

No. 83738-4
Consolidated under State v. Jones, No. 83451-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL DONAGHE,

Petitioner.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2010 APR 26 AM 8:03
BY RONALD N. CARPENTIER
CLERK

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

The Honorable Chris Wickham, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

DANA M. LIND
Attorney for Appellant

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

TABLE OF CONTENTS

	Page
A. <u>SUPPLEMENTAL ARGUMENT</u>	1
1. BECAUSE THE LEGISLATURE HAS VESTED EXCLUSIVE AUTHORITY IN THE DEPARTMENT OF CORRECTIONS (DOC) TO DETERMINE SENTENCE TOLLING, THE TRIAL COURT ACTED OUTSIDE ITS AUTHORITY IN REFUSING TO ISSUE THE CERTIFICATE OF DISCHARGE.....	1
2. THE RULE OF LENITY AND PRINCIPLES OF EQUITY FAVOR INAPPLICABILITY OF THE TOLLING STATUTE UNDER THE CIRCUMSTANCES HERE.	9
3. DISENFRANCHISEMENT IS PUNITIVE AND RENDERS DONAGHE'S COMMITMENT UNCONSTITUTIONAL.....	16
B. <u>CONCLUSION</u>	19

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>Ashmore v. Estate of Duff,</u> 165 Wn.2d 948, 205 P.3d 111 (2009).....	7
<u>In re Marriage of Hawthorne,</u> 91 Wn. App. 965, 957 P.2d 1296 (1998).....	3
<u>In re Personal Restraint of Knippling,</u> 144 Wn. App. 639, 183 P.3d 365 (2008).....	11-12
<u>In re Personal Restraint of Albritton,</u> 143 Wn. App. 584, 180 P.3d 790 (2008).....	4
<u>In re Personal Restraint of Roach,</u> 150 Wn.2d 29, 74 P.3d 134 (2003).....	14-15, 17
<u>In re Young,</u> 122 Wn.2d 1, 857 P.2d 989 (1993) <u>superseded by statute,</u> Laws of 1995, ch. 216, § 9	18
<u>King v. Clodfelter,</u> 10 Wn. App. 514, 518 P.2d 206 (1974).....	7
<u>Macumber v. Shafer,</u> 96 Wn.2d 568, 637 P.2d 645 (1981).....	3
<u>Marine Power & Equip. Co.</u> <u>v. Human Rights Comm'n Hearing Tribunal,</u> 39 Wn. App. 609, 637 P.2d 645 (1981).....	3, 5
<u>State v. Alvarado,</u> 164 Wn.2d 556, 192 P.3d 345 (2008).....	12-13

TABLE OF AUTHORITIES (CONT.)

Page

WASHINGTON CASES (CONT.)

<u>State v. Bader,</u> 125 Wn. App. 501, 105 P.3d 439 (2005).....	4
<u>State v. Bunker,</u> 144 Wn. App. 407, 183 P.3d 1086, <u>review granted,</u> 165 Wn.2d 1003, 198 P.3d 1086 (2008).....	5
<u>State v. Donaghe,</u> 152 Wn. App. 97, 215 P.3d 232 (2009).....	8-10, 17-18
<u>State v. MacKenzie,</u> 114 Wn. App. 687, 60 P.3d 607 (2002).....	6
<u>State v. Pillatos,</u> 159 Wn.2d 459, 150 P.3d 1130 (2007).....	3
<u>State v. Schmidt,</u> 143 Wn.2d 658, 23 P.3d 462 (2001).....	18
<u>State v. Taylor,</u> 111 Wn. App. 519, 45 P.3d 1112 (2002).....	4
<u>Tomlinson v. Clark,</u> 118 Wn.2d 498, 825 P.2d 706 (1992).....	6

TABLE OF AUTHORITIES (CONT.)

	Page
<u>FEDERAL CASES</u>	
<u>White v. Pearlman</u> , 42 F.2d 788 (10 th Cir. 1930)	14-16
 <u>OTHER JURISDICTIONS</u>	
<u>Brown v. Brittain</u> , 773 P.2d 570 (Colo. 1989)	16
<u>In re Messerschmidt</u> , 104 Cal. App.3d 514, 163 Cal. Rptr. 580 (1980)	16
 <u>RULES, STATUTES AND OTHERS</u>	
Former RCW 9.94A.030(3)	9
Former RCW 9.94A.030(3) (1988)	11
Former RCW 9.94A.030(4)	13
Former RCW 9.94A.030(4) (1988)	8, 10, 12
Former RCW 9.94A.030(21) (1988)	9-10
Former RCW 9.94A.170 (1988)	1-2
Former RCW 9.94A.030(3)	13
Former RCW 9.94A.170(4) (1988)	6-7

TABLE OF AUTHORITIES (CONT.)

Page

RULES, STATUTES AND OTHERS (CONT.)

Former RCW 9.94A.170 (1993)	2
Former RCW 9.94A.170(1)-(3) (1993)	4
Former RCW 9.94A.170(4)	5
Former RCW 9.94A.170(4) (1993)	10
Former RCW 9.94A.220	7
Former RCW 9.94A.170(4) (1993)	8
Former RCW 9.94A.715	13
Former RCW 9.94A.715(1)	11
Laws of 1988, ch. 153, § 1	1, 9
Laws of 1988, ch. 153, § 5	1, 11
Laws of 1988, ch. 153, § 9	2, 11-12
Laws of 1993, ch. 31, § 2	2
Laws of 2002, ch. 16	17
Laws of 2009, ch. 375, § 7	13
Laws of 2009, ch. 375, § 10	13
RCW 9.94A.171	2
RCW 9.94A.195	1, 11

TABLE OF AUTHORITIES (CONT.)

Page

RULES, STATUTES AND OTHERS (CONT.)

RCW 9.94A.625(3).....	11-12
RCW 9.94A.637(1)(a)	7
RCW 9.94A.637(1)(c).....	10
RCW 9.94A.707	11, 13
RCW 9.94A.707 (2009).....	13
RCW 26.19.080.....	3

A. SUPPLEMENTAL ARGUMENT

1. BECAUSE THE LEGISLATURE HAS VESTED EXCLUSIVE AUTHORITY IN THE DEPARTMENT OF CORRECTIONS (DOC) TO DETERMINE SENTENCE TOLLING, THE TRIAL COURT ACTED OUTSIDE ITS AUTHORITY IN REFUSING TO ISSUE THE CERTIFICATE OF DISCHARGE.

At the time of Donaghe's offenses, sentence tolling was governed by former RCW 9.94A.170, which provided:

- (1) A term of confinement including community custody ordered in a sentence pursuant to this chapter shall be tolled by any period of time during which the offender has absented him or herself from confinement without the prior approval of the entity in whose custody the offender has been placed. A term of partial confinement shall be tolled during any period of time spent in total confinement pursuant to a new conviction or pursuant to sanctions for violation of sentence conditions on a separate felony conviction.
- (2) A term of supervision, including postrelease supervision ordered in a sentence pursuant to this chapter shall be tolled by any period of time during which the offender has absented himself or herself from supervision without prior approval of the entity under whose supervision the offender has been placed.
- (3) Any period of supervision shall be tolled during any period of time the offender is in confinement for any reason. However, if an offender is detained pursuant to section 5 of this 1988 act or RCW 9.94A.195 and is later found not to have violated a condition or requirement of supervision, time spent in confinement due to such detention shall not toll to period of supervision.

(4) For confinement sentences, the date for the tolling of the sentence shall be established by the entity responsible for the confinement. For sentences involving supervision, the date for the tolling of the sentence shall be established by the court, based on reports from the entity responsible for the supervision.

Former RCW 9.94A.170 (1988) (emphasis added); Laws of 1988, ch. 153, § 9.¹ Pursuant to subsection (4), it was the court – based on reports from the entity responsible for supervision – that determined tolling.

In 1993, however, the Legislature amended subsection (4) by vesting exclusive authority in the entity responsible for supervision to determine tolling:

(4) For confinement or supervision sentences, the date for the tolling of the sentence shall be established by the entity responsible for the confinement or supervision.

Former RCW 9.94A.170 (1993); Laws of 1993, ch. 31, § 2. This was the Legislature’s sole amendment to the statute and stated its purpose was to “clarify tolling provisions.”

AN ACT Relating to the clarification of responsibility to monitor criminally insane offenders, track sentences, clarify tolling provisions, and charge offenders for special services[.]

Laws of 1993, ch. 31.

¹ This statute is currently codified as RCW 9.94A.171.

Although Donaghe's offense pre-dates this amendment, it is clearly remedial and therefore applied to Donaghe's motion for a certificate of discharge. Generally, remedial statutes are enforced as soon as they are effective, even if they relate to transactions predating their enactment. State v. Pillatos, 159 Wn.2d 459, 473, 150 P.3d 1130 (2007). A statute is remedial when it relates to practice, procedure, or remedies and does not affect a substantive or vested right. If a statute is remedial in nature and retroactive application would further its remedial purpose, it will be enforced retroactively. Macumber v. Shafer, 96 Wn.2d 568, 570, 637 P.2d 645 (1981).

The amendment at issue here is patently remedial because it relates to practice, procedure, or remedies and does not affect a substantive or vested right. Marine Power & Equip. Co. v. Human Rights Comm'n Hearing Tribunal, 39 Wn. App. 609, 617, 694 P.2d 697 (1985); see also In re Marriage of Hawthorne, 91 Wn. App. 965, 968-69, 957P.2d 1296 (1998) ("Because RCW 26.19.080, as amended, does not create a new right of action but merely clarifies the procedures the obligor may use to recoup payments for daycare expenses which are not incurred, it is a remedial statute. The trial court could therefore apply it retroactively"). Similarly, the

amendment here merely clarified procedure: which entity will determine sentence tolling. Regardless of the entity responsible, the rules as to tolling remained the same. Former RCW 9.94A.170(1)-(3) (1993).

For this reason, the state's reliance on cases applying the law in effect at the time of the offense to *substantive* issues of supervision is misplaced. See Brief of Respondent (BOR) at 1 (citing State v. Bader, 125 Wn. App. 501, 503, 105 P.3d 439 (2005);² State v. Taylor, 111 Wn. App. 519, 523, 45 P.3d 1112 (2002);³ In re Personal Restraint of Albritton, 143 Wn. App. 584, 591 fn. 4, 180 P.3d 790 (2008)).⁴

Similarly, the state's reliance on RCW 9.94A.345 is misplaced. BOR at 5. Under the statute, "any sentence *imposed* . . . shall be determined in accordance with the law in effect when the current offense was committed." Emphasis added. The issue here is not whether the sentence *imposed* was determined in accord

² In Bader, the court determined the law in effect at the time of the offense determined the *commencement* of community custody. Bader, 125 Wn. App. at 503-505.

³ In Taylor, the court determined the law in effect at the time of the offense applied to determine the *length* of community custody. Taylor, 111 Wn. App. at 524.

⁴ In Albritton, the court held that under the drug offender sentencing alternative (DOSA) statute in effect at the time of the offense, Albritton was entitled to credit for the time he served in confinement for violating the community custody conditions of that sentence. Albritton, at 590-92.

with the law in effect at the time of the offense, but which entity is responsible for determining whether a portion of it has been carried out.

Moreover, retroactive application of subsection (4) of former RCW 9.94A.170 furthers its remedial purpose, because it streamlines the procedure for determining tolling. Pursuant to the amendment, the courts no longer determine tolling “*based on the reports from the entity responsible for the supervision.*” Former RCW 9.94A.170(4) (emphasis added). Rather, “the entity responsible for the supervision” makes the determination itself. The amendment essentially cuts out the middleman. It therefore applies retroactively. See e.g. Marine Power & Equip. Co., 39 Wn. App. at 618-19.

Alternatively, that the Legislature stated its intent was to “clarify” the tolling provisions, indicates it never intended for tolling determinations to be made by the court at all. See e.g. State v. Bunker, 144 Wn. App. 407, 183 P.3d 1086 (2008), review granted, 165 Wn.2d 1003, 198 P.3d 512 (2008) (legislature’s amendment to no contact order provisions enacted solely “to make clear its intent” that willful violation of no-contact order provision is a criminal

offense evidenced the construction sought by Bunker “is, and always has been, erroneous”.)

“When a statute or regulation is adopted to clarify an internal inconsistency to help it conform to its original intent, it may properly be retroactive as curative.” State v. MacKenzie, 114 Wn. App. 687, 699, 60 P.3d 607 (2002). Similarly, “[w]hen an amendment clarifies existing law and where that amendment does not contravene previous constructions of the law, the amendment may be deemed curative, remedial and retroactive. This is particularly so where an amendment is enacted during a controversy regarding the meaning of the law.” Tomlinson v. Clark, 118 Wn.2d 498, 510-11, 825 P.2d 706 (1992).

The amendment at issue here clarified existing law and did not contravene any previous construction of the law, as the court was always required to *establish tolling based on reports by the entity responsible for the supervision*. Former RCW 9.94A.170(4) (1988). Because the amendment was remedial, it applied to Donaghe. It was therefore up to DOC to determine tolling, not the court. Because DOC considered the terms of Donaghe’s sentence

complete, the court had no discretion but to issue the certificate of discharge, pursuant to Former RCW 9.94A.220.⁵

In his pro se briefing to the trial court, Donaghe argued the court should apply the version of former RCW 9.94A.170(4) in effect at the time of his sentence. CP 57. Regardless, however, the doctrine of judicial estoppel should not apply, as Donaghe has never altered his position that he completed the terms of his sentence, according to DOC, and was entitled to a certificate of discharge. See e.g. Ashmore v. Estate of Duff, 165 Wn.2d 948, 951-52, 205 P.3d 111 (2009) (the doctrine of judicial estoppel concerns itself with inconsistent assertions of fact, not with inconsistent positions taken on points of law); King v. Clodfelter, 10 Wn. App. 514, 521, 518 P.2d 206 (1974) (“heart of the doctrine is the prevention of inconsistent positions as to facts”).

⁵ The language of former RCW 9.94A.220 is set forth in the state's response brief at page 5 and is substantially similar to the current version of the statute, RCW 9.94A.637(1)(a), which provides:

When an offender has completed all requirements of the sentence, including any and all legal financial obligations, and while under the custody and supervision of the department, the secretary or the secretary's designee shall notify the sentencing court, which shall discharge the offender and provide the offender with a certificate of discharge[.]

Finally, the state asserted below that even if the 1993 amendment to former RCW 9.94.170(4) applied to Donaghe, the DOC letter did not entitle him to a certificate of discharge, because “[t]here is no authority for the proposition that termination of supervision equals notification that the sentence is complete.” BOR at 9. However, the letter expressly stated: “He was on supervision with the Department of Corrections from 4/25/96 until 11/24/04 when these cases were terminated.” CP 41. The state concedes all conditions (apart from the term of community placement)⁶ were completed. CP 53-55. Under former 9.94A.030(4) (1988), “community placement” was defined as:

A one-year period during which the offender is subject to the conditions of community custody and/or postrelease supervision, which begins either upon completion of the term of confinement (postrelease supervision) or at such time as the offender is transferred to community custody in lieu of earned early release. Community placement may consist of entirely community custody, entirely postrelease supervision, or a combination of the two.

Former RCW 9.94A.030(4) (emphasis added); Laws of 1988, ch. 153, § 1.

Community custody was defined as:

⁶ As the court of appeals noted, Donaghe was sentenced to community placement, not community custody. CP 70; State v. Donaghe, 152 Wn. App. 97, 102 n.4, 215 P.3d 232 (2009).

That portion of an inmate's sentence of confinement in lieu of earned early release time served in the community subject to controls placed on the inmate's movement and activities by the department of corrections.

Former RCW 9.94A.030(3) (emphasis added).

Postrelease supervision, however, was defined as:

That portion of an offender's community placement that is not community custody.

Former RCW 9.94A.030(21) (1988) (emphasis added).⁷

Accordingly, the department's assertion that Donaghe "was on supervision with the Department of Corrections from 4/25/96 until 11/24/04 when these cases were terminated" can only mean that the department considered the community placement portion of Donaghe's sentence – which by statute, could consist entirely of postrelease supervision – completed. The court erred in refusing to issue the certificate of discharge.

2. THE RULE OF LENITY AND PRINCIPLES OF EQUITY FAVOR INAPPLICABILITY OF THE TOLLING STATUTE UNDER THE CIRCUMSTANCES HERE.

The appellate court decided Donaghe's case based on the definition of "community custody," as that "portion of an offender's

⁷ Contrary to the court of appeals, this provision was indeed in effect at the time of Donaghe's offenses. Cf. Donaghe, 152 Wn. App. at 108 n.15, and Laws of 1988, ch. 153, § 1; former RCW 9.94A.030(21).

sentence of confinement in lieu of earned early release time . . . served in the community . . . subject to controls placed on the offender's movement and activities by the department." Donaghe, 152 Wn. App. at 107 (emphasis in original).⁸ As the court earlier pointed out, however, Donaghe was sentenced to "community placement," not community custody. Donaghe, 152 Wn. App. at 102 n.4. As set forth in the proceeding section, community placement "may consist of entirely community custody, entirely of postrelease supervision, or a combination of the two." Former RCW 9.94A.030(4) (1988). And contrary to the court of appeals decision, at the time of Donaghe's offenses, "postrelease supervision" was defined as "that portion of an offender's community placement that is not community custody." Former RCW 9.94A.030(21) (1988). In contrast to "community custody," "postrelease supervision" does not have a community service requirement. Accordingly, the court of appeals reasoning for

⁸ The court did not address Donaghe's argument that the department, not the court, determines tolling by virtue of the 1993 amendment to former RCW 9.94A.170(4). Opening Brief of Appellant (BOA) at 1, 8-11; Reply Brief of Appellant (RB) at 13-14; see Donaghe, 152 Wn. App. at 102-03, 105-106. Instead, the court addressed a different argument regarding retroactivity, whether RCW 9.94A.637(1)(c) – which provides a mechanism for an offender, instead of DOC, to notify the court of his or her completion of the terms of his or her sentence – is remedial and retroactive. See RB at 13-14. According to the court, this issue was inadequately briefed. Donaghe, 152 Wn. App. at 111 n. 23.

affirming the lower court's denial of Donaghe's certificate of discharge does not withstand scrutiny.

Regardless, the state's argument regarding tolling remains. As set forth in the preceding section, the applicable tolling statute provided:

Any period of supervision shall be tolled during any period of time the offender is in confinement for any reason. However, if an offender is detained pursuant to section 5 of this 1988 act or RCW 9.94A.195 and is later found not to have violated a condition or requirement of supervision, time spent in confinement due to such detention shall not toll to period of supervision.

Former RCW 9.94A.030(3) (1988); Laws of 1988, ch. 153, § 9.

As noted in the Knippling decision, however, a later version of this tolling provision (RCW 9.94A.625(3)) seemingly conflicts with former RCW 9.94A.715(1), which provides that community custody begins at the completion of the term of confinement.⁹ In re Personal Restraint Petition of Knippling, 144 Wn. App. 639, 642-43, 183 P.3d 365 (2008). The court harmonized the two statutes, however, reasoning:

Our interpretation of RCW 9.94A.715(1) is consistent with RCW 9.94A.625(3). The latter deals with tolling

⁹ Under former RCW 9.94A.715(1), "community custody ... begin[s]: (a) Upon completion of the term of confinement; [or] (b) at such time as the offender is transferred to community custody in lieu of earned release." Knippling, 144 Wn. App. at 367. The statute has since been re-codified as RCW 9.94A.707.

of the term of community custody after the term of community custody has started. It provides that the community custody term does not run during time in confinement for new crimes or for community custody violations. In contrast, RCW 9.94A.715(1) addresses the point in time at which the term of community custody begins. And, the statute is clear that the term of community custody begins when the offender completes his confinement time.

Knippling, 144 Wn. App. at 367.

Granted, the Knippling court addressed a latter version of the tolling statute, RCW 9.94A.625(3), which specifically addressed community custody, not community placement. However, the same seeming conflict exists because, under the law in effect at the time of Donaghe's offense, "community placement" began "either upon completion of the term of confinement (postrelease supervision) [which, was not required to be served in the community, as argued in the preceding section] or at such time as the offender is transferred to community custody in lieu of earned early release." Former RCW 9.94A.030(4) (1988); Laws of 1988, ch. 153, § 9.

This Court review issues of statutory construction de novo. State v. Alvarado, 164 Wn.2d 556, 561, 192 P.3d 345 (2008). In discerning the plain meaning of a provision, this Court considers the entire statute in which the provision is found, as well as other related statutes or other provisions in the same act that disclose

legislative intent. Alvarado, 164 Wn.2d at 562. In this case, former RCW 9.94A.030(4) states that community placement begins “upon completion of the term of confinement.” There is no mention of release to the community. But former RCW 9.94A.170(3) states that any period of supervision shall be tolled any period of time the offender is incarcerated. Reading the statutes in tandem, there is an ambiguity, because the statutory scheme does not say which provision controls.¹⁰ Donaghe maintains this conflict creates a statutory ambiguity that must be interpreted in his favor. See Petition for Review (PR) at 9-12.

¹⁰ As noted in the preceding footnote, the Legislature recently amended former RCW 9.94A.715, which is now codified as RCW 9.94A.707. That statute provides, in relevant part:

Community custody shall begin: (a) Upon completion of the term of confinement; or (b) at the time of sentencing if no term of confinement is ordered.

RCW 9.94A.707 (2009); Laws of 2009, ch. 375, § 7. Regarding this change, the Legislature stated:

The existing sentencing reform act contains numerous provisions for supervision of different types of offenders. This duplication has caused great confusion for judges, lawyers, offenders, and the department of corrections, and often results in inaccurate sentences. The clarifications in this act are intended to support continued discussions by the sentencing guidelines commission with the courts and the criminal justice community to identify and propose policy changes what will further simplify and improve the sentencing reform act relating to the supervision of offenders.

Laws of 2009, ch. 375, § 10. This statement recognizes the confusion engendered by the community supervision laws and if anything, supports the application of the rule of lenity in this case.

Assuming arguendo, this Court determines there is no ambiguity and the tolling statute trumps the definition of when community placement begins, principles of equity nevertheless support inapplicability of the tolling statute here.

The federal courts have recognized an inmate is entitled to serve his sentence without interruption:

A prisoner has some rights. A sentence of five years means a continuous sentence, unless interrupted by escape, violation of parole, or some fault of the prisoner, and he cannot be required to serve it in installments. Certainly a prisoner should have his chance to re-establish himself and live down his past.

White v. Pearlman, 42 F.2d 788 (10th Cir. 1930). Applying this reasoning, the Tenth Circuit held that where a prisoner is erroneously discharged from a penal institution, without any contributing fault on his part, and without violations of conditions of parole, that his sentence continues to run while he is at liberty. Id.

This Court adopted the equitable doctrine of credit for time at liberty for a person mistakenly released in In re Personal Restraint of Roach, 150 Wn.2d 29, 74 P.3d 134 (2003) (an erroneously released prisoner will be granted day-for-day credit against 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).

The same reasons that apply for the equitable doctrine of credit for time at liberty apply for application of an equitable doctrine of credit for time at the Special Commitment Center. But for the state's prosecution of Donaghe for involuntary commitment, his community placement sentence would have run. It was interrupted through no fault of his own. He served the time the Legislature deemed appropriate for his crimes. He has since been put away, not based upon what he has done, but based upon what state's experts speculate he might do. As a result, he has done nothing to abscond from his legal obligations, in the same way as someone who is erroneously released from incarceration. He is therefore entitled to credit against his sentence for community placement for time spent at the SCC, in the same vein that Roach was entitled to credit for time spent at liberty against his confinement sentence. As this Court aptly stated:

The rule properly balances the equities. A prisoner released without contributing fault, either because of ignorance or because of diligence in calling the government's mistake to the attention of the responsible authorities, should not be effectively penalized by being required to return to prison to correct the government's mistake. E.g., Brown v.

Brittain, 773 P.2d 570, 574-75 (Colo. 1989); In re Messerschmidt, 104 Cal. App.3d 514, 163 Cal. Rptr. 580, 581-82 (1980). Just as society is entitled to have the debt paid, the prisoner is entitled to pay his or her debt to society, "re-establish himself and live down his past." White, 42 F.2d at 789.

Roach, 150 Wn.2d at 39 (J. Chambers, concurring).

By virtue of civil commitment, Donaghe was prevented from paying his debt to society, re-establishing himself and living down his past. For this reason, as well as the rule of lenity, the tolling statute does not apply to his period of community placement.

3. DISENFRANCHISEMENT IS PUNITIVE AND
RENDERS DONAGHE'S COMMITMENT
UNCONSTITUTIONAL.

The state claims Donaghe's disenfranchisement does not render his involuntary commitment unconstitutional, on grounds his disenfranchisement is the result of his felony conviction – as opposed to his involuntary commitment. Supplemental Brief of Respondent (SBOR) at 17-20. This is not true. But for Donaghe's involuntary commitment, he would have had the chance to serve his community placement sentence and "re-establish himself and live down his past." White, 42 F.2d at 789. As this Court has recognized, a prisoner has some rights. An individual has the right to a continuous sentence, unless interrupted by escape, violation of

parole, or some fault of the prisoner, and he cannot be required to serve it in installments. Roach, 152 Wn.2d at 34. Yet that is exactly what the state is advocating for. Assuming this Court agrees Donaghe's community placement sentence has tolled the last thirteen years by virtue of his involuntary commitment, that commitment has deprived him of his right to vote. Donaghe, 152 Wn. App. at 113 (Armstrong, J., dissenting) ("Donaghe would have regained his voting rights long ago had it not been for his confinement as a sexually violent predator")

Significantly, the Legislature has reiterated the importance of voting rights – especially where felons are concerned:

The legislature recognizes that an individual's right to vote is a hallmark of a free and inclusive society and that it is in the best interest of society to provide reasonable opportunities and processes for an offender to regain the right to vote after completion of all the requirements of his or her sentence. The legislature intends to clarify the method by which the court may fulfill its already existing direction to provide discharged offenders with their certificates of discharge.

Laws of 2002, ch.16 (intent).

Division Two's decision in Donaghe's case conflicts with Legislative intent, constitutes punishment and renders SCC commitment unconstitutional.

According to this Court's opinion in In re Young, 122 Wn.2d 1, 857 P.2d 989 (1993), superseded by statute, Laws of 1995, ch. 216 § 9, "[T]he goals of civil and criminal confinement are quite different; the former is concerned with incapacitation and treatment, while the latter is directed to retribution and deterrence." Young, 122 Wn.2d at 21. Disenfranchisement has a punitive purpose. See State v. Schmidt, 143 Wn.2d 658, 683, 23 P.3d 462 (2001) (Johnson, J., dissenting) (loss of liberty, the right to vote, and the and the right to possess a firearm collectively encompass the punishment the state imposes on a convicted felon). The civil commitment goals of incapacitation and treatment are intended to be distinct from punishment; disenfranchisement does nothing but continue to punish a person involuntarily committed. Donaghe, 152 Wn. App. at 114 (Armstrong, J., dissenting) (citing Young, 122 Wn.2d at 21-22).

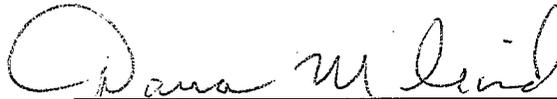
B. CONCLUSION

The court was without authority to determine tolling. Regardless, the rule of lenity and principles of equity support inapplicability of the tolling statute under the circumstances of this case. Moreover, application of the tolling statute here results in punitive civil commitment as it results in Donaghe's perpetual disenfranchisement.

Dated this 23rd day of April, 2010.

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. LIND, WSBA 28239
Office ID No. 91051
Attorneys for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)

Respondent,)

v.)

SAMUEL DONAGHE,)

Petitioner.)

NO. 83738-4, Consolidated
under State v. Jones,
No. 83451-2

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 23RD DAY OF APRIL, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CAROL LA VERNE
THURSTON COUNTY PROSECUTOR'S OFFICE
2000 LAKERIDGE DRICE SW
OLYMPIA, WA 98502-6001

[X] JEREMY MORRIS
KITSAP COUNTY PROSECUTOR'S OFFICE
614 DIVISION STREET
PORT ORCHARD, WA 98366

[X] ROGER HUNKO
569 DIVISION STREET
SUITE E
PORT ORCHARD, WA 98366

[X] SAM DONAGHE
SPECIAL COMMITMENT CENTER
P.O. BOX 88600
STEILACOOM, WA 98388

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF APRIL, 2010.

x Patrick Mayovsky