9.94A.737(2) is the defendant's violation of community custody. Majority at 9. The majority's confusion may be understandable in light of the DOC's unclear position on retroactivity. The DOC argues that the "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 [o]n prior law.'" Suppl. Br. of DOC (Jan. 19, 2010) at 4 (quoting *State v. Pillatos*, 159 Wn.2d 459, 471, 150 P.3d 1130 (2007)). The majority also relies on *Pillatos*, 159 Wn.2d 459, and upon *In re Estate of Burns*, 131 Wn.2d 104, 110-11, 928 P.2d 1094 (1997). Majority at 7-9. But *Pillatos* explained that "'[a] statute operates prospectively when the *precipitating event* for operation of the statute occurs after enactment, even when

the precipitating event originated in a situation existing prior to the enactment [of the statute].'" *Pillatos*, 159 Wn.2d at 471 (first alteration in original) (quoting *Burns*, 131 Wn.2d at 110-11). *Burns* instructs that in determining "the precipitating event giving rise to application of the statute, a court may look to the subject matter regulated by the statute." *State v. T.K.*, 139 Wn.2d 320, 330, 987 P.2d 63 (1999) (citing *Burns*, 131 Wn.2d at 112). As far as the subject of community custody violations is concerned, *Johnson* confirms that the precipitating event is the commission of the original conviction.[1] I would hold that the DOC impermissibly applied the 2007 amendment retroactively to an event occurring prior to its enactment. For this reason, I dissent.

[1] Moreover, in *Pillatos*, the legislative act at issue "clearly contemplate[d] that either the entry of the plea or the trial is the precipitating event. Based on its plain language, the act is not retroactive in this context." *Pillatos*, 159 Wn.2d at 471. Here, the statute at issue does not clearly contemplate that the event triggering its operation is the community custody violation as opposed to the original offense. As in *Johnson*, the general rule is that the original offense is the triggering event, and absent clear legislative intent to the contrary, the statute is presumed to apply only to offenses committed after its effective date. *See Johnson*, 529 U.S. at 702.

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WE CONCUR:

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