

67173-1 REC'D

67173-1

DEC 14 2012
King County Prosecutor
Appellate Unit

NO. 67173-1-1

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

STATE OF WASHINGTON,

Appellant,

v.

ESMOND HOLMES,

Respondent,

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Carol A. Schapira, Judge

BRIEF OF RESPONDENT

DANA M. NELSON
Attorney for Respondent

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373



TABLE OF CONTENTS

	Page
A. <u>INTRODUCTION</u>	1
B. <u>COUNTER STATEMENT OF ISSUES</u>	2
C. <u>STATEMENT OF THE CASE</u>	4
D. <u>ARGUMENT IN RESPONSE</u>	10
1. THE TRIAL COURT PROPERLY DECIDED HOLMES' CrR 7.8 MOTION.....	10
2. APPLICATION OF THE 2007 STATUTE TO HOLMES CONSTITUTED AN IMPERMISSIBLE RETROACTIVE APPLICATION.....	11
3. THE TRIAL COURT PROPERLY EXERCISED ITS EQUITABLE POWERS TO REQUIRE DOC TO GRANT HOLMES DAY-FOR-DAY CREDIT TOWARDS HIS REMAINING PERIOD OF COMMUNITY CUSTODY.....	17
D. <u>CONCLUSION</u>	25

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Pers. Restraint of Hinton</u> 152 Wn.2d 853, 100 P.3d 801 (2004)	11
<u>In re Knippling</u> 144 Wn. App. 639, 183 P.3d 365 (2008)	9
<u>In re Personal Restraint of Knippling</u> 144 Wn. App. 639, 183 P.3d 365 (2011)	1, 8, 9, 17
<u>In re Personal Restraint of Roach</u> 150 Wn.2d 29, 74 P.3d 134 (2003)	18, 19, 21, 22, 23, 24, 25
<u>In the Personal Restraint of Flint</u> 174 Wn.2d 539, 277 P.3d 657 (2012)	1, 2, 3, 9-12, 14, 15, 16
<u>Seattle v. Wilkins</u> 72 Wn. App. 753, 865 P.2d 580 (1994)	10
<u>State v. Allen</u> 161 Wn. App. 727, 255 P.3d 784 <u>rev. granted</u> , 172 Wn.2d 1014 (2011)	10
<u>State v. Berlin</u> 80 Wn. App. 734, 911 P.2d 414 (1996) <u>rev'd</u> , 133 Wn.2d 541, 947 P.2d 700 (1997)	10
<u>State v. Dalseg</u> 132 Wn. App. 854, 134 P.3d 261 (2006)	19, 20, 24, 25
<u>State v. Donaghe</u> 172 Wn.2d.253, 256 P.3d 1171 (2011).	17, 18, 21
<u>State v. Ferguson</u> 76 Wn. App. 76 Wn. App. 560, 886 P.2d 1164 (1995)	10

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Gore</u> 101 Wn.2d 481, 681 P.2d 227 (1984)	10
<u>State v. Hardy</u> 133 Wn.2d 701, 946 P.2d 1175 (1997)	10
<u>State v. Jones</u> 172 Wn.2d 236, 257 P.3d 616 (2011) ... 1, 2, 3, 9, 10, 17, 21, 22, 24	
<u>State v. Laureano</u> 101 Wn.2d 745, 682 P.2d 889 (1984)	10
<u>State v. Madsen</u> 153 Wn. App. 471, 228 P.3d 24 (2009)	1, 8, 9, 11
<u>State v. Rogers</u> 112 Wn.2d 180, 770 P.2d 180 (1989)	23
<u>State v. Thompson</u> 95 Wn.2d 888, 632 P.2d 50 (1981)	10
<u>State v. Wilson</u> 83 Wn. App. 546, 922 P.2d 188 (1996) <u>rev. denied</u> , 130 Wn.2d 1024 (1997)	10

FEDERAL CASES

<u>Calder v. Bull</u> 3 Dall. 386, 390 1 L. Ed. 648 (1798).....	11
<u>California Dept. of Corrections v. Morales</u> 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995).....	12
<u>Green v. Christiansen</u> 732 F.2d 1397 (9 th Cir. 1984)	19
<u>Johnson v. United States</u> 529 U.S. 694, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000) 2, 8, 11-16	

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>Lindsey v. Washington</u> 301 U.S. 397, 57 S. Ct. 797, 81 L. Ed. 1182 (1937)	8
<u>United States v. Martinez</u> 837 F.2d 861 (9 th Cir. 1988)	18
<u>United States v. Page</u> 131 F.3d 1173 (6th Cir.1997)	13

RULES, STATUTES AND OTHER AUTHORITIES

CrR 7.8	7, 10
Former RCW 9.94A.030(4)	21
Former RCW 9.94A.170(3)	21
Former RCW 9.94A.728 (2001)	23
Former RCW 9.94A.737 (2002)	1, 3, 4, 5, 7, 12, 14, 16, 17
Laws of 2008, ch. 231, § 16	5
Laws of 2008, ch. 231, § 61)	5
Laws of 2012, ch. 6 (S.S.S.S.B. 6204), § 5	5
RCW 9.31.090	22
RCW 9.94A.171	7
RCW 9.94A.625	22
RCW 9.94A.714	5
RCW 9.94A.731	24
RCW 9.94A.737	3, 4, 5, 15

TABLE OF AUTHORITIES (CONT'D)

	Page
RCW 9.94A.870	23
U.S. Const., Art. I, § IX	11
U.S. Const. art. I, § X	15
Wash. Const. art. I, § 23.....	15
18 U.S.C. § 3583(h)	12, 13, 16

A. INTRODUCTION

Esmond Holmes is the respondent in the state's appeal of the trial court's ruling granting him day-for-day credit against his period of community custody for time spent incarcerated following an administrative hearing, at which the department of corrections (DOC) sanctioned him for violating the terms of community custody by returning him to prison to serve the remaining portion of his sentence, i.e. 438 days of earned early release.

Relying on this Court's decision in State v. Madsen,¹ the court held DOC's application of a 2007 statute – not in effect at the time of Holmes' 2003 offense – to sanction Holmes in this manner violated the ex post facto clause. In ruling that he was entitled to day-for-day credit for in-custody time against his remaining period of community custody, the court relied on Division Three's decision in In re Personal Restraint of Knippling.²

¹ State v. Madsen, 153 Wn. App. 471, 228 P.3d 24 (2009) (former RCW 9.94A.737(2), enacted in 2007 after defendant's offense, mandating that the department return defendant to prison for third community custody violation violated the ex post facto clause), overruled by, In the Personal Restraint of Flint, 174 Wn.2d 539, 532 n.7, 277 P.3d 657 (2012) (punishment not altered by enactment of former RCW 9.94A.737(2)).

² In re Personal Restraint of Knippling, 144 Wn. App. 639, 183 P.3d 365 (2011) (defendant was entitled to credit against his period of community custody for time spent in prison beyond the lawful period of confinement), overruled by, State v. Jones, 172 Wn.2d 236, 257 P.3d 616 (2011) (granting credit for time spent in confinement, even if unlawful, contravenes the tolling statute, which provides that

As indicated in note 1 and 2, these decisions have since been overruled by the state Supreme Court. Nonetheless, Holmes will argue that despite Flint, the trial court's ruling that the 2007 statute was impermissibly applied to Holmes was mandated by the United States Supreme Court's decision in Johnson v. United States, 529 U.S. 694, 702, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000) (amended federal law regarding revocation of supervised release could not be applied to defendant convicted before its enactment). Holmes will further argue that Jones should be reconsidered, as its refusal to fashion an equitable remedy for the violation at issue there (i.e. unlawful incarceration), such as the day-for-day credit granted by the trial court here, rested on a questionable premise.

B. COUNTER STATEMENT OF ISSUES

1. In Johnson v. United States,³ the United States Supreme Court held that when 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

community custody shall toll during any period of time the offender is in confinement, *for any reason*).

before the law was enacted. Johnson, 529 U.S. at 700. Despite this, the majority opinion in Flint held the triggering event for application of former RCW 9.94A.737(2) is the defendant's violation of community custody. As a result, the majority held the law mandating the person's return to prison to serve the remainder of his sentence for any violation found at a third community custody hearing can be applied to a person convicted after its enactment. Flint, 174 Wn.2d at 552-53.

Where the majority opinion in Flint conflicts with controlling United States Supreme Court precedent, should this Court decline to follow it?

2. While acknowledging its decision resulted in Jones' receiving no credit for 30 months of incarceration served under a void sentence, the Jones Court declined to exercise its equitable powers to grant him credit towards his remaining period of community custody. Jones, 172 Wn.2d at 247, n.7. Where the court's decision was based on the questionable premise that it had not previously exercised similar equitable powers under circumstances where it would contravene a relevant statute, should the court's decision be reconsidered?

³ 529 U.S. 694, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000).

C. STATEMENT OF THE CASE

Respondent Esmond Holmes pled guilty to second degree robbery and received a sentence consisting of 63 months of incarceration and 18-36 months of community custody. CP 1-9. At the time of his offense, January 16, 2003, the law set forth the following potential sanction for community custody violations:

(1) 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 (2) of this section.

Former RCW 9.94A.737 (2002) (emphasis added); CP 1.

Because Holmes earned "good time" credits, he was released from prison to community custody on November 2, 2006, after serving 44 months. CP 26. Holmes was sanctioned a number of times following his release for violating various terms of community custody. CP 26-27.

At Holmes' sixth administrative hearing on December 13, 2007, he was found guilty of various violations and sanctioned to return to total confinement to serve the entire length of his earned early release, 438 days. CP 27.

Of import here, 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 former RCW 9.94A.737(2) ("2007 statute"). The 2007 statute made it mandatory that when an offender is found guilty of violating a condition of community custody at a third violation hearing, 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) (emphasis added).⁴

In ordering Holmes' return to total confinement for the remainder of his prison sentence, the DOC hearing officer relied on

⁴ In 2008, the legislature revised the statute by deleting the provision from RCW 9.94A.737 and re-codifying it as RCW 9.94A.714(1). Laws of 2008, ch. 231, § 16 (effective Aug. 1, 2009, Laws of 2008, ch. 231, § 61). More recently, however, the legislature has deleted the provision entirely. Laws of 2012, ch. 6 (S.S.S.B. 6204), § 5.

the 2007 statute, stating Holmes had "tied [his] hands" and noting the absence of any "mitigating" circumstances:

It's purely punitive. Purely. Has nothing to do with how I think your [sic] going to um adjust when you get out. However, you've tied my hands. With your use, not reporting over and over has given me no circumstance, no mitigating circumstance especially considering you didn't get revoked last time.

CP 197-98.

Holmes appealed the sanction to the DOC Regional Appeals Panel and was informed the new legislation mandated Holmes' return to prison:

The question you raise in your appeal is very straight forward and the panel can answer it directly. During the last state legislative session the legislature passed, and the Governor signed, ESSB 6157 which mandated that when an offender on Community Custody has three (or more) violation hearings where guilty findings are entered for violation(s) the offender will be returned to total confinement to serve the remainder of the good/earned time credits they had remaining. There are some exceptions such as if there are mitigating circumstances in the case that would indicate an alternate sanction was appropriate or if there was so little remaining good time that it would not adequately address the seriousness of the violations being addressed.

The appeals panel is sympathetic to your current family circumstances. However, the overwhelming facts are that this was your sixth violation hearing and you were found guilty of 5 violations. Your continued decision to resist

compliance and treatment gave the Hearings Officer no other choice but to return you to prison for the remainder of your sentence.

CP 39; see also CP 54 (noting that Holmes was returned to total confinement under former RCW 9.94A.737 (2)).

Holmes served the remaining portion of his sentence, 438 days, and was released on Valentine's Day, February 14, 2009. CP 28. When he reported to his CCO for the first time thereafter, he was informed he still had approximately 12 months of community custody to serve, as it had tolled during his incarceration. CP 28, 42; RCW 9.94A.171.

In April 2010, Holmes filed a pro se CrR 7.8(b) motion seeking relief from the DOC sanction, on grounds retroactive application of 2007 statute to him violated the ex post facto clause. CP 13-19. Because Holmes had already completed the 438 days remaining of his sentence, Holmes requested the court to credit the sanction time towards his remaining 12 months of community custody, which would render that period complete. CP 19.

The court granted Holmes' motion for appointment of counsel, and defense counsel thereafter filed a motion for relief elaborating on Holmes' arguments. CP 12, 25-52. In support of Holmes' ex post facto argument, counsel cited to this Court's then-

recent opinion in Madsen. CP 12, 25-52. Following the United States Supreme Court opinion in Johnson, this Court held punishment for a community custody violation is attributed to the crimes for which defendant was originally convicted, not to the violation. Madsen, 153 Wn. App. at 479 (citing Johnson, 529 U.S. at 700-01). This Court further found the 2007 statute increased the measure of punishment for Madsen's original offense (committed before 2007), because "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." Madsen, 153 Wn. App. 481 (citing Lindsey v. Washington, 301 U.S. 397, 57 S. Ct. 797, 81 L. Ed. 1182 (1937) (a statute increases punishment if it makes mandatory a penalty that formerly was optional). This Court therefore held retroactive application of the statute to Madsen violated the prohibition against ex post facto laws. Madsen, 153 Wn. App. at 484.

Although Holmes had already served the entire sanction, counsel argued his alternate choice of remedy was supported by Division Three's then-recent opinion in In re Knippling:

Had he not been incarcerated unlawfully for 14 ½ months, he would have completed the remaining 334 days in the community and he would have

completed his term of community custody. He therefore is entitled to an order relieving him of any remaining community custody on this cause number. See In re Knippling, 144 Wn. App. 639, 183 P.3d 365 (2008) (holding that additional time served by prisoner before he was resentenced following his successful appeal should be credited against his term of community custody).

CP 31.

The department asked the trial court to stay its ruling until the Supreme Court entered its decisions in In re Personal Restraint of Flint,⁵ and State v. Jones,⁶ which were then-pending. CP 55-56. The court declined to do so and granted Holmes' requested relief, pursuant to Madsen and Knippling. CP 165-66.

The department thereafter sought reconsideration of the court's ruling, on grounds the hearing officer did not return Holmes to total confinement pursuant to the 2007 statute, but pursuant to the old statute in effect at the time Holmes committed his offense. CP 167-68. The court denied the motion, and the department has expressly abandoned this argument on appeal. CP 204-05; Brief of Respondent (BOR), at 20.

⁵ In the Personal Restraint of Flint, 174 Wn.2d 539, 532 n.7, 277 P.3d 657 (2012).

⁶ State v. Jones, 172 Wn.2d 236, 257 P.3d 616 (2011).

D. ARGUMENT IN RESPONSE

At the outset, Holmes recognizes that the Court of Appeals is not entirely free to disregard Supreme Court decisions. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). But the Court of Appeals has not shied from careful criticism in appropriate cases.⁷ Such criticism has been important in changing erroneous decisions.⁸ Because Flint conflicts with United States Supreme Court precedent, and because Jones rests on a questionable premise, Holmes posits his case is an appropriate vehicle for careful criticism.

1. THE TRIAL COURT PROPERLY DECIDED HOLMES' CrR 7.8 MOTION.

The state devotes much of its brief to arguing the trial court lacked subject matter jurisdiction to adjudicate the claim, as well as personal jurisdiction over DOC, via Holmes' CrR 7.8(b) motion.

⁷ See, e.g., State v. Allen, 161 Wn. App. 727, 756, 255 P.3d 784 (Ellington and Cox, J., concurring) (criticizing State v. Laureano, 101 Wn.2d 745, 682 P.2d 889 (1984)), rev. granted, 172 Wn.2d 1014 (2011); State v. Ferguson, 76 Wn. App. 76 Wn. App. 560, 570 n.13, 886 P.2d 1164 (1995) (criticizing the rule in State v. Davis as "go[ing] too far"); accord Seattle v. Wilkins, 72 Wn. App. 753, 757 n.6, 865 P.2d 580 (1994); State v. Berlin, 80 Wn. App. 734, 743, 911 P.2d 414 (1996) (reluctantly following Davis, stating that the supreme court "should clarify and limit Davis"), rev'd, 133 Wn.2d 541, 947 P.2d 700 (1997)).

⁸ See, e.g., Berlin, 80 Wn. App. at 734 (criticizing Davis); see also State v. Wilson, 83 Wn. App. 546, 553, 922 P.2d 188 (1996) (criticizing State v. Thompson, 95 Wn.2d 888, 892, 632 P.2d 50 (1981)), rev. denied, 130 Wn.2d 1024 (1997). Thompson was later overruled in State v. Hardy, 133 Wn.2d 701, 709 n.9, 946 P.2d 1175 (1997) (citing Wilson's criticism with approval).

Brief of Respondent (BOR) at 8-20. But the department made similar arguments in Madsen. While the department expands on these jurisdictional arguments here, the crux is essentially the same, i.e. that the only vehicle for the court to gain jurisdiction over DOC and claims regarding its supervision of community custody is via a personal restraint petition. BOR at 16-17, 19-20. But this Court soundly rejected the same argument in Madsen. Madsen, 153 Wn. App. at 475. Despite the department's criticism of this Court's decision (BOR at 13, 15-16), that portion of Madsen remains good law. Flint, 174 Wn.2d 539 (2012).

2. APPLICATION OF THE 2007 STATUTE TO HOLMES CONSTITUTED AN IMPERMISSIBLE RETROACTIVE APPLICATION.

The heart of the Ex Post Facto Clause, U.S. Const., Art. I, § 9, bars application of a law “that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed” Johnson, 529 U.S. at 699 (quoting Calder v. Bull, 3 Dall. 386, 390 1 L. Ed. 648 (1798) (emphasis deleted); In re Pers. Restraint of Hinton, 152 Wn.2d 853, 861, 100 P.3d 801 (2004). To prevail on this sort of ex post facto claim, the individual must show both that the law he challenges operates retroactively (that it applies to conduct completed before its enactment) and that

it raises the penalty from whatever the law provided when he acted. Johnson, 529 U.S. at 699 (citing California Dept. of Corrections v. Morales, 514 U.S. 499, 506-507, n. 3, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995)).

Contrary to the Washington State Supreme Court's decision in Flint, the triggering date for application of former RCW 9.94A.737 (2) is the date of the offense, not the date of the alleged violation. Because the legislature did not indicate an intent for retroactive application, the statute was impermissibly applied to Holmes, as it was enacted after the date of his offense.

The United States Supreme Court reviewed an almost identical question in Johnson, 529 U.S. 694, 120 S.Ct. 1795. 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, 120 S.Ct. 1795. 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, 120 S.Ct. 1795 (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, 120 S.Ct. 1795.

The Court rejected the view that post revocation penalties are attributable to a violation of the terms of supervised release. Id. at 701, 120 S.Ct. 1795. 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 re-imprisonment as punishment for the violation of the conditions of supervised release. Although such violations often lead to re-imprisonment, 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 post revocation sanctions as part of the penalty for the initial offense, however (as most courts have done), avoids these difficulties.

Id. at 700, 120 S.Ct. 1795. 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, 120 S.Ct. 1795.

In Flint, there was no dispute that former RCW 9.94A.737 (2) (the 2007 statute) was enacted after Flint’s offense. Flint, 174 Wn.2d at 541. There was likewise no dispute that the department applied the 2007 statute to Flint to return him to total confinement for the remainder of his sentence. Flint, at 543-44. And significantly, the majority also found “no basis for concluding that the 2007 amendment to RCW 9.94A.737 adding subsection 2 was intended to be applied retroactively.” Flint, 174 Wn.2d at 546. Nonetheless, the majority held it was not retroactively applied to Flint:

None of the principles mentioned above suggest that the statute’s application to a person in Mr. Flint’s position is a retroactive application. First, the triggering event for application of RCW 9.94A.737

(2) is when a defendant is found to have committed violation(s) of conditions of community custody at a third violation hearing. It is at this point that the statute directs that 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.” RCW 9.94A.737(2).

Flint, 174 Wn.2d at 548.

Responding to Flint’s argument that a contrary result was required under Johnson, the majority posited

In Johnson, however, the challenged statutory provision imposes a post revocation penalty for the original offense, a *second* term of earned early release, following re-incarceration. The same is not true in Mr. Flint’s case. RCW 9.94A.737(2) does not impose any additional punishment, as explained, and for this reason does not violate the ex post facto clauses of the state and federal constitutions. U.S. Const. art. I, § 10; Wash. Const. art. I, § 23. Accordingly, the ex post facto issue in Mr. Flint’s case is not the same as in Johnson.

Flint, 174 Wn.2d at 552-53 (emphasis in original).

But as the four dissenters properly note, the decision in Johnson had nothing to do with whether the challenged statutory provision *increased* Johnson’s punishment. The decision was based solely on its analysis of the triggering event (date of the offense) and the presumption that laws apply prospectively:

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, 120 S.Ct. 1795.

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, 120 S.Ct. 1795. "Since post revocation 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, 120 S.Ct. 1795 ("Given this conclusion [non retroactivity], 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.").

Flint, 174 Wn.2d at 558 (Stephens, J., dissenting).

Relying on the clear mandate of Johnson, the dissenters would have held the statute at issue, former RCW 9.94A.737 (2), was impermissibly applied to Flint retroactively. In light of Johnson's clear mandate, and because the relevant circumstances here are no different than in Flint, Holmes contends RCW 9.94A.737(2) was impermissibly applied to him retroactively, as well.

3. THE TRIAL COURT PROPERLY EXERCISED ITS EQUITABLE POWERS TO REQUIRE DOC TO GRANT HOLMES DAY-FOR-DAY CREDIT TOWARDS HIS REMAINING PERIOD OF COMMUNITY CUSTODY.

As argued above, former RCW 9.94A.737 (2) was impermissibly applied to Holmes retroactively. Accordingly, the issue remaining is the propriety of the remedy granted him by the trial court. In granting Holmes' day-for-day credit against his period of community custody for time spent wrongly incarcerated, the trial court relied on Division Three's decision in In re Knippling, which was subsequently reversed in Jones. Knippling, 144 Wn. App. at 643 (defendant was entitled to credit against his period of community custody for time spent in prison beyond the lawful period of confinement), overruled by, State v. Jones, 172 Wn.2d at 246, 249 (granting credit for time spent in confinement, even if unlawful, contravenes the tolling statute, which provides that community custody shall toll during any period of time the offender is in confinement, *for any reason*).

But there was a non-statutory argument presented in Jones⁹ and its companion case, State v. Donaghe,¹⁰ in favor of granting credit towards community custody, despite the tolling statute –

⁹ State v. Jones, 172 Wn.2d 236, 257 P.3d 616 (2011).

based on the court's powers of equity. Holmes contends that the Jones Court's hasty rejection of the argument in a footnote was based on a faulty premise and therefore should be considered anew.

Our Supreme Court adopted the equitable doctrine of credit for time spent at liberty in In re Personal Restraint of Roach, 150 Wn.2d 29, 74 P.3d 134 (2003). Roach involved a prisoner erroneously released from DOC custody after he had served only the lesser of two concurrent sentences. Roach, 150 Wn.2d at 31. The erroneous release apparently resulted from an incomplete transfer of his sentencing records from the county jail to DOC. Roach, 150 Wn.2d at 32. DOC discovered the error 10 days later and attempted to re-apprehend Roach, but he had left the state. Almost three years later, Indiana extradited Roach to Washington to serve the remainder of his sentence.

Roach filed a personal restraint petition, asking the court to apply the equitable doctrine of credit for time spent at liberty, as articulated by the Ninth Circuit in United States v. Martinez, 837 F.2d 861 (9th Cir. 1988) (7 year delay in execution of a 4 year sentence due to clerical error), and Green v. Christiansen, 732 F.2d

¹⁰ State v. Donaghe, 172 Wn.2d 253, 268 n.15, 256 P.3d 1171 (2011).

1397 (9th Cir. 1984) (prisoner erroneously released from state custody before serving concurrent federal sentence). Roach, 150 Wn.2d at 35.

Our Supreme Court accepted review of Roach's personal restraint petition and granted him equitable relief. The court agreed with the conclusion of federal and state courts that "fairness and equity" require the state to give a convicted person credit against his sentence for time spent at liberty due to the state's mistake. Roach, 150 Wn.2d at 37.

Thus, the court held that "a convicted person is entitled to credit against his sentence for time spent erroneously at liberty due to the State's negligence, provided that the convicted person has not contributed to his release, has not absconded legal obligations while at liberty, and has had no further criminal convictions." Roach, 150 Wn.2d at 37.

Relying on Roach, Division Three of this Court has extended the equitable doctrine of credit for time spent at liberty to give credit against an individual's sentence for time spent in a statutorily *noncompliant* work release program due to the state's negligence. State v. Dalseg, 132 Wn. App. 854, 134 P.3d 261 (2006). There, Jeff Dalseg and Timothy Cestnik challenged the trial court's

decision to deny them credit for time served in the Nisqually Tribal Jail “work release” program. After the men had served more than 11 months of a 12-month work release sentence in the Nisqually program, the state learned that the program did not comply with statutory requirements for work release and asked the court to order Dalseg and Cestnik to begin serving their sentences in one that did. Dalseg, 132 Wn. App. at 857.

On appeal, Division Two held that Dalseg and Cestnik were entitled to day-for-day credit against their sentences for their time served in the Nisqually day reporting program:

The equitable doctrine of credit for time spent at liberty applies by analogy to this case. If equity entitles a convicted person to day-for-day credit for time spent at liberty due to the State’s mistake, equity should entitle him to credit for time spent in some lesser form of restraint than the punishment actually imposed. Thus, we hold that a convicted person is entitled to credit against his sentence for time spent in a statutorily noncompliant work release program due to the State’s negligence, provided that the convicted person has not contributed to the error, has not absconded legal obligations while in the program, and has had no further criminal convictions.

Dalseg, 132 Wn.2d at 865.

The equitable doctrine of credit for time spent at liberty should apply by analogy here as well. If equity entitles a convicted person to day-for-day credit for time spent at liberty due to the

state's mistake, equity should entitle a convicted person to day-for-day credit for time spent incarcerated, due to the state's mistake, against the period of community custody. Under the circumstances here, "fairness and equity" require the state to give credit for the time Holmes was illegally held.

As indicated, a similar argument was made and rejected in

Jones:

We acknowledge that our decision results in Jones' receiving no credit for 30 months of incarceration served under a void sentence; however, we decline to exercise our equitable powers to grant Jones credit toward his sentence of community custody for that time. In State v. Donaghe, 172 Wash.2d 253, 256 P.3d 1171 (2011), a case originally consolidated with this case but deconsolidated after oral argument, petitioner argued that this court should exercise such equitable powers, citing In re Personal Restraint of Roach, 150 Wash.2d 29, 74 P.3d 134 (2003). In Roach, the Department of Corrections erroneously released an inmate 18 months early. Id. at 31, 74 P.3d 134. This court adopted the equitable doctrine granting the offender day-for-day credit toward his sentence for time spent at liberty provided that he did not contribute to his erroneous release and, while at liberty, he did not abscond any remaining legal obligations and had no criminal convictions. Id. at 37, 74 P.3d 134. This court justified its adoption of this equitable doctrine, in part, because there was not a contrary statute on point. Id. at 36–37, 74 P.3d 134. In this case, both former RCW 9.94A.030(4) and former RCW 9.94A.170(3) would be contradicted by granting Jones credit toward his community custody. Therefore, we decline to extend the holding in Roach, and do not exercise our

equitable powers to contravene the statutory scheme and public policy of this State.

Jones, 172 Wn.2d at 247, n.7.

But contrary to the Court's justification above, its adoption of the equitable doctrine in Roach arguably contravened a contrary statute on point. In the passage referred to above, the Roach Court stated:

Further, the DOC argues that the laws of Washington authorize the State to re-incarcerate Roach and that the doctrine of credit for time at liberty conflicts with Washington's laws. The DOC cites RCW 9.94A.625(1) and 9.31.090 as authority for re-incarcerating Roach.

RCW 9.94A.625(1) provides that "[a] term of confinement ... shall be tolled by any period of time during which the offender has absented himself or herself ... without the prior approval of the entity in whose custody the offender has been placed." RCW 9.94A.625(1) does not apply here. Roach did not absent himself from custody without prior approval; rather, authorities released Roach on their own accord. RCW 9.31.090, likewise, does not apply. It provides that a person "who shall escape from custody, may be recaptured and imprisoned for a term equal to the unexpired portion of the original term." RCW 9.31.090. Roach did not escape from custody.

Roach, 150 Wn.2d at 36-37.

Whether the statutes cited by DOC were inapplicable to the circumstances of Roach, application of equitable principles to grant

Roach credit for time spent at liberty nonetheless contravened other, applicable law. Specifically, Former RCW 9.94A.728 (2001), which provided:

No person serving a sentence imposed pursuant to this chapter and committed to the custody of the department shall leave the confines of the correctional facility or be released prior to the expiration of the sentence except as follows:

Emphasis added.

Thereafter follow a number of exceptions, such as earned early release, community custody for qualifying sex offenders, furlough, extraordinary medical placement, governor's grant of extraordinary release, governor's pardon, ten day early release by department, and reduction in sentence as provided for in RCW 9.94A.870 (emergency due to inmate population). Former RCW 9.94A.728 (2001) (1)-(9).

Significantly, this statute does not allow the court to release an offender prior to the expiration of his term for "good cause." State v. Rogers, 112 Wn.2d 180, 183, 770 P.2d 180 (1989) ("The statute prohibits early release absent existence of one of the statutory exceptions.") But that is essentially what the Roach Court did – released Roach prior to the expiration of his sentence for

“good cause.” Accordingly, the court’s remedy of granting Roach credit for time spent at liberty arguably contravened this statute.

Accordingly, the Jones Court’s marginalization of its holding in Roach is questionable. The court in fact applied an equitable theory to grant relief, despite an arguably contrary statute on point.

Significantly, Division Two’s decision to apply the equitable doctrine of credit for time served in Dalseg was also in contravention of a contrary statute on point. There, although the defendants were not confined for eight hours a day at the Nisqually Tribal Jail, as required under RCW 9.94A.731 to qualify as “work release,” the court nevertheless held they were entitled to credit for time served as if they were. This holding directly contravenes RCW 9.94A.731. Dalseg, 132 Wn. App. at 864 (“we hold that a person is entitled to credit against his sentence for time spent in a statutorily noncompliant work release program due to the State’s negligence[.]”)

Finally, it should be noted that the public policy considerations at play in Jones favoring community custody for sex offenders are not at issue here. See Jones, 172 Wn.2d at 246 (emphasizing importance of community custody for convicted sex offenders). For all these reasons, the equitable argument

presented here should be considered anew. Whether application of equitable theory to grant relief here would contravene the tolling statute, the trial court's grant of relief should be affirmed, as it is supported by the result reached in Roach and Dalseg.

D. CONCLUSION

For the reasons stated above, the trial court's ruling should be affirmed in all respects.

Dated this 14th day of December, 2012

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. NELSON, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

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

STATE OF WASHINGTON)

Appellant,)

v.)

ESMOND HOLMES,)

Respondent.)

COA NO. ~~37173-1+~~

07173-1

DEC 19 2012
W

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18TH DAY OF DECEMBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] RONDA LARSON
ATTORNEY GENERAL'S OFFICE
P.O. BOX 40116
OLYMPIA, WA 98504

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF DECEMBER 2012.

X Patrick Mayovsky