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Looking At The Law

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A Guide to Statutory Retroactivity in the Revocation Context

This article discusses principles that determine which version of a punitive statute applies to a specific offender in the context of probation or supervised release revocation proceedings. Those precepts are constitutional (the *Ex Post Facto* Clause), jurisprudential (the presumption against retroactivity [i]), and statutory (the federal savings statute). This article demonstrates that applying these principles enables officers to select the correct version of a revocation provision and accurately determine whether a substantive statute may be invoked as a potential basis for revoking a particular offender's term of supervision.

I. The *Ex Post Facto* Clause and the Presumption Against Retroactivity

The *Ex Post Facto* Clause generally prohibits legislators from altering or creating criminal consequences for an action taken prior to legislative action. [ii] Current understanding of the *Ex Post Facto* Clause is based on the Supreme Court's initial interpretation of the provision in *Calder v. Bull* [iii]. In *Calder*, the Court identified four types of *ex post facto* laws: 1) a law that "makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action"; 2) a law that "aggravates a crime, or makes it greater than it was, when committed"; 3) a law that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed"; and 4) a law that "alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." [iv]

Revocation sanctions for violating post-conviction conditions of supervision fall within the third type of *ex post facto* laws described in *Calder*. To prevail on this type of *ex post facto* claim, an offender has to satisfy a two-part test. First, the offender must establish that the challenged law operates retroactively, that is, it applies to conduct completed before its enactment. Second, the offender must establish that the challenged law increases the penalty from whatever the law provided when the offense of conviction was committed. [v] Counsel and courts often apply the two-part *ex post facto* test to a new revocation provision without first examining the legislation for evidence that Congress intended the provision to be applied retroactively. Forgoing this step can lead to the inaccurate conclusion that a new revocation provision applies to all future revocation proceedings if it appears no more punitive than the predecessor statute.

The revocation sentence under review by the Supreme Court in *Johnson v. United States* [vi] illustrates this problem. In *Johnson*, the Supreme Court considered whether legislation adding a new revocation sanction to 18 U.S.C. § 3583 could be applied to an offender whose offense of

conviction had preceded enactment of the provision but whose violation of a condition of supervised release occurred after enactment. The new revocation sanction was created by the Violent Crime Control and Law Enforcement Act of 1994 ("VCCA"), [vii] was enacted on September 13, 1994, and codified as a new subsection (h) of 18 U.S.C. § 3583. Section 3583(h) specifically authorized courts to impose a term of supervised release to follow a revocation sentence of imprisonment. Congress had not specified an effective date for the new provision, which meant that the law took effect on the date of its enactment and could only be applied to offenders who committed their offenses on or after the date the President signed the bill into law. [viii] Petitioner Cornell Johnson, who committed his offense of conviction in October 1993, had violated one of his conditions of supervised release several months after the VCCA's enactment.

Before the Supreme Court's decision in *Johnson*, circuit courts had disagreed whether § 3583(h) could be applied to offenders like Johnson who committed their offenses prior to September 13, 1994. Resolution of this issue depended upon whether revocation of supervised release was characterized as punishment for a post-enactment violation or as conditional punishment imposed at sentencing. The Sixth Circuit precedent on review before the Supreme Court characterized revocation as punishment for a new "offense." Under such precedent, applying § 3583(h) to a violation that occurred post-enactment would not be a "retroactive" application of the new law, but punishment for an offense that had occurred after the law was enacted. [ix] Other circuits disagreed with the Sixth Circuit and held that applying § 3583(h) retroactively would disadvantage offenders in violation of the *Ex Post Facto* Clause by increasing the revocation penalty that was an inherent part of a pre-enactment sentence. [x]

In *Johnson*, the Court rejected the Sixth Circuit's analysis, and held that the prudential rule proscribing retroactive application of new laws precluded the retroactive application of §3583(h). [xi] In addition, the Court held that reimposition of supervised release was implicitly authorized under § 3583(e)(3) for offenses committed *before* enactment of § 3583(h). [xii] The Court found that characterizing supervised release violations as new offenses, as the Sixth Circuit did, avoided the retroactivity element of an *ex post facto* claim, but invited claims that the Double Jeopardy Clause would be violated if a crime was punished by revocation *and* a separate criminal
prosecution. [xiii] The Court held that revocation sanctions were part of the sentence for the original offense, thereby averting potential conflict with the Double Jeopardy Clause while limiting revocation sanctions to those available at sentencing.

Once the *Johnson* Court determined that imposing a revocation sanction created by post-offense legislation would result in retroactive application, it only had to determine that the new law increased the revocation penalty to find an *ex post facto* violation. Instead of proceeding to the "increased punishment" prong of the *ex post facto* test, however, the Court relied upon the judicial presumption that, unless otherwise stated, Congress intends that statutes operate prospectively. [xiv] The Court observed that this presumption is particularly strong when criminal laws are under consideration and the *Ex Post Facto* Clause is implicated. [xv]

The *Johnson* Court, while relying upon the presumption against retroactivity, did not describe its contours and limitations. Supreme Court cases decided before *Johnson*, most notably *Landgraf v. USI Film Products*, [xvi] made it clear that "(e)lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." [xvii] To implement these basic considerations of fairness, the presumption against retroactivity applies to "'every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.'" [xviii] In *Lynce v. Mathis*, [xix] the Court stated that the specific prohibition against ex post facto laws was "only *one* aspect of the broader constitutional protection against arbitrary changes in the law." [xx] The Court in *Johnson* held that this presumption against retroactive effect can only be overcome by a "clear statement" from Congress that it intended the law to have retroactive effect. [xxi]

The presumption applies if "the new provision attaches new legal consequences to events

completed before its enactment." [xxii] It generally does not apply, however, if the legislation is primarily prospective in nature (such as laws authorizing or negating the availability of injunctive relief), [xxiii] if it creates or ousts jurisdiction, [xxiv] or if it alters procedural rules. [xxv] Nonetheless, the presumption may apply even to these exceptions if giving retroactive effect would affect substantive rights or the "primary" conduct of litigation. [xxvi] Given that even the exceptions to the presumption against retroactivity are subject to exceptions, the Court engaged in understatement when it observed that "deciding when a statute operates 'retroactively' is not always a simple or mechanical task." [xxvii] Fortunately, legislation amending revocation provisions will generally affect substantive rights and therefore have only prospective effect, or it will alter procedure and generally will apply to all offenders.

As clarified by *Johnson*, the general rule in the revocation context is this: absent specific direction from Congress regarding a law's effective date, a new statute that creates or increases a penalty is assumed to only apply prospectively: that is, to offenders whose offenses were committed on or after the date of enactment. [xxviii] Because revocation sanctions are deemed to be a component of the original sentence, and the sentence must be one that applied when the offense was committed, revocation sanctions also are limited to those that applied when the offender committed the offense. If a statute alters existing procedures but will neither affect an offender's sentencing exposure nor influence the court's decision about the propriety of a revocation sanction, it is not subject to the presumption against retroactivity. If Congress specifies that a revocation sanction is to apply retroactively, the presumption against retroactivity does not apply. Instead, a court considering the propriety of applying the statute retroactively would have to determine if such application violates the *Ex Post Facto* Clause by increasing the revocation penalty from whatever the law provided when the offense of conviction was committed.

II. The Federal Savings Statute: 1 U.S.C. § 109

While the *Ex Post Facto* Clause prohibits the retroactive application of a new punitive statute that disadvantages a wrongdoer, no constitutional provision limits the retroactive enforcement of legislation that ameliorates a pre-existing provision. Does this mean that a defendant may benefit from legislation that *decreases* or repeals a sentencing provision that he was subject to when he committed his offense? [xxix] Under common law, the answer would have depended on whether the new legislation replaced the entire statute setting forth the offense and its penalty or only lowered the prior penalty. The repeal of an entire criminal statute or re-enactment by amendment when the new statute increased a penalty or broadened the scope of prohibited conduct precluded a prosecutor from charging or convicting a defendant under *either* statute. Conviction and sentencing under the former statute was precluded by the doctrine of abatement. [xxx] Conviction and sentencing under the newly-enacted statute would be unconstitutional because it would be an *ex post facto* law if applied to a defendant who had violated the former law. [xxxi] If a statutory amendment simply reduced punishment, however, courts generally held that an offender who violated the version of the statute with the more onerous penalty could receive the more lenient punishment set forth in the amending legislation. [xxxii] The common law abatement rule was designed to implement presumed legislative intent when Congress had failed to specify whether it intended to repeal or preserve a prior criminal law with regard to defendants who had violated it before its amendment.

Whether a new criminal sanction is more lenient than its predecessor, and therefore may be applied retroactively, may be difficult to determine, however. For example, which hypothetical statutory maximum sentencing provision is more lenient – one calling for no more than 10 years imprisonment with no supervised release to follow or one providing for a maximum of 10 years *combined* imprisonment and supervised release? What if the potential maximum revocation sentence for the latter provision was an additional five years imprisonment with an additional term of supervised release? To avoid such questionable weighing of penalties and foreclose fortuitous escapes from prosecution due to technical abatements of amended or repealed statutes, Congress and most state legislatures abolished the common law presumption by enacting general savings statutes specifying that amendments to a civil or criminal statute do not extinguish penalties, rights, or liabilities accrued or incurred under the original law. [xxxiii] The federal

savings statute ("savings statute") states that,

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. § 109. While the savings statute provides that it applies to the "*repeal* of any statute," courts have uniformly interpreted this language to mean that the statute applies to statutory amendments as well as repeals. [xxxiv]

The plain language of the federal savings statute requires that when an individual is subject to a harsh penalty or liability under *any* statute that is either effectively repealed by an ameliorative amendment or eliminated entirely, courts must apply the harsher repealed or amended version to offenses that occurred prior to repeal or amendment. The only exception to this rule is if Congress directs that the more lenient provision applies to pre-enactment offenses. The Supreme Court in *Johnson* held (as did most circuit courts prior to *Johnson*) that revocation sanctions are those that were in effect when an offender committed his original offense. The savings statute and presumption against retroactivity applied in *Johnson* require that courts rely upon the supervised release sanctions that were part of the punishment when the original offense was committed, regardless of subsequent ameliorative amendment to revocation provisions. [xxxv]

III. Applying the *Ex Post Facto* Clause, the Presumption Against Retroactivity, and the Savings Statute in the Revocation Context

A. 1994 Amendments to Mandatory Revocation Provisions

Prior to the VCCA's September 13, 1994, enactment, 18 U.S.C. §§ 3565(a) and 3583(g) required mandatory revocation of a term of probation or supervised release when an offender violated a condition of supervision by possessing a controlled substance. [xxxvi] Several circuit courts interpreted §§ 3565(a) and 3583(g) to require a finding of possession and mandatory revocation after a positive urine test. [xxxvii] VCCA sections 110505 and 110506 removed the mandatory minimum term of imprisonment (one-third the sentence of probation or supervised release after revocation), and simply required the court to impose a sentence that included a "term of imprisonment." [xxxviii]

In addition, VCCA section 20414 amended § 3563(a) to require the court, acting in accordance with the Sentencing Guidelines, to consider exempting an offender who fails a drug test from the § 3565(b) mandatory revocation provisions:

The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3565(b), when considering any action against a defendant who fails a drug test administered in accordance with paragraph (4). [xxxix]

A similar amendment was made to section 3583(d) with respect to the 3583(g) mandatory revocation provision for supervised release. [xl]

Taken together, the new VCCA provisions regarding drug testing and revocation required a court to revoke and impose a sentence of imprisonment when an offender was found to have illegally *possessed* a controlled substance. A positive drug test, however, required a court to consider options other than imprisonment (unless possession and not merely a positive drug test was established). Although the amended versions of §§ 3565(b) and 3583(g) still required a district court to revoke probation or supervised release and impose a term of imprisonment once possession was proven, they gave the court discretion as to length of the imprisonment for probation and supervised release revocations, [xli] and they authorized a court to forego imprisonment for a positive drug test if appropriate drug treatment services are available. [xlii] These statutory amendments were incorporated into the relevant section of the United States

Sentencing Guidelines ("guidelines") in 1995. [xliii]

Following enactment of the VCCA amendments, the Office of General Counsel ("OGC") advised that courts could apply the more lenient post-VCCA versions of §§ 3565(b) and 3583(g) to offenders who had been sentenced before the VCCA's September 13, 1994, effective date. OGC acknowledged that this advice was in tension with the plain language in the savings statute that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." [xliv] OGC advocated that courts view the savings statute as applying only to the sentence for an offense, but not to the §§ 3563, 3565, and 3583 provisions governing the revocation of supervised release. [xlv]

OGC's opinion that the savings statute applied to the sentence imposed for the offense but not to revocation sanctions may have been a tenable position prior to the Supreme Court's holding in *Johnson*. However, after *Johnson* established that the presumption against retroactivity and the *Ex Post Facto* Clause required that courts apply the revocation provisions that were in effect when an offense occurred, the argument that the savings statute did not apply to revocation provisions became insupportable. The plain language of the savings statute and the Court's holding in *Johnson* that revocation penalties are those that were in effect when the offense was committed resolved any doubts concerning which version of §§ 3563, 3565, and 3583 applies upon revocation. When an individual incurs a penalty or liability under *any* statute that subsequently is repealed or amended by ameliorative legislation, courts must continue to impose the harsher version of the statute unless Congress had expressly stated that the recent lenient legislation should be applied retroactively. Because the VCCA did not provide for retroactive application of its ameliorative provisions, the better view is that the savings statute limits their application to offenders who committed their offenses after its effective date.

The Second Circuit is the only circuit court to directly address the propriety of retroactively applying one of the VCCA amendments based upon the Supreme Court's holding in *Johnson* and the savings statute. In its 2003 decision in *United States v. Smith*, [xlvi] the Second Circuit held that the Supreme Court's holding in *Johnson* and the plain language of the savings statute precluded retroactive application of the VCCA's ameliorative amendment to § 3583(g). The defendant in *Smith* had contended that the district court erred when revoking his term of supervised release by relying upon the pre-VCCA version of § 3583(g) that applied when he committed his offense rather than the more lenient post-VCCA version of § 3583(g) in effect when his supervision was revoked. The Second Circuit held that the fundamental "message of *Johnson*" was that "supervised release sanctions are part of the punishment for the original offense, and that the sanctions of the original offense remain applicable, despite subsequent amendment." [xlvii] In addition, the *Smith* panel held that the savings statute preserved the original penalties in effect when the offender had committed his offense, including those relating to supervised release. Finally, the Second Circuit held that the version of the sentencing guidelines in effect at the time of Smith's revocation, which indirectly supported Smith's argument, conflicted with the pre-VCCA version of § 3583(g). Because sentencing guidelines are the equivalent of legislative rules adopted by federal agencies, and statutes always trump conflicting rules, the pre-VCCA version of § 3583(g) prevailed over the conflicting guidelines. [xlviii]

B. 2002 Amendments to Mandatory Revocation Provisions and the Enactment of Juvenile Supervised Release

In November 2002, section 2103 of the 21st Century Department of Justice Appropriations Authorization Act ("the DOJ Authorization Act") [xlix] once again amended §§ 3565(b) and 3583(g) to establish a fourth basis for mandatory revocation of probation or supervised release. The DOJ Authorization Act required revocation if an offender "as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year." [l] OGC analyzed the DOJ Authorization Act in a January 15, 2003, memorandum that recommended that

officers count any positive drug test after November 2, 2002 (the effective date of the Act), towards the four or more positive tests mandating revocation regardless of whether the offender had committed his offense before or after the DOJ Authorization Act's effective date. This advice was not unqualified, however. The memorandum cautioned that "Chiefs may wish to consult with their courts regarding the reporting of the first three positive drug tests." [li]

The rationale provided for this advice was that applying §§ 3565(b)(4) and 3583(g)(4) retroactively would not disadvantage offenders. Rather, application of these provisions arguably would ameliorate the harsher pre-existing mandatory revocation provisions in 18 U.S.C.

§§ 3565(b)(1) and 3583(g)(1) for "drug possession." [lii] The pre-existing "drug possession" revocation provisions of §§ 3565(b)(1) and 3583(g)(1) were characterized as harsher than the DOJ Authorization Act's "more than three positive drug tests" provisions of 18 U.S.C.§§ 3565(b)(4) and 3583(g)(4), because the latter provisions allowed a court to consider drug treatment in lieu of revocation even after four or more failed drug tests. Likewise, the pre-DOJ Authorization Act versions of §§ 3565(b) and 3584(d) placed offenders at risk of revocation for even one positive drug test. The memorandum opined that, because there was no similar treatment alternative to revocation for offenders who "possess" drugs, a court would not run afoul of the *Ex Post Facto* Clause if it applied the amendments to offenders who committed their offenses before November 2, 2002 ("pre-DOJ Authorization Act offenders").

While the January 15, 2003, OGC memorandum may have correctly determined that retroactive application would not violate the *Ex Post Facto* Clause, it conflicted with the Supreme Court's mandate that "'congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.'" [liii] Because nothing in the DOJ Authorization Act overcomes this presumption of prospective effect, OGC revised the memorandum in November 2005 [liv] to counsel that §§ 3565(b)(4) and 3583(g)(4) should not be applied retroactively to pre-DOJ Authorization Act offenders. Rather, those provisions should only be applied to offenders who committed their crimes after November 2, 2002.

OGC expressed a similar view in 2005 regarding the non-retroactivity of Section 12301 of the DOJ Authorization Act, which amended 18 U.S.C. § 5037 to authorize a term of supervised release for juveniles. [lv] OGC's 2005 revised advice was consistent with the Eighth Circuit's 2004 retroactivity analysis in *United States v. J.W.T.* [lvi] In *J.W.T.*, the Eighth Circuit reviewed a district judge's determination that the juvenile supervised release provision created by the DOJ Authorization Act could be applied retroactively even if the underlying act of delinquency occurred before November 2, 2002. As an initial matter, the Eighth Circuit considered the threshold requirement of clear congressional intent that courts apply the statute retrospectively. The Eighth Circuit held that, because there was no evidence that Congress intended the law to apply retroactively, the presumption against retroactivity precluded courts from applying the amended statute to a juvenile whose delinquent act had occurred before enactment. The court's reasoning was straightforward: there is a presumption that legislation should not be applied retroactively absent an express indication to the contrary by Congress; such a statement was absent regarding juvenile supervised release; therefore, the November 2002 amendments to § 5037 could only be applied prospectively. The Eighth Circuit invoked the Supreme Court's holding in *Johnson* that a term of supervised release must be considered as part of the penalty for the original criminal act (or, in this context, the act of juvenile delinquency). [lvii]

As in *Johnson* and *J.W.T.*, nothing in the DOJ Authorization Act amendments to §§ 3565(b) and 3583(g) countered the presumption against retroactive application of new legislation to those who committed their offenses prior to enactment. Even if the amendments to §§ 3565(b), 3583(g), and 5037 could be deemed ameliorative, the savings statute, 1 U.S.C.§ 109, would preclude offenders from benefitting from more lenient laws passed after they had committed their offenses. [lviii]

C. Violations of 18 U.S.C. § 2250 as a Basis for Revocation

Section 141 of the "Sex Offender Registration and Notification Act" ("SORNA"), which is Title

I of the "Adam Walsh Child Protection and Safety Act of 2006" ("Adam Walsh Act"), [lix] created 18 U.S.C. § 2250, [lx] a new federal crime of failing to register in accordance with SORNA. Violations of § 2250 are increasingly relied upon as a basis for revoking supervised release. Because SORNA did not specify effective dates for most of its sex offender registration requirements or the new federal crime of failure to register, § 2250 took effect on July 27, 2006, the date of its enactment. Nonetheless, district courts have disagreed about whether application of 18 U.S.C. § 2250 violates the *Ex Post Facto* Clause when one or more (but not all) elements of the offense occurred prior to its date of enactment. Officers must resolve the retroactivity issue whenever a basis for revocation is a § 2250 violation involving an offender who committed the sex offense that requires registration prior to July 27, 2006.

Determining whether application of § 2250 violates the *Ex Post Facto* Clause is complicated because the statute is violated only if an offender was required to register under SORNA by virtue of 1) a conviction under federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States (collectively "a federal sex offense conviction") and the offender knowingly failed to register or update a prior registration; or 2) a conviction under state law and the offender "travels" in interstate or foreign commerce or enters or leaves, or resides in, Indian country and knowingly failed to register or update a prior registration. 42 U.S.C. § 16913(d) authorized the Attorney General to specify the applicability of SORNA to sex offenders who had been convicted of a sex offense before July 27, 2006, and who were unable to comply [lxi] with initial registration requirements. On February 28, 2007, the Attorney General issued an interim rule "specify[ing] that the requirements of [SORNA] apply to sex offenders convicted . . . before the enactment of [SORNA]." [lxii]

The interim rule prompted offenders with pre-enactment state sex offense convictions to raise *ex post facto* challenges to § 2250 if they had traveled in interstate commerce and/or failed to register or update a registration after the enactment of SORNA but before the February 28, 2007, interim rule that purported to clarify their registration obligations. Many district courts found *ex post facto* violations where an offender had been convicted of a sex offense prior to SORNA's July 27, 2006, enactment but was charged with violating § 2250 by failing to register or update a registration *prior* to issuance of the February 28, 2007, interim rule that established the registration
obligation. [lxiii] Other district courts have dismissed indictments for *ex post facto* violations when the offender's interstate travel occurred before SORNA's July 27, 2006, enactment even though the alleged failure to register or update a registration occurred both before *and* after February 28,
2007. [lxiv] The latter category of cases found violations on the grounds that a § 2250 violation is not a "continuing violation," like conspiracy. Instead, the crime is deemed to be complete as soon as the obligation to register ripened after interstate commerce from one jurisdiction to another. [lxv]

A significant number of district courts concluded that § 2250 was effective upon its July 26, 2007, enactment as to all those convicted of sex offenses after that date who failed to register as required by SORNA, but it did not apply to those with pre-SORNA convictions until the Attorney General eventually issued the interim rule on February 28, 2007. Until binding circuit court precedent clarifies the retroactivity issue, officers should invoke a violation of § 2250 as a basis for revocation of supervision with caution. To avoid *ex post facto* problems when petitioning to revoke based on an apparent § 2250 violation, [lxvi] officers may petition to revoke offenders who qualify as sex offenders under SORNA because of a *post*-July 26, 2007, federal sex offense conviction if the offender failed to register or update a registration after July 26, 2007. If the qualifying federal sex offense conviction was *prior to* July 26, 2007, a petition may be premised on a failure to register or update a registration after the Attorney General had issued the interim rule on February 28, 2007. Officers may petition to revoke offenders who qualify as sex offenders under SORNA because of a *post*-July 26, 2007, *State* sex offense conviction if the offender thereafter traveled in interstate commerce (as defined in § 2250(a)(2)(B)), and failed to register or update a registration. If a State sex offense conviction was *prior to* July 26, 2007, a

petition will likely survive challenge if the requisite interstate travel and failure to register or update a registration occurred after the Attorney General issued the interim rule on February 28, 2007.

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The Influence of Social Distance on Community Corrections Officer Perceptions of Offender Reentry Needs

1. Please direct all correspondence to Jacqueline Helfgott, Criminal Justice Department, Seattle University, 901 12th Ave., P.O. Box 222000, Seattle, WA 98122-1090, jhelfgot@seattleu.edu.
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2. Helfgott (1997) suggested that if prisons are ecologically constructed so that prisoners have opportunities to make meaningful choices to live constructively while incarcerated, communities must also provide opportunities and niches to enable ex-offenders to reintegrate successfully into society upon release

3. While this value is below the often cited .70 level recommended by Nunnally (1978) and others (e.g., Carmines & Zeller, 1979), Devellis (1991) indicates that alpha coefficients between .65 to .70 are minimally acceptable.

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i. A "retroactive statute" is a new "law [that] changes the legal consequences of acts completed before its effective date." *Weaver v. Graham*, 450 U.S. 24, 31 (1981); see also *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269 (1994) ("[a] court must ask whether the new provision attaches new legal consequences to events completed before its enactment"); Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 692 (1960) ("A retroactive statute is one which gives to preenactment conduct a different legal effect from that which it would have had without the passage of the statute.") (footnote omitted).

ii.

[ii.] *See* Art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.") & Art. I , § 10, cl. 1 ("No state . . . shall pass any ex post facto law, or law impairing the obligation of contracts.").

[iii.] 3 U.S. (3 Dall.) 386 (1798).

[iv.]. *Id.* at 390 (emphasis omitted).

[v.] *SeeJohnson v. United States*, 529 U.S. 694, 699 (2000); *California Dep't of Corrs. v. Morales*, 514 U.S. 499, 506-07, n.3 (1995).

[vi.] 529 U.S. 694 (2000).

[vii.] Pub. L. No. 103-322, §110505, 180 Stat. 1796, 2016-17 (1994).

[viii.] *Johnson*, 529 U.S. at 701-02; *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991).

[ix.] *See, e.g., United States v. Abbington*, 144 F.3d 1003, 1005 (6 th Cir. 1998); *United States v. Page*, 131 F.3d 1173, 1175-76 (6 th Cir. 1997).

[x.] *See, e.g., United States v. Lominac*, 144 F.3d 308, 315 n.9 (4 th Cir. 1998); *United States v. Dozier*, 119 F.3d 239, 242 n.2 (3d Cir. 1997); *United States v. Collins*, 118 F.3d 1394, 1397 (9th Cir. 1997). Prior to the VCCA's enactment, two circuit's presciently had held that § 3583(e) potentially could serve as a basis for reimposing a further term of supervised release after revocation. *See, e.g., United States v. O'Neil*, 11 F.3d 292, 301 (1 st Cir. 1993); *United States v. Schrader*, 973 F.2d 623, 624-35 (8 th Cir. 1992). The majority of the circuits had held that there was no pre-VCCA authority to reimpose a term of supervised release after revocation. *See, e.g,. United States v. Malesic*, 18 F.3d 205, 205-06 (3d Cir. 1994); *United States v. Truss*, 4 F.3d 437, 439 (6th Cir. 1993); *United States v. Tatum*, 998 F.2d 893, 895-96 (11th Cir. 1993); *United States v. Rockwell*, 984 F.2d 1112, 1116-17 (10th Cir. 1993); *United States v. McGee*, 981 F.2d 271, 274-76 (7th Cir. 1992); *United States v. Koehler*, 973 F.2d 132, 134-36 (2d Cir. 1992); *United States v. Cooper*, 962 F.2d 339, 341-42 (4th Cir. 1992); *United States v. Holmes*, 954 F.2d 270, 272-73 (5th Cir. 1992); *United States v. Behnezhad*, 907 F.2d 896, 898-99 (9th Cir. 1990). Subsection (h) was Congress's response to the Sentencing Commission's written request that Congress amend the Sentencing Reform Act "to grant sentencing judges the power the majority courts wish they had and the minority courts have found them to have already." *Malesic*, 18 F.3d at 206 & n.2.

[xi.] *Johnson*, 529 U.S. at 702.

[xii.] *Id.* at 713.

[xiii.] *Id.* at 700.

[xiv.] "[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf*, 511 U.S. at 265; *see also Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 311-12 (1994) ("'The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.'").

[xv.] *Johnson*, 529 U.S. at 701-02 ("The *Ex Post Facto* Clause raises to the constitutional level one of the most basic presumptions of our law: legislation, *especially of the criminal sort*, is not to be applied retroactively. . . . Quite independent of the question whether the *Ex Post Facto* Clause bars retroactive application of § 3583(h), then, there is the question whether Congress intended such application. Absent a clear statement of that intent, we do not give retroactive effect to statutes burdening private interests.") (emphasis added)).

[xvi.] 511 U.S. 244 (1994); *see also Lynce v. Mathis*, 519 U.S. 891, 895 (1997) ("The presumption against the retroactive application of new laws is an essential thread in the mantle

of protection that the law affords the individual citizen.").

[xvii.] *Landgraf*, 511 U.S. at 265.

[xviii.] *Id.* at 268-69 (quoting *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. (C.C.D.N.H.) (No. 13,156) 756, 767 (1814) (interpreting ban on retrospective legislation in the New Hampshire Constitution)).

[xix.] 519 U.S. 433 (1997).

[xx.] *Id.* at 439-40 (emphasis added).

[xxi.] *Johnson*, 529 U.S. at 701 (citing *Landgraf*, 511 U.S. at 270).

[xxii.] *Landgraf*, 511 U.S. at 269.

[xxiii.] *Id.* at 273-74.

[xxiv.] *Landgraf*, 511 U.S. at 274.

[xxv.] *Id.* at 275.

[xxvi.] *Id.*

[xxvii.] *Id.* at 268.

[xxviii.] *Johnson*, 529 U.S. at 702; *see also Lynce*, 519 U.S. at 895; *Landgraf*, 511 U.S. at 265.

[xxix.] The concerns about fairness, settled expectations, and an *ex post facto* increase in punishment that underlie the presumption against retroactivity (as discussed in *Landgraf*, 511 U.S. at 265) would be absent or greatly diminished if the retroactive application of a more lenient sanction was at issue. The presumption against retroactivity would likely to be correspondingly weaker, and the inclination to revert to the common law practice of imposing the recent legislation with a more lenient sanction (discussed *infra*) greater.

[xxx.] The Supreme Court described the "universal common-law rule" of abatement as follows:

[W]hen the legislature repeals a criminal statute or otherwise removes the State's condemnation from conduct that was formerly deemed criminal, this action requires the dismissal of a pending criminal proceeding charging such conduct. The rule applies to any such proceeding, which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it.

Bell v. Maryland, 378 U.S. 226, 230 (1964).

[xxxi.] *See United States v. Tynen*, 78 U.S. (11 Wall.) 88, 20 L.Ed. 153 (1871) (dismissing indictment because of subsequent congressional repeal of criminal enactment); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (penalties should be abated if law amended before final judgment); *see also Bradley v. United States*, 410 U.S. 605, 611 (1973) (Repeal of a criminal statute resulted in the abatement of "all prosecutions which had not reached final disposition in the highest court authorized to review them."); *United States v. Chambers*, 291 U.S. 217, 223-24 (1934) (prosecution for violation of National Prohibition Act cannot continue with repeal of Eighteenth Amendment by ratification of the Twenty-First Amendment.).

[xxxii.] *Payne v. State*, 688 N.E.2d 164, 165 (Ind. 1997) ("when the legislature enacts an ameliorative amendment without including a specific savings clause," defendant can be sentenced under the more lenient version of the statute); *Sekt v. Justice's Ct.*, 26 Cal 2d 297, 159 P.2d 17 21-22 (Cal. 1945) ("Where the later statute reduces the punishment the cases quite uniformly hold that the offender may be punished under the new law, and that the repeal by amendment of the old punishment does not operate to free the offender from all punishment."); *Lindsey v. State*,

65 Miss. 542, 5 So. 99, 100 (Miss. 1888) (where an amendment clearly mitigates punishment, the more lenient provision can be applied retroactively; if the relative severity of the old and new law is ambiguous, abatement requires dismissal of pending charges and *ex post facto* concerns preclude punishment under the amended statute).

[xxxiii.] Congress enacted its first general savings provision in 1871 "to obviate mere technical abatement." *Hamm v. City of Rock Hill*, 379 U.S. 306, 314 (1964); *see also Warden v, Marrero*, 417 653, 660 (1974).

[xxxiv.] *See, e.g., Warden v. Marrero*, 417 U.S. 653, 660 (1974) (general savings clause applies to repeals followed by reenactments)*; Fujitsu Ltd. v. Federal Exp. Corp.*, 247 F.3d 423, 432 (2d Cir. 2001); *Martin v. United States*, 989 F.2d 271, 274 (8 th Cir. 1993); *United States v. Stillwell*, 854 F.2d 1045, 1048 (7th Cir. 1988); *United States v. Breier*, 813 F.2d 212, 215 (9th Cir. 1987); *United States v. Mechem*, 509 F.2d 1193, 1194 n.3 (10th Cir. 1975).

[xxxv.] *See United States v. Smith*, 354 F.3d 171, 173 (2d Cir. 2003) ("[I]t is the law at the time of the offense, including those provisions relating to supervised release, that governs. Second, the federal 'saving statute' preserves the original penalties in effect when Smith committed the offense, including those relating to supervised release.").

[xxxvi.] *See* 18 U.S.C. § 3565(a) (1993) ("[I]f a defendant is found by the court to be in possession of a controlled substance . . . the court shall revoke the sentence of probation and sentence the defendant to not less than one-third the original sentence."); *Id.* § 3583(g) (1993) ("If the defendant is found by the court to be in the possession of a controlled substance, the court shall terminate the term of supervised release and require the defendant to serve in prison not less than one-third of the term of supervised release.").

[xxxvii.] *See, e.g., United States v. Hancox*, 49 F.3d 223, 225 (6 th Cir. 1995) (collecting cases); *United States v. Baclaan*, 948 F.2d 628, 630 (9th Cir. 1991) (upholding the district court's finding of possession based on four positive drug tests and the defendant's admission of use); *United States v. Dow*, 990 F.2d 22, 24 (1st Cir. 1993) (upholding the district court's finding of possession based on eleven positive drug tests).

[xxxviii.] 18 U.S.C. § 3565(b) (the VCCA also moved the mandatory revocation provision for controlled substance possession to subsection (b)); Id. § 3583(g).

[xxxix.] *Id.* § 3563(a).

[xl.] *Id.* § 3583(d) ("The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test.")

[xli.] *Id.* § 3583(e)(3).

[xlii.] Section 3583(g), as amended by the VCCA, provided:

Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing. -- If the defendant --

1. possesses a controlled substance in violation of the condition set forth in subsection (d);
2. possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm; or
3. refuses to comply with drug testing imposed as a condition of supervised release;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection

(e)(3).

18 U.S.C. § 3583(g) (1994); *see also id.* § 3583(d).

xliii. *See* U.S. Sentencing Guidelines Manual app. C, amend. 533, at 361-62 (1997).

xliv. 1 U.S.C. § 109.

xlv. A May 3, 1996, letter from OGC Assistant General Counsel David Adair to Chief Probation Officer David Miller regarding the effect of the savings statute on the VCCA ameliorative provisions stated:

The savings [statute] prevents a change in the law that results in a lighter punishment for an offense from applying to offenders who commit their offense prior to the change, unless Congress expressly provides for retroactive application.

The application of the savings [statute] to the drug testing and revocation provisions is unclear. But the savings [statute] has generally been applied only to the sentence for the offense; it has not been extended to the court's authority to sanction the offender for violation of release conditions. Until it has, I think the better policy is to apply these more favorable provisions immediately.

Letter from David Adair, May 3, 1996, to David Miller, Chief Probation Officer (May 3, 1996) (on file with the Office of General Counsel). Mr Adair reiterated this advice in a December 2000 *Federal Probation* article entitled *Revocation Sentences: A Practical Guide*, 54 Fed. Prob. 67, 69 (2000). In the article, Mr. Adair acknowledged that the Fourth Circuit in *United States v. Schaeffer*, 120 F.3d 505, 508-09 (4 th Cir. 1997), disagreed with this view when it held that the originally applicable guideline range was binding in a revocation that occurred after the VCCA's effective date. Nonetheless, the letter stated that "[d]espite this holding, officers are still advised to recommend consideration of the treatment options . . . for pre-VCCA offenders unless and until there is more explicit authority to the contrary." *Revocation Sentences*, 54 Fed. Prob. at 69.

xlvi. 354 F.3d 171 (2d Cir. 2003).

xlvii. *Id.* at 174. The Second Circuit had previously relied upon *Johnson* and refused to apply retroactively the amended version of § 3583(d) and (g) in *United States v. Wirth*, 250 F.3d 165 (2d Cir. 2001). In *Wirth*, the defendant's underlying offenses were committed in 1990 and 1991, but his supervised release violations did not occur until after the 1994 amendments became effective. Relying on *Johnson*'s holding that the law relating to supervised release in effect at the time of the initial offense governs a defendant's sentencing, the Second Circuit held that Wirth's supervised release violation was governed by the pre-VCCA version of § 3583(g). *Id.* at 169-70.

xlvii. *Smith*, 354 F.3d at 175.

xlix. Pub. L. No. 107-273, 116 Stat. 1758 (November 2, 2002).

l. 18 U.S.C. §§ 3565(b)(4) & 3583(g)(4). The other three bases for mandatory revocation are 1) possession of a controlled substance, 2) possession of a firearm in violation of federal law or a condition of probation or supervised release; and 3) refusal to comply with a drug testing condition. *Id.* §§ 3565(b)(1) - (3) & 3583(g)(1) - (3).

li. Memorandum from John M. Hughes with attached OGC Analysis of DOJ Authorization Act to Chief Pretrial Services and Probation Officers (January 15, 2003) (on file with author).

lii. Whether the §§ 3565(b)(4) and 3583(g)(4) positive drug test provisions are more lenient than the §§ 3565(b)(1) and 3583(g)(1) "drug possession" provisions is open to question. Prior to November 2002, the First, Third, Eighth, Ninth, and Eleventh Circuits held that positive drug tests were simply circumstantial evidence of drug possession; therefore, a positive drug test did not require a finding of drug possession and mandatory revocation under §§ 3565(b)(1) or

3583(g)(1). *SeeUnited States v. Pierce*, 132 F.3d 1207, 1208 (8th Cir. 1997) (district court had discretion whether to find possession based on a failed drug test); *United States v. Almand*, 992 F.2d 316, 318 (11th Cir. 1993) (upholding district court's "exercise [of] its factfinding power" in finding possession based on four positive drug tests, while noting that "there is no indication that the district court believed it was required to equate use with possession"); *United States v. Dow*, 990 F.2d 22, 24 (1st Cir. 1993) (upholding the district court's finding of possession based on eleven positive drug tests); *United States v. Baclaan*, 948 F.2d 628, 630 (9th Cir. 1991) (upholding the district court's finding of possession based on four positive drug tests and the defendant's admission of use); *United States v. Blackston*, 940 F.2d 877, 891 (3d Cir. 1991) (evidence of drug use is circumstantial evidence of possession and upholding the district court's finding of possession based on three positive drug tests and the defendant's admission of use). A persuasive argument could be made that Congress created the §§ 3565(b)(4) and 3583(g)(4) mandatory revocation provisions for three or more positive drug tests in a year to require *more punitive* treatment in the circuits that treated a positive drug test as merely *evidence* of drug possession. Under that interpretation, the *Ex Post Facto* Clause would bar retroactive application of §§ 3565(b)(4) and 3583(g)(4), even if the Act had specified that courts must apply the provisions retroactively.

[liii.] *Landgraf* , 511 U.S. at 272 (quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)); *see also Johnson*, 529 U.S. at 701 ("Quite independent of the question whether the *Ex Post Facto* Clause bars retroactive application of § 3583(h), then, there is the question whether Congress intended such application. Absent a clear statement of that intent, we do not give retroactive effect to statutes burdening private interests.").

[liv.] Revised Memorandum from John M. Hughes with attached OGC Analysis of DOJ Authorization Act to Chief Pretrial Services and Probation Officers (January 15, 2003) (on file with author, and available at http://jnet.ao.dcn/img/assets/5005/21st_CentReaut_rev.pdf).

[lv.] *See* Letter from Joe Gergits, Assistant General Counsel, to Karl Acosta, Probation Officer (November 1, 2005) (on file with the author).

[lvi.]368 F.3d 994 (8 th Cir. 2004).

[lvii.]*Id.* at 995.

[lviii.]*See Smith*, 354 F.3d 171, 174-75 (Section 109 requires courts to apply pre-1994 law governing supervised release violations to defendants whose offenses occurred before 18 U.S.C. § 3583 was amended); *United States v. Schaefer*, 120 F.3d 505, 507-08 (4 th Cir. 1997) (same); *see also Wirth*, 250 F.3d at 169-70 (Because the offense was committed prior to the 1994 amendment to § 3583 that created the "drug treatment exception" to mandatory revocation for a positive drug test, the district court was precluded from applying the exception and was obliged to impose a mandatory revocation sentence of one-third the period of supervised release).

[lix.] Pub. L. No. 109-248, 120 Stat 587 (July 27, 2006).

[lx.] Section 2250 provides:

(a) In general.--Whoever--

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) *travels* in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

(b) Affirmative defense.--In a prosecution for a violation under subsection (a), it is an affirmative defense that--

(1) uncontrollable circumstances prevented the individual from complying;

(2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

(3) the individual complied as soon as such circumstances ceased to exist.

18 U.S.C. § 2250(a)-(b) (emphasis added).

[lxi.] 28 C.F.R. § 72.1-3. On May 30, 2007, the Attorney General issued further guidelines for the interpretation and implementation of SORNA that reiterated that SORNA applies to offenders convicted prior to a jurisdiction's implementation of sex offender registration requirements. 92 F.R. 30210-01, ¶C, 2007 WL 1540140.

[lxii.] *See, e.g.,United States v. Smith*, 528 F. Supp.2d 615, 619 (S.D. W. Va. 2007); *United States v. Gill*, 520 F. Supp.2d 1341, 1349 (D. Utah 2007); *United States v. Kapp*, 487 F. Supp.2d 536, 543 (M.D. Pa. 2007); *United States v. Heriot*, Cr. No. 3:07-323, 2007 WL 2199516, at *2 (D.S.C. July 27, 2007), *United States v. Muzio*, No. 4:07CR179 CDP, 2007 WL 2159462, at *6-7 (E.D. Mo. July 26, 2007), and *United States v. Cole*, No. 07-cr-30062-DRH, 2007 WL 2714111, at *3 (S.D. Ill. Sept. 17, 2007).

[lxiii.] *See, e.g., United States v. Deese*, No. CR-07-167-L, 2007 WL 2778362 (W.D. Okla. Sept. 21, 2007); *United States v. Sallee*, No. CR-07- 152-L, 2007 WL 3283739 (W.D. Okla. Aug. 13, 2007).

[lxiv.] *United States v. Smith*, 481 F. Supp.2d 846, 852 (E.D. Mich. 2007) (state law obliged the offender to register within 10 days; § 2250 is not a continuing offense where an individual can be prosecuted separately for each day he fails to register after the 10th day).

[lxv.] This advice is offered in the absence of binding precedent at the time this article was written. Needless to say, officers should ignore this advice and comply with any subsequent binding circuit court precedent or contrary ruling by a district judge with jurisdiction over a case.

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References

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