

NO. 83815-1

SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint Petition of :

ERIC SHERIDAN FLINT,

Petitioner.

**RESPONSE OF THE DEPARTMENT OF CORRECTIONS TO
PETITIONER'S MOTION FOR DISCRETIONARY REVIEW**

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I. IDENTITY OF RESPONDENT

Respondent is the Washington State Department of Corrections (Department or DOC).

II. DECISION

Respondent requests that this Court deny Petitioner's motion for discretionary review seeking review of the October 5, 2009, Order Dismissing Personal Restraint Petition, entered by the Washington State Court of Appeals, Division II. Appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Does Mr. Flint's motion for discretionary review fail to meet any of the requirements governing acceptance of review under RAP 13.4 (b)?
2. Are Mr. Flint's issues presented for review without merit?

IV. STATEMENT OF THE CASE

A. BASIS OF CUSTODY

Mr. Flint is in the custody of the Washington Department of Corrections pursuant to Kitsap County convictions for First Degree Robbery (Count 1) and Possession of a Controlled Substance (Methamphetamine) (Count 2). Exhibit 1, Attachment 1 at 1¹. The court sentenced Mr. Flint to 100 months total confinement on Count 1 and to 14

¹ The Exhibits referenced in this Response are Exhibits attached to the Response of the Department of Corrections to Mr. Flint's personal restraint petition in the Washington Court of Appeals, Division II.

months total confinement on Count 2. Id. at 2. Additionally, he was sentenced to a term of community custody for a range of 18 to 36 months. Id. at 3.

On February 12, 2009, Mr. Flint was sanctioned to return to prison and serve the earned early release time previously applied to his sentence. Appendix B. His current Planned Release Date is November 13, 2010. Exhibit B, Attachment A at 1.

B. FACTS RELEVANT TO THE ISSUES PRESENTED

On August 27, 2007, Mr. Flint was released from his confinement term to his community custody term. Exhibit 2, Attachment A at 17. Subsequently, on April 2, 2008, a community custody violations hearing was held concerning Mr. Flint's alleged violations of his community custody conditions. Exhibit 2, Attachment B at 24, entry dated 04/02/2008. At the hearing Mr. Flint was found guilty of 1) failure to report since 2/26/08; 2) using a controlled substance, methamphetamine, on or about 2/26/08; 3) failure to obey all laws by rendering criminal assistance on 3/19/08; and 4) contact with a known drug user on 3/19/08. Id. Mr. Flint was sanctioned to 14 days confinement with credit for time served since March 19, 2008 and was released that same day. Id.; Exhibit 2, Attachment A at 17, movement entry dated 04/02/2008.

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On July 28, 2008, Mr. Flint signed a Stipulated Agreement admitting he was guilty of violating his community custody conditions by failing to report on July 21, 2008. Exhibit 2, Attachment B at 16, entry dated 07/28/2008. Mr. Flint agreed to a sanction of imposition of a curfew. Id.

On November 5, 2008, a second community custody violation hearing was held concerning Mr. Flint. He was found guilty of 1) failure to report on 9/15/08 and 2) failure to abide by UA/BA (urinalysis/blood alcohol) monitoring on 9/24/08. Id. at 9, entry dated 11/05/2008. Mr. Flint was sanctioned to 13 days in jail with credit for time served since October 24, 2008. Id. Mr. Flint was released on November 5, 2008. Exhibit 2, Attachment A at 17, movement entry dated 11/05/2008

On February 6, 2009, Mr. Flint signed a second Stipulated Agreement admitting he was guilty of violating his community custody conditions by using a controlled substance on January 7, 2009. Exhibit 2, Attachment B at 1, entry dated 03/17/2009. He was sanctioned to increased reporting, increased UAs, and to attend a drug support group weekly. Id.

On February 12, 2009, a third and final community custody violation hearing was held concerning Mr. Flint. Exhibit 1, Attachment B. Mr. Flint was found guilty by admission of 1) failure to abide by UA/BA

Monitoring on 1/21/09; 2) failure to attend Sober Support Group on 1/21/09; 3) failure to report on 1/28/09; and, 4) failure to obey all laws-Misdemeanor-Possession of Drug Paraphernalia on 2/4/09. Id. at 2. He was sanctioned to return to prison for the remainder of his prison sentence, 647 days. Id. at 6; Exhibit 2, Attachment B at 2, entry dated 02/13/09 and 02/20/2009.

Mr. Flint appealed the hearing officer's decision to the Regional Appeals Panel stating that the sanction imposed was unreasonable. Exhibit 1, Attachment C. The Regional Appeals Panel affirmed the hearing officer's decision. Exhibit 1, Attachment D at 1.

C. PROCEEDINGS IN STATE COURT

On April 20, 2009, Mr. Flint filed a personal restraint petition with the Court of Appeals, Division II. He alleged that the DOC had no authority to return him to prison to serve the earned early release time previously credited to his sentence.

The DOC responded arguing that under RCW 9.94A.737(2), the DOC was *required* to return an offender to prison when the offender was found guilty of violating conditions at the third community custody hearing. Mr. Flint subsequently filed a motion to amend raising new claims for review to include the following summarized claims: (1) the sanction imposed under ESSB 6157 violates the Ex Post Facto Clause of the United

States Constitution; (2) the sanction, returning Mr. Flint to prison, expired and became void as of August 1, 2009 under ESSB 5288, sec. 18; (3) RCW 9.94A.714 (2008 c. 231 sec. 16) has no retroactive effect; (4) the sanctions imposed on Mr. Flint were not a “graduated sanction”; (5) the DOC failed to notify Mr. Flint that he could be returned to total confinement at his third community custody hearing; and, (6) Mr. Flint is entitled to earn earned early release time on the remainder of his sentence.

The Acting Chief Judge dismissed the petition as frivolous under RAP 16.11(b). Appendix A. The court responded to Mr. Flint’s arguments in his amended petition, without seeking a response from the DOC.

Mr. Flint then filed this timely motion for discretionary review.

V. ARGUMENT

A. MR. FLINT’S MOTION FAILS TO MEET ANY OF THE REQUIREMENTS FOR DISCRETIONARY REVIEW.

RAP 13.5A(b) states that the considerations that govern the acceptance of discretionary review following dismissal of a personal restraint petition by the Court of Appeals are set out in rule 13.4(b). RAP 13.5A(b). RAP 13.4(b) provides that discretionary review will be accepted by the Supreme Court only:

- (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

- (2) if the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Mr. Flint's motion fails to meet any of the considerations outlined for acceptance of discretionary review.

The Court of Appeal's decision is not in conflict with any decision of the Supreme Court or any other Court of Appeals. Further, Mr. Flint cannot demonstrate any state or federal constitutional violation nor any issue of substantial public interest. This Court should determine that there is no basis for acceptance of the motion for discretionary review.

B. MR. FLINT'S ISSUES FOR REVIEW ARE WITHOUT MERIT.

In this motion for discretionary review, Mr. Flint raises the same arguments that he presented in his motion to amend. Mr. Flint's arguments are without merit.

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1. **Retroactive Application of RCW 9.94A.737(2) Does Not Violate the Ex Post Facto Clause.**

The Washington State Constitution and the United States Constitution prohibit the enactment of ex post facto laws. U.S. Const., art. I, § 23; Const. art. I, § 10, cl. 1. The Washington Supreme Court has long held that Washington's ex post facto prohibition is co-extensive with the federal provision. Johnson v. Morris, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976) (adopting analytical framework of Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L. Ed. 2d 648 (1798)); see also State v. Hennings, 129 Wn.2d 512, 524-25, 919 P.2d 580 (1996) (approving United States Supreme Court holding in California Dept. of Corrections v. Morales, 514 U.S. 499, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995)). Ex post facto guarantees prohibit enactment of laws that “retroactively alter the definition of crimes or increase the punishment for criminal acts.” California Dept. of Corrections v. Morales, 514 U.S. at 504; accord, State v. Hennings, 129 Wn.2d at 525.

“The Ex Post Facto Clause, which ‘forbids the application of any new punitive measure to a crime already consummated,’ has been interpreted to pertain exclusively to penal statutes.” Kansas v. Hendricks, 521 U.S. 346, 370, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) (quoting Lindsey v. Washington, 301 U.S. 397, 401, 57 S. Ct. 797, 81 L. Ed. 2d 1182 (1937); see also, Forster v. Pierce County, 99 Wn. App. 168, 991 P. 2d 687,

695 (2000) (citing United States Supreme Court, federal Courts of Appeals, and Washington case law for the proposition that the ex post facto prohibition applies only to laws inflicting criminal punishment).

“Although the Latin phrase “Ex-Post Facto” literally encompasses any law passed “after the fact,” it has long been recognized by this Court that the constitutional prohibition on ex-post facto laws applies only to penal statutes which disadvantage the offender affected by them.” Collins v. Youngblood, 497 U.S. 37, 41, 110 S. Ct. 2715, 2718, 111 L. Ed. 2d 30 (1990) (citing Calder v. Bull, 3 Dall. 386, 390-392, 1 L. Ed. 648 (1798) (opinion of Chase, J.); Id., at 396 (opinion of Patterson, J.); Id., at 400 (opinion of Iredell, J.). Washington State cases have held similarly. “The ex-post facto prohibition applies only to laws inflicting criminal *punishment*.” (emphasis in the original). State v. Ward, 123 Wn.2d 488, 499, 869 P.2d 1062 (1994), citing Johnson v. Morris, 87 Wn.2d 922, 928, 557 P.2d 1299 (1976), and In re Young, 122 Wn.2d 1, 857 P.2d 989 (1993).

A law violates the ex post facto prohibition if it:

- (1) is substantive, as opposed to merely procedural;
- (2) is retrospective (applies to events which occurred before its enactment); and,

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(3) disadvantages the person affected by it.

Hennings, 129 Wn.2d at 525.

Disadvantage is not determined by weighing the disadvantageous aspects against the ameliorative effects. See Personal Restraint of Powell, 117 Wn.2d 175, 189-190, 814 P.2d 635 (1991). Rather, the sole determinative factor is “whether the law alters the standard of punishment which existed under prior law.” State v. Ward, 123 Wn.2d 488, 497, 869 P.2d 1062 (1994) (emphasis in original); accord, Hennings, at 526. “Finding a[n ex post facto] violation turns upon whether the law changes legal consequences of acts completed before its effective date.” State v. Edwards, 104 Wn.2d 63, 71, 701 P.2d 508 (1985). Ex post facto concerns do not comprehend an individual’s right to reduced punishment or, strictly speaking, avoiding the risk of increased punishment. Dobbert v. Florida, 432 U.S. 282, 293, 97 S. Ct. 2290, 2298, 53 L.Ed.2d 344 (1977). The evil to be avoided is “the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.” Personal Restraint of Powell, 117 Wn.2d at 184-185. Ultimately, if a change in the law does not increase the punishment available at the time the crime was committed, it does not constitute an ex post facto violation. In re Williams, 111 Wn.2d 353, 363, 759 P.2d 436 (1988).

The ex post facto prohibition does not preclude any intervening legislative enactment or amendment that has a “speculative and attenuated risk of increasing the measure of punishment attached to the covered crimes.” Morales, 514 U.S. at 514. Therefore, in order to prevail on an ex post facto challenge, the petitioner must “show with certainty that the sentence is harsher. The change in the law cannot result in mere speculation that the punishment is more severe.” Personal Restraint of Stanphill, 134 Wn.2d 165, 173, 949 P.2d 365 (1998).

[T]he focus of the ex post facto inquiry is not on whether a legislative change produces some ambiguous sort of “disadvantage, nor, as the dissent seems to suggest, on whether an amendment affects a prisoner’s ‘opportunity to take advantage of provisions for early release,’ . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.”

Morales, 514 U.S. at 506 n.3 (emphasis in original) (citations omitted). Here, the statutory amendment to RCW 9.94A.737 does not increase the quantum of punishment. Because the DOC has had the authority to return community custody offenders to prison for the remainder of their sentence under RCW 9.94A.737(1) since July 1, 2001, the effective date of the Offender Accountability Act, application of 9.94A.737(2) after a third violation hearing does not increase the quantum of punishment. Mr. Flint, whose crimes were committed on January 30, 2002 and February 4, 2002

(see Exhibit 1, Attachment A), was subject to RCW 9.94A.737(1) at the time he committed his crimes. The DOC has had the authority to administratively return Mr. Flint to prison at any time he violated community custody conditions – the first time, the second time, or at any time during his community custody term.

Because the quantum of punishment has not been increased by the amendment to RCW 9.94A.737, the amendment may be applied retroactively.

2. **Alternately, the Acting Chief Judge Properly Determined that the 2007 Amendments Apply Prospectively Because the Precipitating Event Occurs After the Effective Date of the Statute.**

A statute operates prospectively when the precipitating event for its application occurs after the effective date of the statute. Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n, 83 Wn.2d 523, 535, 520 P.2d 162 (1974). “A statute does not operate ‘retrospectively’ merely because it is applied in a case arising from conduct antedating the statute’s enactment. . . or upsets expectations based in prior law.” Landgraf v. USI Film Prods., 511 U.S. 244, 269, 114 S. Ct. 1522, 128 L. Ed. 2d 229 (1994). The court first looks to the statute’s plain language to determine a statute’s triggering event. In re Estate of Burns, 131 Wn.2d 104, 112, 928 P.2d 1094 (1997). Id.

For RCW 9.94A.737(2), the plain language of the statute, provides that the precipitating event is the third community custody hearing where the offender is found guilty of violating community custody conditions. The effective date of ESSB 6157 was July 22, 2007. Mr. Flint's third community custody hearing, where he was found guilty of violating community custody conditions, was held on February 12, 2009. Appendix B. As a result, the precipitating event for application of the statute occurred after the effective date of the 2007 amendments.

The Acting Chief Judge properly determined that the 2007 amendments did not violate the Ex Post Facto Clause because the precipitating or triggering event for application of the 2007 amendments is prospective. Because the statute only applies to an offender who has at least a third violation hearing occur after the effective date of the statutory amendments, this Court should determine that there is no violation of the Ex Post Facto Clause nor is there any basis for review.

3. Mr. Flint's Sanction is Not Void.

Mr. Flint argues that because section 19 of ESSB 5288 provided that the 2007 version of RCW 9.94A.737(2) would expire August 1, 2009, that expiration voids the sanction under RCW 9.94A.737(2). The Acting Chief Judge properly determined that Mr. Flint was mistaken.

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Mr. Flint claims that the Legislature intended ESSB 5288 to alleviate any federal Constitutional problems with RCW 9.94A.737(2)'s retroactive application. However, nowhere in the bill does it state that that is the Legislative intent. Rather, the bill was intended to decrease the number of offenders that the DOC was supervising. See Appendix C, Final Bill Report. Moreover, the Legislature reenacted RCW 9.94A.737(2) in HB 2719, 2008 Laws of Washington, ch. 231, at § 16, a new section, which provided as follows:

(1) If an offender has not completed his or her maximum term of total confinement and is subject to a third violation hearing pursuant to RCW 9.94A.737 for any 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 risk of reoffending.

Laws of Washington, ch. 231, §16. This legislation was codified at RCW 9.94A.714.

Section 55 (6) of the bill provided that "Sections 6 through 58 of this act shall not affect the enforcement of any sentence that was imposed prior to August 1, 2009, unless the offender is resentenced after that date." Under the specific language of this section, Mr. Flint's sanction to return to prison was not voided.

Although Mr. Flint may argue that the language of the statute only states “sentence” rather than “sanction,” a sanction is part of the original underlying sentence. See State v. DeBello, 92 Wn. App. 723, 727, 964 P.2d 1192 (1998) (modification of sentences due to violations of community supervision should be deemed punishment for the original crime).

The Acting Chief Judge properly determined that the Legislature’s intent was not to void sanctions that had been applied under RCW 9.94A.737(2) prior to August 1, 2009. This Court should determine that Mr. Flint’s argument does not merit review.

4. **Mr. Flint has no due process right to notice of criminal statutes.**

Mr. Flint argues that the DOC’s failure to notify him that the DOC was required to return him to prison at his third community custody hearing if he was found guilty of the violations violates his Fourteenth Amendment due process rights. He alleges that the failure to notify him of the effect of the third hearing deprived him of the chance to prepare a defense. Mr. Flint’s argument is without merit.

The Chief Judge properly determined that there is no due process requirement that Mr. Flint be notified of the possible sanction of return to prison on the third community custody hearing. Mr. Flint, as all others, is

charged with knowledge of all criminal statutes. As such, he is charged with being aware of RCW 9.94A.737(1) and RCW 9.94A.737(2). If the Legislature had intended that the DOC provide notice of the 2007 amendments to RCW 9.94A.737, the Legislature knows how to require the DOC to provide notice of some new statute if it wants to. See e.g. RCW 10.73.120 (DOC's duty to advise offenders in its custody as of 7/23/89 of the one-year time bar).

Mr. Flint relies on a federal case, Jessop v. U.S. Parole Comm'n, 889 F.2d 831, 835 (9th Cir. 1989) for the proposition that the "failure to provide prior notice of the possible consequences of a parole revocation hearing violates the parolee's right to due process." But that case may be readily distinguished as it is a federal case dealing with the United States Parole Commission, and concerns the notice requirement of a federal statute, 18 U.S.C. § 4214(a)(2)(A)(3). The Jessop case concerns a federal requirement for loss of credit for "street time" when an offender's parole is revoked due to a new felony.

Here, Mr. Flint was given notice of all the allegations against him and received all of the Morrissey due process protections.² He had sufficient time to prepare a defense against the allegations, but chose to

² Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). See also In re McNeal, 99 Wn. App. 617, 994 P.2d 890 (2000) (Morrissey's due process protections apply to community custody hearings).

plead guilty to four allegations. Unlike the federal case, upon return to prison, Mr. Flint was given credit for the time he spent successfully on community custody.

Mr. Flint appears to argue that if he had specific notice of the statute, he would have been able to prepare a defense, not with regard to his guilt concerning the allegations, but with regard to RCW 9.94A.737(2)'s possibility of mitigation. RCW 9.94A.737(2) requires the DOC to return the offender to prison to serve up to the remainder of his sentence, "unless it is determined that returning an offender ...would substantially interfere with the offender's ability to maintain community supports or to participate in necessary treatment or programming and would substantially increase the offender's likelihood of reoffending." RCW 9.94A.737(2).

However, Mr. Flint fails to demonstrate that he would have successfully provided such a defense. Throughout his time on community custody, he repeatedly failed to report, used controlled substances, and finally, after being given a stipulated agreement for using drugs on 1/21/09, failed to report and was later arrested for possessing drug paraphernalia to include a portable scale and a bundle of plastic bags. Appendix B at 4. The Hearing Officer determined that there were no compelling reasons not to send Mr. Flint back to prison to serve the

remaining portion of his sentence. The Hearing Officer held as follows:
“I believe his behavior presents a risk to the safety of the community and this sanction does not interfere with his adjustment in the community.”
Appendix B at 7.

This Court should determine that there is no basis for review of the Acting Chief Judge’s decision.

5. **Mr. Flint is not entitled to obtain earned early release time credits on the remainder of his sentence.**

Mr. Flint argues that, as a community custody violator, he is entitled under DOC Policy 350.100 IX.A.2. to earn earned release credits at the rate of 33 percent. Based on the language of the DOC policy, Mr. Flint further argues that under In re Cashaw, 123 Wn.2d 138, 147-48, 866 P.2d 8 (1994), because the DOC is allegedly failing to follow its rules and regulations, he is entitled to relief. But the DOC’s policy for earned release time, specifically states that offenders who are serving time as a result of lost earned time or lost good conduct time may not earn good conduct time. See Appendix D, DOC Policy 350.100, Earned Release Time at 2, Section I.B.2.

Mr. Flint is not serving his original prison term. Rather, he is serving the early release time previously applied to his original prison term after having lost that time due to violations of community custody.

Nothing in statute or DOC policy allows him to earn early release credits during a confinement term that is comprised of lost early release credits.

RCW 9.94A.728 governs early release credits from an original prison term. RCW 9.94A.737 governs confinement terms due to violations. RCW 9.94A.737 does not require the DOC to offer early release time to an offender who is serving prison due to having lost early release time. To do so would be to undermine the purpose of RCW 9.94A.737, which is to provide consequences to offenders who violate sentence conditions while on community custody. To allow an offender to earn back what he already lost would reduce the effectiveness of the incentive under RCW 9.94A.737 to remain violation free.

The DOC is entitled to enact policies that it sees fit. It has not enacted a policy that allows early release credits for offenders returned to prison to serve the remainder of their sentence (the earned early release credits previously applied to shorten the sentence term).

This Court should determine that Mr. Flint's claim, that he is entitled to earned early release time, is without merit.

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VI. CONCLUSION

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

RESPECTFULLY SUBMITTED this 3rd day of December, 2009.

ROBERT M. MCKENNA
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CERTIFICATE OF SERVICE

I certify that I served a true and correct copy of the foregoing
**RESPONSE OF THE DEPARTMENT OF CORRECTIONS TO
PETITIONER'S MOTION FOR DISCRETIONARY REVIEW** on all
parties or their counsel of record as follows:

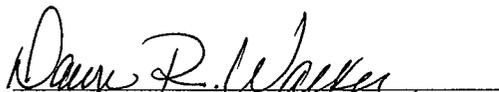
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TO:

ERIC S. FLINT, DOC#733044
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I certify under penalty of perjury that the foregoing is true and
correct.

EXECUTED this 3rd day of December, 2009 at Olympia, WA.


DAWN R. WALKER
Legal Assistant

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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In re the
Personal Restraint Petition of

ERIC SHERIDAN FLINT,

Petitioner.

No. 39212-7-II

ORDER DISMISSING PETITION

Eric Flint seeks relief from personal restraint imposed after he pleaded guilty to first degree robbery. The trial court sentenced him to 100 months of confinement, to be followed by 18 to 36 months of community custody. As a result of earning early release credits, the Department of Corrections released Flint from total confinement to his term of community custody on August 27, 2007, 1,013 days early.

After a community custody violation hearing on April 2, 2008, the Department found Flint guilty of violating conditions of his community custody, including failure to report, use of methamphetamine, rendering criminal assistance and contact with a known drug user. The Department imposed a sanction of 14 days of confinement, with credit for time served.

After another community custody violation hearing on November 5, 2008, the Department found Flint guilty of violating conditions of his community custody, including failure to report and failure to abide by substance abuse monitoring requirements. The Department imposed a sanction of 13 days of confinement, with credit for time served.

APPENDIX A

After a third community custody violation hearing on February 12, 2009, the Department found Flint guilty of violating conditions of his community custody, including failure to abide by substance abuse monitoring requirements, failure to attend a support group, failure to report and unlawful possession of drug paraphernalia. But after this hearing, the Department imposed a sanction of returning Flint to total confinement to serve the remaining 647 days of his sentence.¹ The Department's Regional Appeals Panel denied his appeal.

First, Flint argues that because he earned his early release credits, the Department did not have the authority to impose a sanction of returning him to total confinement. But RCW 9.94A.737(2) requires that:

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

(Emphasis added). Once it found Flint had violated conditions of his community custody after a third community custody violation hearing, the Department was required to return him to total confinement to serve up to the remaining portion of his sentence.

Second, Flint argues that because RCW 9.94A.737(2) was not enacted until 2007, after his 2002 conviction, its application to him is ex post facto. However, it was enacted before he was released from total confinement and so applied throughout his term of community custody. He does not show that RCW 9.94A.737(2) is an ex post facto application of the law.

¹ Flint had served 366 days of community custody, which were deducted from his remaining term of confinement.

Third, Flint argues that because section 19 of ESSB 5288 provided that the 2007 version of RCW 9.94A.737(2) would expire August 1, 2009, that expiration voids the sanction imposed under RCW 9.94A.737(2). He is mistaken. Section 55 of ESSB 5288 expressly provides that it does not affect any sanction imposed before August 1, 2009.

Fourth, Flint argues that his sanction does not comply with the 2009 version of RCW 9.94A.737 because it is not a "graduated sanction." But the 2009 version of RCW 9.94A.737 does not apply to him because it applies only to sanctions imposed on or after August 1, 2009.

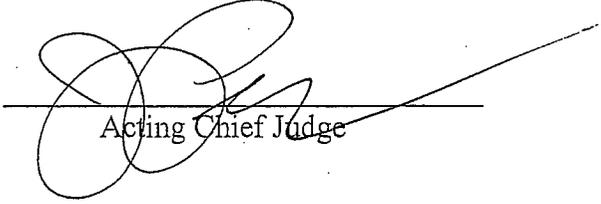
Fifth, Flint argues that he was never informed of the possibility that the Department might return him to serve the remainder of his term of total confinement as a sanction for violating conditions of his community custody. But he identifies no requirement that he be notified of that possibility.

Finally, he contends that because he is serving his total confinement in the Yakima County Jail rather than in a Department facility, he cannot earn early release credits. He fails to show that he is being denied early release credits or that he is being denied any rights that would apply to him if he were in a Department facility instead of the jail.

Flint fails to demonstrate any grounds for relief. Accordingly, it is hereby

ORDERED that Flint's petition is dismissed as frivolous under RAP 16.11(b).

DATED this 5th day of October, 2009.


Acting Chief Judge

APPENDIX B



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

COMMUNITY CUSTODY HEARING REPORT

OFFENDER NAME: FLINT, Eric

DATE: 2/26/09

CRIME: CT I Robbery 1st Degree

DOC NUMBER: 733044

CT II Possession of Controlled
Substance: (Methamphetamine)

COUNTY OF CONVICTION: Kitsap

CAUSE #: AF 021001651

A Community Custody Hearing was held on 2/12/09 at Kitsap County Jail in Port Orchard, Washington, regarding the following alleged violations of the conditions of supervision / sentence for Mr. Eric Flint. The hearing was conducted by Hearing Officer Ernest Torok and parties present for the hearing were: Community Corrections Officer Karla Pijaszek and Mr. Eric Flint.

Upon convening the hearing, I determined that Mr. Flint had received proper service of the Notice of Allegations, Hearing, Rights, and Waiver. I also found that Mr. Flint had previously been provided with copies of all of the documentary evidence to be used against him during the hearing.

I provided the offender with notice of the right to appeal, the address for filing the appeal, and an optional form to be used to file an appeal and Mr. Flint acknowledged that he understood his hearing and appeal rights.

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DOC 460.130

APPENDIX B

Preliminary Matters:

None

The Department of Corrections alleged that the following **violations** were committed:

1. Failing to abide by previous sanction by failing to report to the Department of Corrections on 1/28/09 as directed in Kitsap County, WA.
2. Failing to abide by previous sanction by failing to be available for urinalysis testing since 1/21/09.
3. Failing to abide by previous sanction by failing to submit verification of sober support group attendance since 1/21/09 in Kitsap County, WA
4. Failing to obey all laws by being in Possession of drug paraphernalia on or about 2/4/09.
5. Failing to obey all laws by driving without a valid driver's license on or about 2/4/09 in Kitsap County, WA

The offender entered the following **pleas** to each violation:

1. Guilty
2. Guilty
3. Guilty
4. Guilty
5. Not Guilty

The hearing officer made the following **findings** as to each violation:

1. Guilty
2. Guilty
3. Guilty
4. Guilty
5. Not Guilty

Evidence Relied Upon:

CCO Pijaszek reported that on 4/19/02, Mr. Flint was sentenced in Kitsap County Superior Court on Cause AF 0211001651 to 18 to 36 months of Community Custody. He was ordered to report

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to The Department of Corrections (DOC) as directed, comply with all DOC imposed conditions, obey all laws and not to possession or consume unlawful drugs or drug paraphernalia.

Allegations One, Two and Three

On 9/10/07, Mr. Flint signed the DOC Standard Conditions, Requirement and Instruction form and agreed to abide by his conditions of Community Custody. On 1/21/07, Mr. Flint signed a Stipulated Agreement and agreed to the following sanctions for four consecutive weeks: Report each Wednesday to his assigned CCO beginning on 1/28/09, submit to increased urinalysis testing and attend 3 sober support groups (AA/NA) per week.

CCO Pijaszek reported that on 1/28/09, she talked to Britney McNight and she said she was with B & M Landscaping and Mr. Flint was working for her. She reported that Mr. Flint was working in Seabeck and may not return from the jobsite in time make his reporting obligation. CCO Pijaszek told Ms. McNight to have Mr. Flint call her if he returned to the office before 5 PM, and if not he was to call her in the morning.

Mr. Flint did not report on 1/28/09, as required, did not call on 1/29/09 as instructed through Ms. McNight. CCO Pijaszek called Ms. McNight on 1/29/09, looking for Mr. Flint, and left a voice message for her to call back. Ms. McNight never called CCO Pijaszek back. CCO Pijaszek then called Mr. Flint's cell phone and it was not working.

CCO Pijaszek asked CCO Zapp to look for Mr. Flint and he could not find him. CCO Zapp checked Mr. Flint's last known location, which was a storage unit he had reported to be living in and could not find him. CCO Zapp went Poulsbo Mini Storage Unit #3 on the night of 1/29/09 and then again on the morning of 1/30/09 and could not find him. CCO Pijaszek then requested a Secretary's Warrant for Mr. Flint's arrest on 1/30/09.

CCO Pijaszek summarized violations one through three by stating, Mr. Flint failed to report since 1/21/09, he failed to make himself available for UA monitoring, he failed to submit verification of attending 3 sober support groups for the weeks ending 1/28/09 and 2/4/09 as agreed in the Stipulated Agreement.

At the Hearing, Mr. Flint plead guilty to allegations one, two and three. He said that he was told by his boss that he was cleared to work on the 28th and the message he got, did not say anything about calling on the 29th. Mr. Flint said his next report day was on 2/4/09 and he got arrested on the morning of 2/4/09 and therefore could not report after that. Mr. Flint said he also attended the sober support groups but did not have proof of attending and that was why he plead guilty to

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allegations three. He said he also knew that he was required to report on the 28th and should have followed up and that is why he plead guilty to allegations one and two.

I found Mr. Flint **guilty of allegations one, two and three** based on his plea and did not find his explanations very believable or creditable. I relied more on the facts presented by CCO Pijaszek in that Mr. Flint did not report since 1/21/09 and then was arrested on 2/4/09.

Allegations Four and Five

CCO Pijaszek reported that on 2/4/09, Mr. Flint was arrested by Officer Justin Gillen, who was with the Paulsbo Police Department. Officer Gillen noticed that Mr. Flint was driving a red car in the City of Paulsbo and the registration in the computer reported it as a white car. Officer Gillen stopped the car and the driver was Mr. Flint. He did not have a driver's license on his person and said the car had been recently painted red. Investigation revealed that Mr. Flint also had an outstanding DOC warrant. Mr. Flint was arrested and the car was searched. Officer Gillen discovered a multicolored pipe lying between the driver's seat and the door. With Officer Gillen's experience as a K-9 handler, he identified the pipe to be drug paraphernalia and it had an odor of burnt marijuana.

Officer Gillen also discovered a blue colored draw string bag which contained a portable scale, a bundle of clear plastic bags and red colored cut straw. Officer Gillen also believed these items to be drug paraphernalia based on his experience. Officer Gillen obtained "Aico" (a certified narcotic detection dog) and proceeded with a narcotic odor search. The dog confirmed the odor of narcotics on the drug paraphernalia. While transporting Mr. Flint to jail he told Officer Gillen that, "it is hard not to go out and buy a pound of dope and flood the city with it." CCO Pijaszek introduced as evidence the police report written by Officer Gillen. She also read the police report aloud at this hearing. In addition, CCO Pijaszek testified that she spoke with Officer Gillen and confirmed the information in the police report.

At the Hearing, Mr. Flint plead guilty to allegation four and said he had the pipe to give to a friend as a replacement to one that he had broken. However, he said he did not know that the scale and the bundle of clear plastic bags were in the car. Mr. Flint also said he did not have his driver's license on him when he was stopped by Officer Gillen, but he did in fact have a valid driver's license.

I found Mr. Flint **guilty of allegation four** based on Mr. Flint's plea and the evidence submitted by CCO Pijaszek.

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I found Mr. Flint **not guilty of allegation five** because Mr. Flint said he had a valid driver's license and produced a valid Washington State ID when he was stopped. And there were no evidence submitted to prove that he did not have a valid issued license. He was not charge with driving without a valid license by the arresting officer and there were no evidence introduced to show that Mr. Flint's license had been suspended.

Under RCW 46.20.005, Driving without a license, this section does not apply if when the person is stopped, they have an expired license or other identifying documentation, etc. Because of these circumstances, the violation becomes a traffic infraction and not a misdemeanor under RCW 46.20.015 (a). Therefore, I found Mr. Flint not guilty because he committed a traffic infraction and did not commit a misdemeanor. Therefore, it had not been proven that Mr. Flint failed to obey all laws.

Disposition:

The CCO provided the following information regarding the offender's **adjustment** on supervision:

CCO Pijaszek reported that Mr. Flint is classified as High Violent. His risk factors include attitude/behavior and community/employment. He is currently being supervised for Robbery 1st Degree and Possession of Meth. Mr. Flint previous convictions include 3 convictions for Violation of a Protection Order, 2 for UPCS, 2 for Theft, 2 for Obstructing, 2 for Malicious Mischief, 2 for Criminal Trespass and convictions for Possession of Stolen Property, Forgery, Criminal Assistance and Burglary. He also has a pending infraction of Improper Use of License Plates out of Tacoma Municipal Court with a hearing scheduled 3/9/09.

Mr. Flint adjustment to supervision is guarded. Over the last year, Mr. Flint has appeared at 3 OAA Hearings and received sanctions at two. He also signed two Stipulated Agreements. Mr. Flint completed a Chemical Dependency evaluation on 6/4/08 with the recommendation of no treatment at this time. However, given his recent U/A for meth and having drug paraphernalia in his car the risk factors are elevated at this time.

The offender provided the following information regarding their **adjustment** on supervision:

Mr. Flint reported that it has been up and down. He said he has a drug problem and needs treatment. He said he has been out about a year and a half. He said he got a job with the City of Lynnwood, WA and lost the job in October of 2008. He said he was working at the waste water treatment plant making \$24.00. He was fired when he got a DOC violation and they let him go. Mr. Flint said he got the training while he was in prison and the City of Lynnwood gave

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him a brake and hired him. Mr. Flint said he was homeless and living in a storage unit. He now has an offer from friends, with a place to live and an appointment for a job interview at the Family Pancake House in Bremerton, as a cook. Mr. Flint said he lost his car when he was arrested. He has now gotten it back and it cost him \$500.00 in fees. He said if he were released, he could make it to his job interview and get started back into treatment, if given a chance.

The disposition recommendation of the CCO:

CCO Pijaszek recommended 30 days confinement, obtain an appointment for a Chemical Dependency evaluation within 7 days of release and follow all treatment recommendations. Enroll in MRT Classes with 7 days of release, report to CCO within 1 business day of release and follow all facility rules.

The disposition recommendation of the offender:

Mr. Flint said he would like credit for time served, sanctioned to daily reporting and given an opportunity to get back into treatment. He said he would be happy to take MRT and any other programming recommended.

Hearing Officer disposition, decision, and reasons:

The reason for this sanction is because this is Mr. Flint's third full hearing, he is presently unemployed, lost his job with the City of Lynnwood for DOC violations, and has been somewhat homeless by living in a storage unit. In addition, he has not gotten himself into drug treatment after admitting he has a drug problem.

Mr. Flint was recently was given a Stipulated Agreement for using drugs on 1/21/09 and was to report back on 1/28/09 and he never did. Then the next time his CCO hears from him is when he is arrested for having drug paraphernalia in his car on 2/4/09. I find no compelling reasons not to send Mr. Flint back to prison to serve the remaining portion of his sentence. I believe his behavior presents a risk to the safety of the community and this sanction does not interfere with his adjustment in the community. Therefore, I have imposed the following sanction:

On Cause AF 021001651 return to total confinement to serve the remaining portion of your sentence with credit for time served since 2/4/09. Your sentence and release date shall be recalculated and determined by DOC Records Staff at WCC.

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Ernest Torok

Ernest Torok
HEARING OFFICER SIGNATURE

DATE 2/26/09

ET:at

Distribution: Court Prosecutor Offender County Clerk
 Central File Field File Hearing File
 Hearings Program Manager
 Hearings Officer 2
 ESRB for CCM only

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APPENDIX C

FINAL BILL REPORT

ESSB 5288

PARTIAL VETO

C 375 L 09

Synopsis as Enacted

Brief Description: Changing provisions regarding supervision of offenders.

Sponsors: Senate Committee on Human Services & Corrections (originally sponsored by Senators Hargrove, Stevens, Regala and Shin).

Senate Committee on Human Services & Corrections
House Committee on Human Services
House Committee on Ways & Means

Background: When the Sentencing Reform Act was passed by the Legislature in 1984, it contained very limited provisions for the supervision of offenders. Over time, the Legislature reinstated supervision in varying lengths of time and for varying offenses.

In 1999 the Legislature passed the Offender Accountability Act (OAA). The OAA extended community custody to all sex offenses, all violent offenses, all crimes against persons, and all felony drug offenses. It also required the Department of Corrections (DOC) to utilize a validated risk assessment and supervise offenders according to their risk level. In 2003 due to tough budget circumstances, the Legislature restricted the types of offenders that DOC could supervise and increased earned early release for certain offenders from one-third to 50 percent of their sentence. The supervision scheme has largely remained the same since the 2003 changes.

Currently DOC must supervise any offender who has been sentenced to community custody and every misdemeanor or gross misdemeanor probationer ordered by the superior court to probation if:

- a risk assessment places the offender in one of the two highest risk categories; or
- regardless of the offender's risk category:
 - the offender or probationer has a conviction for:
 - a sex offense;
 - a violent offense;
 - a crime against persons;
 - a felony that is domestic violence;
 - residential burglary;
 - the manufacture, delivery, or possession of methamphetamine; or

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

- delivery of a controlled substance to a minor;
- the offender has a prior conviction for any of the above listed offenses;
- the conditions of the offender's supervision include chemical dependency treatment;
- the offender was sentenced to a First Time Offender Waiver (FTOW) or Special Sex Offender Sentencing Alternative (SSOSA); or
- supervision is required by the Interstate Compact for Adult Offender Supervision.

DOC is prohibited from supervising any offender who does not fall within one of these categories.

DOC has utilized a validated risk instrument, the Level of Service Inventory (LSI-R), to place the offender in one of four risk categories designated as Level A, B, C, and D. Last year, the Washington State Institute for Public Policy (WSIPP) developed an improved risk assessment tool for DOC that will classify offenders as High Risk Violent, High Risk Nonviolent (property and drug), Moderate Risk, and Low Risk. DOC is in the process of implementing this new tool with its current caseload

Summary: DOC must supervise the following offenders sentenced to community custody:

- offenders who are classified at a high risk to reoffend;
- all sex offenders;
- all dangerously mentally ill offenders;
- all offenders with an indeterminate sentence;
- all offenders sentenced to Drug Offender Sentencing Alternative (DOSA), SSOSA, and FTOW; and
- all offenders required to be supervised under the Interstate Compact.

DOC must also supervise the following misdemeanants who have been sentenced to probation by a superior court:

- misdemeanant sex offenders, including those convicted of a failure to register; and
- offenders convicted of fourth degree assault or violation of a domestic violence court order and who have a prior conviction.

DOC may arrest and pursue administrative sanctions for misdemeanants who are under DOC supervision, the same as for felony offenders on community custody. Terms of community custody are changed from ranges established by the Sentencing Guidelines Commission (SGC) to periods fixed by statute as follows:

- 36 months for sex offenders, serious violent offenders, and sex offenders convicted of a felony failure to register;
- 18 months for violent offenders that did not commit a serious violent offense;
- 12 months for offenders convicted of a crime against person, drug offense, or offense involving unlawful possession of a firearm by a gang member; and
- community custody terms are unchanged for DOSA, SSOSA, and FTOW sentences.

SGC must include in its biennial report to the Legislature due December 1, 2011, an analysis of the impact of the provisions of the act on recidivism.

Votes on Final Passage:

Senate	38	8	
House	51	45	(House amended)
Senate	26	23	(Senate concurred)

Effective: July 26, 2009

Partial Veto Summary: The Governor vetoed the emergency clause requiring the act to take effect immediately.

APPENDIX D



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

APPLICABILITY
PRISON/WORK RELEASE
OFFENDER/SPANISH MANUALS

REVISION DATE
9/24/08

PAGE NUMBER
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NUMBER
DOC 350.100

POLICY

TITLE
EARNED RELEASE TIME

REVIEW/REVISION HISTORY:

- Effective: 1/4/82 DOC 280.100
- Revised: 5/1/83 DOC 350.100
- Revised: 3/1/86
- Revised: 8/15/90
- Revised: 7/1/96
- Revised: 10/30/96
- Revised: 12/1/98
- Revised: 12/20/00
- Revised: 3/3/05
- Revised: 8/28/06
- Revised: 3/10/08 AB 08-004
- Revised: 9/24/08

SUMMARY OF REVISION/REVIEW:

Several changes. Read carefully!

APPROVED:

Signature on File

ELDON VAIL, Secretary
Department of Corrections

8/26/08

Date Signed

 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p> <p>POLICY</p>	APPLICABILITY PRISON/WORK RELEASE OFFENDER/SPANISH MANUALS		
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REFERENCES:

DOC 100.100 is hereby incorporated into this policy; RCW 9.92.151; RCW 9.94A.030; RCW 9.94A.505; RCW 9.94A.602; RCW 9.94A.728; RCW 9.95; RCW 69.50; RCW 69.52; RCW 72.09.130; WAC 137-25-030; ACA 4-4480; DOC 320.150 Disciplinary Sanctions; DOC 320.400 Risk Assessment Process

POLICY:

- I. The Department will award Earned Release Time (ERT), which includes good conduct time and earned time credits, to offenders committed to Department facilities within the guidelines established by law.
- II. For an offender convicted of a serious violent offense, or a Class A felony sex offense, committed on or after July 1, 1990, and before July 1, 2003, the ERT may not exceed 15 percent of the sentence.
- III. For offenders convicted of a serious violent offense, or a Class A felony sex offense, committed on or after July 1, 2003, the ERT may not exceed 10 percent of the sentence.

DIRECTIVE:

- I. Good Conduct Time
 - A. All offenders will be eligible for good conduct time, except:
 1. Offenders sentenced to death or Life Without Parole, and
 2. Community Custody Board (CCB) offenders serving the mandatory enhancement portion of their sentences.
 - B. Good conduct time will be applicable to all Class A, B, and C felonies, except that:
 1. Indeterminate offenders cannot earn good conduct time if their minimum term has expired and they have not been paroled or transferred to a consecutive sentence.
 - a. Any good conduct time earned or denied will be addressed to the correct sentence after the parole/transfer date is determined.
 2. Offenders who are serving time as a result of lost earned time or lost good conduct time may not earn good conduct time.

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- C. Offenders may fail to earn good conduct time if found guilty of serious infractions per WAC 137-25-030 and sanctioned per DOC 320.150 Disciplinary Sanctions.
- D. A sentence reduction based on good conduct time will be established for each offender and computed on a pro rata basis for every 30 day period served, as allowed by crime category.
- E. The following offenders may lose their uncertified or un-validated good conduct time if found guilty of a serious infraction:
 - 1. Indeterminate offenders whose time has not been adopted by the Indeterminate Sentence Review Board (ISRB), and
 - 2. Determinate offenders serving time as a result of not earning earned time or having lost good conduct time.
- F. Good conduct time lost as a result of disciplinary action for a serious infraction(s) will not be certified by the Superintendent/Community Corrections Supervisor (CCS). This includes available good conduct time for offenders who are serving time as a result of lost good conduct time. The amount of time lost will be determined by the Disciplinary Hearing Officer/Committee and subject to Superintendent/CCS approval at the time of validation or certification. Offenders found guilty of infraction 557 or 810 will lose available earned release credits and privileges as outlined by DOC 320.150 Disciplinary Sanctions. Offenders found guilty of an infraction 813 related to employment or programming while in Work Release will also lose available earned release credits and privileges.
- G. Offenders serving the mandatory minimum portion of their sentence are subject to a loss of future good conduct time available during the non-mandatory portion of their sentence. Lost good conduct time will be applied to the remainder of the sentence after the mandatory period is served.
- H. Offenders may lose good conduct time if infringed while out to court.
- I. An offender who has transferred from one sentence within a cause number to the next sentence, or from one cause number to the next cause number, cannot lose ERT associated with the previous sentence or cause.
- J. When all of an indeterminate offender's available good conduct time has been denied due to infractions, the Superintendent/CCS may request, via the Headquarters Community Screening Committee (HCSC), that the ISRB schedule a disciplinary hearing to address the offender's time structure.

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POLICY

- K. When an offender paroled from an indeterminate sentence to a consecutive determinate sentence commits an infraction, the Counselor/Community Corrections Officer (CCO) will notify the ISRB via email or hard copy, describing the behavior and recommended action. The report will note this behavior as a violation.

II. Earned Time

- A. [4-4480] Offenders who participate in approved programs, including work and school, are eligible for earned time for each calendar month as follows:
1. Earned Time eligible under 10 percent rule 1.11 days
 2. Earned Time eligible under 15 percent rule 1.76 days
 3. Earned Time eligible under 33 percent rule 5.00 days
 4. Earned Time eligible under 50 percent rule 10.00 days
- B. Reception Diagnostic Center Records staff at Washington Corrections Center (WCC-RDC) or Washington Corrections Center for Women (WCCW-RDC) will initiate DOC 12-025 50% Earned Time Review. If the risk assessment is completed by staff at another facility, a new DOC 12-025 50% Earned Time Review will be completed when the risk level is determined.
- C. The Counselor/CCO and Records staff will follow the Process Steps for 50% Earned Time Review (Attachment 3) and Offender Notification of 50% Earned Time Eligibility (Attachment 2).
- D. When a Counselor/CCO completes a risk reassessment that changes an offender's 50% earned time eligibility from eligible to ineligible, s/he will follow 50% Earned Time Eligibility - Modified (Attachment 1).
1. An offender who disagrees with the risk assessment results has the right to appeal to the Superintendent of the facility where the decision was made within 48 hours of notification per DOC 320.400 Risk Assessment Process.
- E. Effective July 1, 2003, the ERT may not exceed 50 percent of the sentence for offenders who are classified as Moderate Risk or Low Risk, and are not convicted of or have a prior:
1. Sex offense,
 2. Violent offense,



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3. Crime against a person, including Identity Theft 1st and 2nd committed on or after June 7, 2006,
 4. Felony domestic violence,
 5. Residential burglary,
 6. Violation of, or attempt, solicitation, or conspiracy to violate, RCW 69.50.401 prohibiting manufacture or delivery or possession with intent to deliver methamphetamine,
 7. Violation of, or attempt, solicitation, or conspiracy to violate, RCW 69.50.406 prohibiting delivery of a controlled substance to a minor,
 8. Gross misdemeanor stalking,
 9. Domestic violence court order violation, including gross misdemeanors, or
 10. Any felony committed under community supervision.
- F. Offenders are not eligible for earned time if:
1. They are not involved in mandatory programming as determined through the classification process and consistent with their Custody Facility Plan. This includes refusing a mandatory work/school/program assignment or being terminated from a mandatory work/school/program for documented negative or substandard performance.
 - a. Offenders found guilty of infraction 557 or 810 will lose available earned release credits and privileges as outlined by DOC 320.150 Disciplinary Sanctions. Offenders found guilty of an infraction 813 related to employment or programming while in Work Release will also lose available earned release credits and privileges.
 - b. Offenders previously determined qualified to receive 50% earned time will participate in programming or activities targeted in the Custody Facility Plan. The offender will not be penalized if programs and activities not available.
 - c. If found guilty of infraction 557 or 810, the calculation of earned time will revert to being calculated based on the current offense. The Disciplinary Hearing Officer will notify the Records Manager of all guilty findings for 557 and 810 infractions. The Hearing Officer will notify Records staff at the sending facility if the infraction is incurred in Work Release or a facility transfers the offender prior to

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completion of the hearing. Records staff at the sending facility will revise DOC 02-329 50% Earned Time Eligibility Change Notice.

2. They refuse any transfer, excluding Work Release. Earned time, at the appropriate earned time percentage as allowed by crime category, will not be granted for each calendar month the offender refuses assignment.
 3. They serve 20 days or more in one calendar month in Administrative Segregation/Intensive Management status or disciplinary segregation. Loss of ERT will be calculated as allowed per crime category. The offender is not eligible to begin earning earned time until the Superintendent approves placement in general population. Offenders who are approved for transfer to general population and are scheduled for release to the community within 60 days will not lose earned time unless found guilty of infraction 557 or 810, or of an infraction 813 related to employment or programming while in Work Release. For other than negative behavior, offenders on Administrative Segregation/Intensive Management status will continue to earn earned time at the rate allowed by crime category.
 4. They are serving the mandatory minimum portion of their sentence, except indeterminate offenders sentenced for crimes committed before July 1, 1984. The offender's electronic file will be updated to record the behavior.
 5. Their Counselor/CCO receives new information or completes a risk reassessment that changes the offender's risk management level to High Risk Violent or High Risk Non-Violent. The Counselor/CCO will follow the steps in 50% Earned Time Eligibility - Modified (Attachment 1).
- G. Earned time will be reviewed and recorded on the OMNI Earned Time screen at the regularly scheduled review or during any month earned time is not earned. The Counselor/CCO will provide documentation to the Correctional Records Supervisor (CRS) to update the OMNI Earned Time screen prior to the scheduled review and prior to transfer to another facility. Counselors and Work Release CCOs will request an OMNI Earned Release Credits Report. At a classification hearing where earned time will be addressed, the offender will receive a written record of his/her earned time at least 24 hours prior to the scheduled classification review if earned time is not earned. Action taken by the committee is final and cannot be appealed.
- H. Earned time not earned as a result of infraction 557 or 810, or of an infraction 813 related to employment or programming while in Work Release, cannot be restored.

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- I. Offenders will receive a written record of all earned time denials.

- III. County Jail Earned Time
 - A. The Department does not calculate the ERT for the county jails. For offenders transferred from a county jail to the Department, the jail administrator will certify to the Department the amount of time spent in custody at the jail and the amount of ERT.
 1. If no certification has been provided, the CRS/designee will send a letter to the jail administrator requesting s/he provide a jail certification.
 - a. If the jail administrator certifies jail time credits to consecutive sentences for the same time period and the Judgment and Sentence does not address jail time credits, the CRS will correct the jail certification by deducting any duplicate jail time credits and jail good time credits from the jail certification totals and applying the remaining credits.
 - b. In the case of a Department sanction, if the jail administrator certifies jail credits to a consecutive sentence which includes credits for time served on the Department sanction and the Judgment and Sentence does not address jail time credits, the CRS will deduct the sanction days served from the jail credits and the good time for sanction time served and apply the remaining credits to the consecutive sentence.
 - c. The CRS will send a letter to the jail administrator requesting an amended jail certification. However, the CRS does not need to wait for the amended jail certification to apply the proper credits.
 2. The CRS will send the offender DOC 09-261 Court of Appeals Decision – Jail Time Credits, informing him/her of the Department's authority to correct the jail certification when there is a manifest error of law in the jail's certification.
 3. If the court orders jail time credits for the same time period on consecutive sentences with the same intake date to Prison, the Judgment and Sentence must be followed and the jail time credits will be applied accordingly.
 4. If the court orders jail time credits for the same time period on consecutive sentences with different intake dates to Prison, added causes, the CRS will apply the credits for the Judgment and Sentence and then apply

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Wickert time (i.e., out time applied to a period of confinement when the offender is required to serve a consecutive period of confinement starting before the current confinement is complete) for that same time period.

IV. Re-sentenced Credit Time Served

- A. Offenders who are re-sentenced are entitled to receive credit for the original jail time, original jail good time, Department time served, and earned time on the Department time served. All time the offender served for the conviction offense, as well as the ERT at the appropriate earned time percentage, will be applied. Any conduct time loss due to infractions, or earned time not earned during the time served on the original sentence, must be deducted from the Department earned time.

V. Persistent Prison Misbehavior

- A. An offender serving a sentence for an offense committed on or after August 1, 1995, who has lost all of his/her good conduct time credits for the current incarceration may have future and/or un-validated earned time credits taken away as part of a disciplinary sanction for Persistent Prison Misbehavior per DOC 320.150 Disciplinary Sanctions.

VI. Release Date

- A. A determinate offender held beyond his/her Earned Release Date (ERD) may have available ERT taken if found guilty of an infraction.
- B. An offender with an established release date who receives a Category A infraction after a community release plan has been approved will have the release date suspended until adjudication of the infraction and all time loss and sanctions are completed.
- C. The CRS will be immediately notified by telephone if the release date changes, when the offender is denied earned time or loses good conduct time and/or the ERD is within 120 days to release.

VII. Recording/Validation Certification

- A. The CRS will update the earned time on the OMNI Earned Time screen. Entries on OMNI Earned Time begin with the time start and subsequent entries will be from the first of each month. Entries will be made at:
 1. Annual review,
 2. The request of the ISRB,



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- 3. The end of the longest concurrent sentence,
 - 4. Transfer from one cause to a consecutive cause,
 - 5. Transfer to another facility,
 - 6. The time of escape and at apprehension, and
 - 7. Release.
- B. ERT and good conduct time will be reviewed and validated by the Superintendent/CCS at intervals not to exceed one year. At the time of his/her yearly review, each offender will receive a written record of the ERT s/he is eligible to earn.
- C. ERT will be certified by the Superintendent/CCS or designee.
- 1. For indeterminate offenders, certification is final when adopted by the ISRB at the time of parole or transfer to a consecutive determinate sentence.
 - 2. If an offender is found guilty of an infraction after certification on the sentence s/he is currently serving, but prior to release, the certification may be rescinded.
- D. Prior to adoption by the ISRB for indeterminate sentences or certification by the Superintendent/CCS for determinate sentences, the projected ERD should be used for classification purposes when considering minimum facility placement, Work Release, and pre-parole/community release planning.

VIII. Restoration of Good Conduct Time

- A. At a regularly scheduled review, offenders may request restoration of good conduct time from the Superintendent/CCS where the offender is housed.
- B. The unit team may recommend approval provided:
- 1. The good conduct time on a determinate sentence has not been certified,
 - 2. The offender has been free of serious infractions for at least one year from the date of the last serious infraction,
 - 3. The offender is not within 6 months of his/her ERD and the restoration will not put the offender less than 120 days to release,
 - 4. That during the current incarceration the offender has not committed infraction 501, 502, 507, 511, 521, 550, 601, 602, 603, 604, 611, 612, 613, 635, 636, 637, 650, or 651,

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5. That during the current incarceration the offender has not committed infraction 557 or 810, or an infraction 813 related to employment or programming while in Work Release, and
6. That during the current incarceration the offender has not committed infraction 857 before November 20, 2006.

C. When making this decision, the Superintendent/CCS will consider:

1. Length of positive program participation,
2. Period of infraction free behavior,
3. Nature of infractions,
4. Overall behavior during the commitment period, and
5. Unit team recommendation.

D. A copy of the Custody Facility Plan and any associated documents (e.g., infraction reports), along with a criminal history summary, will be sent to the Superintendent/CCS. S/he will complete DOC 21-730 Restoration of Good Conduct Time to recommend or deny restoration of the good conduct time.

E. Designated staff will document restoration of good conduct time in the infraction narrative on OMNI Infraction Summary screen.

F. The CRS will be immediately notified by telephone when the release date is adjusted upon restoration of good conduct time.

IX. Community Custody

A. The Superintendent/CCS will certify the ERT and the transfer of eligible offenders to community custody.

1. Offenders convicted of the following offenses may have their sentences reduced by ERT:

- a. A sex crime,
- b. An offense statutorily categorized as a serious violent offense,
- c. Assault 2nd,
- d. Vehicular Homicide,
- e. Vehicular Assault,
- f. Assault of a Child 2nd,
- g. Any crime against a person where it is determined, per RCW 9.94A.602, that the offender or an accomplice was armed with a deadly weapon at the time of commission, or
- h. Any felony offenses under RCW 69.50 or RCW 69.52.



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2. Community Custody Violators confined in a Department facility for sanction time are eligible for ERT credits at the rate of 33 percent.

DEFINITIONS:

Words/terms appearing in this policy may be defined in the glossary section of the Policy Manual.

ATTACHMENTS:

- 50% Earned Time Eligibility - Modified (Attachment 1)
- Offender Notification of 50% Earned Time Eligibility (Attachment 2)
- Process Steps for 50% Earned Time Review (Attachment 3)

DOC FORMS:

- DOC 02-329 50% Earned Time Eligibility Change Notice
- DOC 05-066 Request for Disclosure of Records
- DOC 05-794 Classification Hearing Notice/Appearance Waiver
- DOC 09-261 Court of Appeals Decision – Jail Time Credits
- DOC 12-025 50% Earned Time Review
- DOC 21-730 Restoration of Good Conduct Time