

Supreme Court No. 83815-1
(COA No. 39212-7-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

PERSONAL RESTRAINT PETITION

OF

ERIC SHERIDAN FLINT

ON APPEAL FROM THE COURT OF APPEALS OF
THE STATE OF WASHINGTON, DIVISION II

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2009 NOV -6 AM 7:56
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PETITIONER'S MOTION FOR DISCRETIONARY REVIEW

Eric S. Flint, Petitioner
Pro Se

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER 1

B. COURT OF APPEALS DECISION 1

C. ISSUES PRESENTED FOR REVIEW 1-2

D. STATEMENT OF THE CASE

 1. Procedural Facts 2-3

 2. Court of Appeals Decision 3-5

E. ARGUMENT

 1. Application of RCW 9.94A.737(2), a 2007 statute, to a person whose original offense occurred prior to the statute's enactment, is ex post facto and violates U.S. CONSTITUTION, Art. 1, §10. 5-8

 2. RCW 9.94A.737(2), and any sanction imposed pursuant to it, was retroactively expired based on a clear legislative intent of retroactive application of ESSB 5288 and the amendments contained within. 8-9

 3. DOC's failure to notify Mr. Flint of the consequences of a third community custody hearing until the hearing had already begun was a violation of his 14th Amendment right to due process. 9-10

 4. Mr. Flint is entitled to earn one-third off of his 647 day sentence pursuant to RCW 9.94A.728(1),(2). DOC's decision to deprive him of the opportunity to earn his statutorily authorized earned-time credits contradicts "the earned early release statute, which allows inmates to earn time off their sentences for good behavior." IN RE TAYLOR, 122 Wn.App. 880, 884 (2004). 11-12

F. CONCLUSION 12-13

A. IDENTITY OF PETITIONER

Petitioner Eric Sheridan Flint asks this court to accept review of the Court of Appeals decision as designated in part B of this petition pursuant to RAP 13.4(a).

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(1-3), Mr. Flint seeks review of the Court of Appeals unpublished decision in Personal Restraint Petition of Eric Sheridan Flint, No. 39212-7-II. The Court of Appeals dismissed the above-referenced petition on October 5, 2009. The opinion is attached to this petition as an Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Is application of RCW 9.94A.737(2), a 2007 statute requiring DOC to return an offender to total confinement to serve the remaining portion of his sentence at a third community custody violation hearing, to Eric Flint, whose underlying offense occurred in 2002, an ex post facto law in that it has "increased the quantum of punishment" and made "more onerous the punishment for crimes committed before its enactment"? WEAVER v. GRAHAM, 450 U.S. 24, 31-33 (1981).

2. Did ESSB 5288's retroactive application coupled with its expiration of RCW 9.94A.737(2), in turn, retroactively expire RCW 9.94A.737(2) and any sanction imposed pursuant to that statute based on the fact that the legislat-

ure has indicated a clear intent for the amendment to apply retroactively?

3. Is it a violation of the United States Constitutional right to due process to not provide prior notice of the possible consequences of a community custody hearing and that failure to comply with conditions - especially those that are not in themselves criminal - will result in revocation?

4 Since RCW 9.94A.737(2) has required Mr. Flint to serve his "sentence" as a "sanction", should he be entitled to earn earned release time pursuant to DOC Policy 350.100 (IX)(A)(2) and if not, is he entitled to earned release time pursuant to RCW 9.94A.728?

D. STATEMENT OF THE CASE

1. Procedural Facts

Eric Sheridan Flint pleaded guilty to first degree robbery and was sentenced to 100 months confinement plus an additional 18-36 months of community custody in April, 2002. After serving two-thirds of his 100 month sentence he was released pursuant to RCW 9.94A.728(2) and began his term of community custody on August 27, 2007. He, having earned the maximum allowable amount of early release credits, was released 1,013 days before his max. date.

On February 12, 2009, after approximately 18 months

at liberty, Mr. Flint's CCO, Karla Pijazek of the Bremerton field office, took Mr. Flint to his third community custody hearing. Ms. Pijazek's recommendation was for 30 days confinement, a CD evaluation, and MRT classes. After the hearing had already begun, Hearing Officer Ernest Torok informed Mr. Flint that he was required to return him to total confinement to serve the remaining portion of his 2002 sentence. At that time, Ms. Pijazek stated that she did not agree with the sanction and, in fact, was unaware that it even existed. She then asked Mr. Torok for the statute.

After objections from both Mr. Flint and Ms. Pijazek, Mr. Torok imposed the "return" sanction pursuant to RCW 9.94A.737(2) which required Mr. Flint to serve the remaining 647 days left on his original conviction.

Mr. Flint filed a timely appeal with the DOC Regional Appeals Panel and the panel affirmed the sanction. In April, 2009, Mr. Flint began his personal restraint petition, COA No. 39212-7-II which was dismissed on October 5, 2009 and subsequently led to this request for review.

2. Court of Appeals Decision

On October 5, 2009 the Court of Appeals, Division II, ordered Mr. Flint's personal restraint petition "dismissed as frivolous under RAP 16.11(b)." Order Dism'g Petition, 3.

The Court of Appeals based its decision on statements such as: "he does not show RCW 9.94A.737(2) is an ex post

facto application of the law", ODP, 2, and that "he identifies no requirement that he be notified of that possibility" (the due process requirement of the notification of revocation), ODP, 3. They also state that "he fails to show that he is being denied early release credits", ODP, 3, although the court does concede that Mr. Flint's sanction is indeed 647 days and, as stated in the record, he was arrested on February 4, 2009 with a DOC "planned release date", see Exhibit A, of November 13, 2010, equaling a total time to be served 647 days in the 647 day sanction. That, in and of itself, shows he is being denied the early release credits authorized to him pursuant to RCW 9.94A.728(1),(2).

In addition to the fact that the Court of Appeals never actually ruled that RCW 9.94A.737(2) as applied to Mr. Flint was **not** an ex post facto law; that the lack of notification was **not** a due process violation, or that DOC had legal grounds by which to refuse Mr. Flint the earned time which is statutorily authorized to him, they also misquoted legislative acts by stating that "section 55 of ESSB 5288 expressly provides that it does not affect any sanction imposed before August 1, 2009." ODP, 3.

Had their statement about ESSB 5228 merely been a typographical error it would be excusable, but there is just no such statement anywhere in the bill. On the contrary, ESSB 5288 expressly provides for retroactive application regard-

less of the offender's situation. ESSB 5288, s.20.

I believe that the Court of Appeals decision to dismiss, when such substantial Constitutional issues are at stake, and when case law - both in this state and throughout our federal system - is so clear, leaves this case ripe for review.

E. ARGUMENT

1. Application of RCW 9.94A.737(2), a 2007 statute, to a person whose original offense occurred prior to the statute's enactment, is ex post facto and violates U.S. CONSTITUTION, ART. 1, § 10.

For a criminal or penal law to be ex post facto, it must satisfy two requirements: 1) it must apply to events occurring before its enactment, and 2) it must disadvantage the offender affected by it. LINDSEY v. WASHINGTON, 301 U.S. 397, 401; CALDER v. BULL, 3 Dall. 386, 390.

Beginning with the first prong of this two-prong test, does RCW 9.94A.737(2) "apply to events occurring before its enactment"?

Washington courts have continuously held that "case law in this state explains in no uncertain terms that incarceration for...violations is a result of the original conviction." STATE v. WATSON, 160 Wn.2d 1, 9; STATE v. EILTS, 94

Wn.2d 484, 489 n.3, 617 P.2d 993 (1980); STATE v. KING, 130 Wn.2d 517, 522, 925 P.2d 606 (1996); STATE v. WHITAKER, 112 Wn.2d 341, 342, 771 P.2d 332 (1989); for additional cases holding the same, please see Appendix A.

Therefore, based on Washington case law, RCW 9.94A.737(2), as applied to Eric Flint, satisfies the first prong of the ex post facto analysis and clearly "applies to events occurring before its enactment."

For the second prong, we must ask if RCW 9.94A.737(2) being applied to an offender convicted under a prior community custody scheme "disadvantages the offender affected by it".

If the court will consider that at the time of Mr. Flint's underlying offense, RCW 9.94A.175 authorized "the offender to be confined for up to 60 days per violation." (emphasis added). Under the law in effect at that time, the maximum penalty DOC could have imposed would have been 240 days (60 days X 4 violations = 240 days). Now, applying the 2007 statute, Mr. Flint has received 647 days for the same 4 violations. Over 400 days more than was statutorily authorized when his crime occurred. Not only has RCW 9.94A.737(2) "disadvantaged" Mr. Flint, it has undoubtedly made "more onerous the punishment for crimes committed before its enactment." WEAVER.

Our federal court has already dealt with the exact

issue presented here and held that "it is an ex post facto violation to impose more severe punishment for a...violation when the punishment is based on conduct that occurs **after** the statutory amendment that authorizes the more severe punishment (because the amendment was not in effect when the underlying offense was committed.)" U.S. v. PASKOW, 11 F.3d 873 (9th Cir 1993).

It is agreed that Mr. Flint's "underlying offense" took place in 2002. ODP, 2. RCW 9.94A.737(2) was not enacted until 2007. ESSB 6157, s.305. The violative conduct that triggered the revocation of Mr. Flint's earned release time from his 2002 sentence occurred in 2008-09. What I would like to emphasize to the court is that the violative conduct that triggered the application of RCW 9.94A.737(2) to Mr. Flint was "not criminal and therefore...punishe[d]...**only** because of the...original offense; for that reason. punishment imposed for the subsequent conduct is linked to the original offense for ex post facto purposes." (emphasis added), U.S. v. BEALS, 87 F.3d 854 (7th Cir. 1996). See also, U.S v SOTO-OLIVAS, 44 F.3d 788 (9th Cir. 1995) ("Our case law is clear that for...ex post facto purposes, parole and probation revocation constitutes punishment for the underlying crime.") For additional authorities, please see Appendix B.

The heart of this ex post facto argument can be summed up by a statement made in 1996 by the BEALS court:

"Statutes forfeiting good-time credits for parole violations **cannot** be applied to those defendants whose underlying crime took place before the statute's enactment." U.S. v. BEALS, 87 F.3d 854 (7th Cir. 1996) (emphasis added).

2. RCW 9.94A.737(2), and any sanction imposed pursuant to it, were retroactively expired based on a clear legislative intent of retroactive application of ESSB 5288 and the amendments contained within.

Mr. Flint was sanctioned under RCW 9.94A.737(2), a 2007 statute who's application to offenders convicted before its enactment appears to be ex post facto. To correct the ex post facto issue, the legislature used ESSB 5288 to alleviate the Constitutional violations intertwined with RCW 9.94A.737(2)'s retroactive application.

"If an offender has not completed his or her maximum term of total confinement and is subject to a third violation hearing...the department shall return the offender... to serve...the remaining portion of his or her sentence..." ESSB 5288, s.13 (RCW 9.94A.737(2)).

"Sections 1, 3, and 13 of this act **expire** August 1, 2009." ESSB 5288, s.19 (emphasis added).

"This act applies **retroactively**...regardless of whether the offender is...on community custody, or...incarcer-

ated..." ESSB 5288, s.20 (emphasis added).

In PERSONAL RESTRAINT OF STEWART, 115 Wn.App. 319, the Court of Appeals held that an amendment is retroactive if it is shown that "the legislature intended the amendment to apply retroactively." Id., 332. Doesn't the fact that ESSB 5288 closes with the stating in section 20 that "this act applies **retroactively**" satisfy the ruling in STEWART? The legislature obviously "intended the amendment to apply retroactively".

3. DOC's failure to notify Mr. Flint of the consequences of a third community custody hearing until the hearing had already begun was a violation of his 14th Amendment right to due process.

The Ninth Circuit Court of Appeals has already held that "failure to provide prior notice of the possible consequences of a parole revocation hearing violates the parolee's right to due process." JESSOP v. U.S. PAROLE COMM'N, 889 F.2d 831 (9th Cir. 1989).

On page 2 of the ORDER DISMISSING PETITION, the Court of Appeals gives an accurate - but incomplete - quote of RCW 9.94A.737(2). Where they leave off is an important part of this due process claim:

"...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).

DOC's failure to notify Mr. Flint of the effect of a third hearing until the hearing had begun deprived him of a "chance to marshal the facts in his defense", WOLFF v. MCDONNELL, 418 U.S. 539 (1974), and satisfy the final portion, the **defense** portion, of RCW 9.94A.737(2).

The chance to prepare a defense is a substantial part of due process. Since the sanction itself hinges on a defense included in the statute, DOC's failure to notify Mr. Flint placed him at an unfair disadvantage. See, U.S. v. SPILOTRA, 562 F.Supp 853 ("It must be shown that the defendant was informed that failure to comply with...conditions may result in revocation "). Now, nearly a year later, any defense that could have been raised has become obsolete. The delay caused is unreasonable and any rehearing at this point to satisfy the due process issue would bring about the "same concerns...as the petitioner whose original hearing was delayed." COMACHO v. WHITE, 918 F.2d 74, 79 (9th Cir. 1990). The proper remedy at this point would be an "automatic restoration of [earned] time in lieu of a new hearing." Id, 79.

4. Mr. Flint is entitled to earn 33 percent "earned release time" pursuant to DOC Policy 350.100(IX)(A)(2) and DOC's refusal to grant him those credits is in violation of their own policy. Following the rule in IN RE CASHAW, 123 Wn.2d 138, 147-48, a showing that a governmental agency has failed to comply with its own rules or regulations is sufficient for relief.

"Community custody violators housed in a department facility serving sanction time are eligible for ERT time at a rate of 33 percent." DOC Policy 350.100(IX)(A)(2).

I believe it is uncontested that Mr. Flint is a "community custody violator". I also believe that because his current address is a cell located at Airway Heights Corr. Center, it is undisputed that he is "housed in a department facility". The DOC has already deemed the time Mr. Flint is serving as "sanction" time. See Attachment A. The Court of Appeals has deemed it a "sanction". See, ODP, passim. The counsel for the State has deemed it a "sanction". See, Attachment B, 4-7. DOC's OMNI tracking system has deemed it a "sanction". See, Attachment C, #1.

How then is DOC able to refuse the time authorized pursuant to their own policy? Mr. Flint has an "earned release date" of April 5, 2010, a "prison max expiration date" of June 5, 2010 and yet DOC has calculated out a "planned"

Release Date" of November 13, 2010? Exhibit A, #1-3.

Because the sanction he is serving is legally a portion of his "sentence", he should be subject to the same legislative graces afforded by RCW 9.94A.728 as all other inmates; inmates including DOSA violators/revokes, Pre-SRA Parole violators/revokes, community custody violators (non-RCW 9.94A.737(2)), and all other inmates serving sentences for similar criminal offenses.

F. CONCLUSION

This is a case that begins with a misinterpretation of ESSB 6157, s.305(2)'s (RCW 9.94A.737(2)'s) application. That statute should have never been applied to any offender who's underlying offense, sentence, and/or conviction occurred prior to August 1, 2007. The state defends its application by saying that the "confinement is not retroactive". Exhibit C. Case law in not only Washington State, but throughout the U.S. Circuit Courts and U.S. Supreme Courts, has already rejected that argument. "Punishment imposed upon revocation of supervised release is punishment for the original crime, not punishment for conduct leading to revocation." U.S. v. SOTO-OLIVAS, 44 F.3d 788 (9th Cir. 1995). See also, U.S. v. PARRIETT, 974 F.2d 523 (4th Cir. 1992) ("We must hold that the revision of the supervised release statute altered the legal consequences of [the] original crime and therefore cannot be applied without

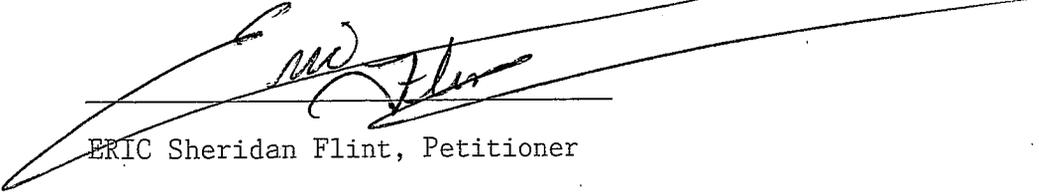
violating the Ex Post Facto Clause.")

The second Constitution violation occurred when DOC failed to notify Mr. Flint of the penalties involved with a revocation hearing and, by doing so, violated his right to due process. While case law isn't as overwhelming on this issue as it is with the ex post facto argument, it is nonetheless just as clear: Notification at the time of the hearing is not sufficient.

The two other assigned errors are based on DOC's judgement and while they don't equate to Constitutional errors, they are based on punishment "imposed...in violation of the... laws of the State of Washington." RAP 16.4(c)(2). I believe that DOC, in failing to follow the legislature's directive set forth in ESSB 5288 and expire Mr. Flint's sanction, coupled with DOC's refusal to grant Mr. Flint his "Earned Release Date" of April 5, 2010 "shows that a governmental agency has failed to comply with its own rules or regulation." IN RE CASHAW, 123 Wn.2d 138, 147-48. As held in CASHAW, that should be "sufficient".

The Washington State Court of Appeals decision to label the petition as "frivolous" is one I hope this court will look beyond and find that there are indeed significant issues presented here. That being said, I respectfully request this court to exercise its discretion and grant review.

Respectfully submitted, this 3rd day of November, 2009.



ERIC Sheridan Flint, Petitioner

Pro Se

APPENDIX A

1. BEEBE v. PHELPS, 650 F.2d 774 (1981)
("The forfeiture of good-time is a sanction that extends the time remaining on petitioner's original sentence. The...effect is a statutory increase in punishment for the first offense enacted subsequent to the commission of the [violations].")
2. DET. OF ALBRECHT, 147 Wn.2d 1, 12-13
("[He] would not have been subject to community [custody] conditions (and the incarceration upon violating those conditions) but for the [original] conviction..., his incarceration ...was 'for' - that is, 'because of' or 'on account of' - the original...offense for which he was convicted in [2002].
Websters Third New International Dictionary, 886 (1976)")
3. STANDLEE v. SMITH, 83 Wn.2d 405
("Parole revocation is not part of a new criminal prosecution. Rather, it is a continuing consequence of the original conviction.")
4. STATE v. DUPARD, 93 Wn.2d 268
("Parole revocation is **not** punishment for the subsequent events which violate parole")(emphasis added)
5. STATE v. GUY, 87 Wn.App. 238 (1997), aff'd 136 Wn.2d 453 (1998)
("The converted sentence was not punishment for later events but was punishment...for the earlier crimes.")
6. STATE v. PRADO, 86 Wn.App. 573 (1997)
("Under Washington law, parole revocations are consequences of the original prosecution. The punishment is part of the sanction for the original crime.")
7. STATE v. WATSON, 130 Wn.App 376, 380
("A reasonable person would understand that later restraint based on probation violations was a continuing consequence of the original offense.")
8. U.S. v. COLLINS, 118 F.3d 1394, 1397 (9th Cir. 1997)
("The violation of a condition of supervised release is often

not criminal at all, and the punishment that follows such a violation is imposed on the authority of conviction for the underlying offense.")

9. U.S. v. ETHERTON, 101 F.3d 80, 81 (9th Cir. 1996)

("Sentence upon revocation of supervised release was part of sentence for underlying offense.")

10. U.S. v. EVENS, 159 F.3d 908, 913 (4th Cir. (1998)

("The term of supervised release, the revocation of that term, and any additional term of imprisonment imposed for violating ...supervised release are all part of the original sentence.")

11. U.S. v. LIERO, 298 F.3d 1175, 1178 (9th Cir. 2002)

("...we have held that the punishment imposed for violating the conditions of supervised release is itself part of the original sentence.")

12. U.S. v. PATTERSON, 230 F.3d 1168, 1196 (9th Cir. 2000)

("...for **Constitutional purposes**, a revocation of supervised release is an execution of the underlying criminal conviction and sentence.")

13. U.S. v. PINJUV, 218 F.3d 1125, 1126 (9th Cir. 2000)

("Revocation proceedings do not punish a defendant for a new offense, but instead, trigger the executions of the conditions of the original sentence for the offense of which the defendant has already been convicted.")

APPENDIX B

1. AKINS v. SNOW, 922 F.2d 1558 (11th Cir. 1991)
("in determining whether a law is 'retrospective', for purposes of the Ex Post Facto Clause, the court **must** look to date when **crime** was committed.")(emphasis added)
2. FENDER v. THOMPSON, 883 F.2d 303
("Statutes enacted or amended after prisoner was sentenced **cannot** be applied to alter conditions of or revoke his...parole notwithstanding that conduct purportedly triggering application of statute occurred after its enactment.")(emphasis added)
3. KRING v. MISSOURI, 107 U.S. 221, 227 (1882)
("It is the date of defendant's **criminal** act...that is significant to an ex post facto determination.")(emphasis added)
4. LYNCE v. MATHIS, 519 U.S. 433
("Retroactive alteration of parole or early release provisions, like the retroactive application of provisions that govern initial sentencing, implicates the Ex Post Facto Clause since such results are a prison-term determinant that, once changed, alters the effective sentence.")
5. SHEPARD v. TAYLOR, 556 F.2d 648
("Since parole...is...an integral part of any sentence, official post sentence action...runs afoul of the ex post facto prohibition; this result follows even though the maximum statutory for the penalty for the crime remained unchanged.")
6. STATE v. NICHOLS, 412 F.2d 778, 779
("A[n] increase in the consequences of parole violations applied retroactively, may be an infringement of constitutional rights, and this may mean that the state must look at the law as of the date of sentence, not the date of the violations of parole.")
7. U.S. v. EVENS, 159 F.3d 908, 913 (4th Cir. 1998)
("The Ex Post Facto Clause prohibits legislative changes in the terms of supervised release following the commission of the underlying offense.")
8. U.S. v. MEEKS

8. U.S. v. MEEKS, 25 F.3d 1117 (2nd Cir. 1994)

("Statutes that alter the consequences of violations of parole, as applied to prisoners or parolees whose underlying offense occurred prior to the passage of the statutes, have consistently been held to violate the Ex Post Facto Clause.")

9. U.S. v. KINCAID, 379 F.3d 813,817 (9th Cir. 2004)

("...ex post facto concerns would arise if the statutory framework governing supervised release were retroactively applied to persons sentenced under prior...scheme.")

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the
Personal Restraint Petition of

ERIC SHERIDAN FLINT,

Petitioner.

No. 39212-7-II

ORDER DISMISSING PETITION

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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.

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



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS
 P.O. BOX 41100 • Olympia, Washington 98504-1100

REGIONAL APPEALS PANEL DECISION

FROM: DOC Regional Appeals Panel, Northwest Region, WA

TO: Eric Flint

DOC #: 733044

Date: March 4, 2009

On February 12, 2009, a DOC Hearing was conducted by, Ernest Torok, at the Kitsap County Jail. The Hearing Officer found you guilty 4 of 5 violations for: 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) Found Not Guilty. These are violations of the conditions of your supervision/custody. The Hearing Officer issued a Hearing and Decision Summary on February 12, 2009, and imposed the following sanction(s) upon you: 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 by DOC Records Staff at WCC.

On February 17, 2009, your appeal was received in which you requested a review of the Hearing Officer's decision and/or sanction. You specifically appealed:

- The finding(s) of guilt
- The sanction(s) imposed
- Other, as explained below:

Your appeal identifies your dissatisfaction with the imposed sanction of CCP Return as you believe it was unreasonable. The DOC Regional Appeals Panel has investigated your appeal request and finds that:

- You were found guilty based upon sufficient evidence.
- There was insufficient evidence for a finding of guilt as explained below.
- A procedural error was made as explained below.
- A guilty finding was made based on unconfirmed allegations as explained below.
- Other as explained below:

The Regional Appeals Panel reviewed all materials provided as discovery from your hearing held on February 12, 2009 at your hearing held at the Kitsap County Jail along with a copy of the Hearing Officer's report.

The Panel reminds you Mr. Flint that you entered guilty pleas to 4 of 5 violations and in turn were found guilty of those 4 violations. This was documented as willing, knowing and voluntary pleas. The Hearing Officer imposed a sanction in accordance to established and identified guidelines and in your particular case, ESSB 6157. Although the sanction imposed may seem somewhat severe for the behavior identified, you must understand that the Department of Corrections has regulations to which they are required to adhere to and in this specific case, the Hearing Officer found no supporting or mitigating factors to support a sanction other than you be returned to prison to complete that remaining portion of your sentence.

Given those reasons as well as information identified in the Hearing Officer's report, this Panel see's no alternative to the sanction imposed and will authorize no modification to this sanction.

AND THEREFORE

The decision of the Hearing Officer is:

- Reversed and vacated
- Reversed and remanded for a new hearing. You will be notified of the hearing date, when scheduled.
- Modified as follows:
- Affirmed

Robert Zarate

DOC REGIONAL APPEALS PANEL MEMBER, ROBERT ZARATE

DATE 3/4/09

[Signature]

DOC REGIONAL APPEALS PANEL MEMBER, DENNIS SPICE

DATE 3/4/09

[Signature]

DOC REGIONAL APPEALS PANEL MEMBER, PAT LOVE

DATE 3/4/09

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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

In re the Personal Restraint Petition of:

ERIC SHERIDAN FLINT,

Petitioner.

RESPONSE OF THE
DEPARTMENT OF
CORRECTIONS

Respondent, the Department of Corrections (DOC), by and through its attorneys, ROBERT M. MCKENNA, Attorney General, and DONNA H. MULLEN, Assistant Attorney General, respectfully submits this response to Mr. Flint's personal restraint petition pursuant to RAP 16.9.

I. 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, Declaration of Laura Ambrosch, Attachment 1 at 1. The court sentenced Mr. Flint to 100 months total confinement on Count 1 and to 14 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.

///

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Due to community custody violations, Mr. Flint was returned to prison to serve the remainder of his sentence. His current Planned Release Date is November 13, 2010. Exhibit B, Declaration of Dawn Walker, Attachment A at 1.

II. STATEMENT OF THE CASE

In 2002, Mr. Flint was found guilty by plea of Robbery in the First Degree and Possession of a Controlled Substance (Methamphetamine). Exhibit 1, Attachment A at 1. The court imposed a sentence of 100 months total confinement for the First Degree Robbery conviction and 14 months total confinement for the Possession of a Controlled Substance conviction. Id. at 2. An 18 to 36-month term of community custody was also imposed. Id. at 3.

Through the application of earned early release credits, Mr. Flint was released from his total confinement term on August 27, 2007. Exhibit 2, Attachment A at 17, movement entry dated 08/27/2007.

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.

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

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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 at 1. 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 total confinement 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.

In this personal restraint petition, Mr. Flint alleges that the DOC did not have the authority to revoke his earned time and to sanction him to total confinement for the remaining portion of his prison sentence. However, under RCW 9.94A.737, the DOC is required to return offenders to serve his/her remaining confinement sentence at his/her third community custody violations hearing.

Mr. Flint's petition should be dismissed.

III. ISSUE PRESENTED

Does the DOC have the authority to sanction Mr. Flint to return to prison to serve the remaining portion of his sentence for his third violation of community custody conditions?

IV. STANDARD OF REVIEW

When an inmate challenges a decision from which the inmate has had no other avenue for obtaining state judicial review, the Court reviews the personal restraint petition by examining the requirements of RAP 16.4. In re Cashaw, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994); In re Lopez, 126 Wn. App. 891, 894-95, 110 P.3d 764, (2005) (denying inmate's challenge to risk level increase that made inmate ineligible to earn 50-percent early release time under ESSB 5990). Under this rule, the inmate is entitled to relief if he can show that a decision "was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington." RAP 16.4(c)(2). A showing that a governmental agency has failed to comply with its own rules or regulations is sufficient. Cashaw, 123 Wn.2d at 147-48.

However, bare assertions and conclusory allegations of constitutional violations are insufficient to support a personal restraint petition. In re Rice, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992).

V. ARGUMENT

THE DOC HAS AUTHORITY UNDER RCW 9.94A.737(2) TO SANCTION MR. FLINT TO RETURN TO PRISON TO SERVE THE REMAINING PORTION OF HIS SENTENCE.

Mr. Flint alleges that the DOC does not have authority to revoke his earned early release time and sanction him to total confinement for the remaining portion of his sentence. See Petition at 3. Mr. Flint's allegation is without merit.

RCW 9.94A.737(2) provides:

If an offender has not completed his or her maximum term of total confinement and is subject to a third violation hearing for any violation of community custody and is found to have committed the violation, the department shall return the offender to total confinement in a state correctional facility to serve up to the remaining portion of his or her sentence, unless it is determined that returning the offender to a state correctional facility would substantially interfere with the offender's ability to maintain necessary community supports or to participate in necessary programming and would substantially increase the offender's likelihood of reoffending.

RCW 9.94A.737(2).

Contrary to Mr. Flint's argument, there is no statutory language supporting consideration of mitigating circumstances in the first and second hearing. Rather, the DOC was required to sanction Mr. Flint to return to prison to serve the remaining portion of his sentence at his third community custody hearing where the Hearing Officer found no

compelling reasons or mitigating circumstances to justify consideration of a different sanction. Exhibit 1, Attachment B at 6.

Mr. Flint was released on August 27, 2007 from his prison sentence, 1,013 days early. Exhibit 2, Attachment B at 2, entry dated 02/20/2009. While serving his community custody term, he successfully served 366 days. Therefore, Mr. Flint was properly sanctioned to return to total confinement for 647 days. Id.

Because the DOC is statutorily mandated under RCW 9.94A.737(2) to return an offender to prison to serve the remainder of his sentence where the offender is found guilty at a third community custody hearing, Mr. Flint's claim is without merit.

VI. CONCLUSION

For the above stated reasons, the Respondent respectfully requests this Court deny Mr. Flint's petition and dismiss the case with prejudice.

RESPECTFULLY SUBMITTED this 31st day of July, 2009.

ROBERT M. MCKENNA
Attorney General



DONNA H. MULLEN, WSBA #23542
Assistant Attorney General
Corrections Division
PO Box 40116
Olympia WA 98504-0116
(360) 586-1445

Inmate: FLINT, Eric Sheridan (733044)

#1

Gender: Male	DOB: [REDACTED]	Age: 32	Category: Sanctioned	Body Status: Active Inmate
RLC: HV	Wrap-Around: No	Comm. Concern: No	Custody Level:	Location: Yakima Co Violator Facility — No Bed Assigned
PRD: 11/13/2010				CC/CCO:

Details

Text

Date & Time Created: 06/18/2009 10:48 AM
 Offender Location At Occurrence: N/A
 Date & Time Of Occurrence: 06/18/2009
 DOC No.: 733044
 Offender Name: FLINT Eric Sheridan
 Author Name: Carlos Sandoval
 Events: Letter Offender (LP)

Received another kite from P requesting Mitchell Vs. Kitsap county; Again provided P a copy information for DOC offenders sanctioned to return on their community custody case.

Date & Time Created: 06/10/2009 10:32 AM
 Offender Location At Occurrence: N/A
 Date & Time Of Occurrence: 06/10/2009
 DOC No.: 733044
 Offender Name: FLINT Eric Sheridan
 Author Name: Carlos Sandoval
 Events: Letter Offender (LP)

Received a couple of kites from P requesting several case laws printed; Highlighted DOC Classifications Unit address and provided a copy of information for DOC offenders sanctioned to Return on their community custody case.

Date & Time Created: 06/01/2009 07:22 AM
 Offender Location At Occurrence: N/A
 Date & Time Of Occurrence: 06/01/2009
 DOC No.: 733044
 Offender Name: FLINT Eric Sheridan
 Author Name: Carlos Sandoval
 Events: Letter Offender (LP)

Received kite from P reporting "I have been informed that per ESSB 5288 pg 47 sect. 19 that section 13 of the bill, THE REVOCATION OF OFFENDERS @ 3rd hearing expires Aug. 1st, 2009. The bill (sect. 20) also states "this act applies retroactively.." In short, DOC revocation is DONE. Do I have to wait until Aug 1st". Replied to P yes, you have to wait.

Date & Time Created: 03/17/2009 08:57 AM
 Offender Location At Occurrence: N/A
 Date & Time Of Occurrence: 03/17/2009
 DOC No.: 733044
 Offender Name: FLINT Eric Sheridan
 Author Name: Dawn Rowe
 Events: Stipulated Agreement (ST)

Stipulated Agreement on 2009-02-06, Kitsap Peninsula 3, Approved by: Wheeler, Dennis F, Authorized by: Rowe, Dawn R 1) Using Controlled Substance on 01/07/2009, Cause (AF), N/A, INCREASED UAS, As Directed, Sanction duration: 30 day(s)..Starting on 02/06/2009. 2) Using Controlled Substance on 01/07/2009, Cause (AF), N/A, DRUG SUPPORT GROUP, Weekly, Sanction duration: 30 day(s). Starting on 02/06/2009. 3) Using Controlled Substance on 01/07/2009, Cause (AF), N/A, INCREASED REPORTING, Weekly, Sanction duration: 30 day (s). Starting on 02/06/2009.

Date & Time Created: 03/17/2009 01:29 PM
 Offender Location At Occurrence: N/A
 Date & Time Of Occurrence: 03/17/2009 01:29 PM
 DOC No.: 733044
 Offender Name: FLINT Eric Sheridan
 Author Name: LAW ENFORCEMENT SYSTEM
 Events: Law Enforcement Contact (CT)

Reported by WSP - Offender Contact Reported to DOC on 03/17/2009 at 01:29 PM Inquiry or contact with: STATE PATROL MOBILE COMPUTER NETWORK WASPM0986 206.455.7700 ORI is WASPM0986 by

Date & Time Created: 03/16/2009 11:35 AM
 Offender Location At Occurrence: N/A
 Date & Time Of Occurrence: 03/16/2009
 DOC No.: 733044
 Offender Name: FLINT Eric Sheridan
 Author Name: Laura Ambrosch
 Events: Records Issues (RC) ,
 Hearings Appeal (HA)

Received 2nd appeal letter from P regarding 2/12/09 sanction. Appeals panel has already made their decision. Sent P a letter explaining.

[Handwritten initials]

#4

Inmate: FLINT, Eric Sheridan (733044)

Gender: Male	DOB: [REDACTED]	Age: [REDACTED]	Category: <input checked="" type="checkbox"/> Sanctioned	Body Status: Active Inmate
RLC: HV	Wrap-Around: No	Comm. Concern: No	Custody Level:	Location: Yakima Co Violator Facility — No Bed Assigned
PRD: 11/13/2010				CC/CCO:

Offender Information (Combined)

1 - Prison Max Expiration Date:	06/05/2010	Last Static Risk Assessment Date:	11/12/2008	DOSA:
2 - Planned Release Date:	11/13/2010	Last Offender Need Assessment Date:	11/12/2008	ISRB? No
3 - Earned Release Date:	04/05/2010	RLC Override Reason:		CCB? No
ESR Sex Offender Level:				SOSSA? No
ESR Sex Offender Level Date:		Offender Release Plan:		Investigation WEP? No
County Sex Offender Level:		Victim Witness Eligible?	No	
Registration Required?		County Of First Felony Conviction:		
DMIO?	Unknown	P U L H E S D X T		
DD?	Unknown	1 1 1 1 1 1 2 1 1		
SMIO?	N			

Personal Characteristics

Aliases, Dates of Birth and Places of Birth

Aliases			
*Last Name:	First Name:	Middle Name or Initial:	Suffix:
FAGAN	Eric	S	
HAGEN	Eric	S	
FLINT	Eric		
FAGAN	Eric	Sheridan	
KIRK	Jeffrey		
FLINT	Eric	J	

Dates of Birth		Places of Birth		
*Dates of Birth:	Use for Age Calculation?	City:	State / Province:	Country:
[REDACTED]	Yes	Unknown	Washington	United States

Identifications

General			
FBI Number:	FBI Fingerprint Code:	WA State ID Number:	ICE Registration Number:
[REDACTED]	[REDACTED]	[REDACTED]	

Social Security		Driver's License		
Social Security Number:	Validated with SSA?	Driver's License Number:	State / Province:	Country:

EXHIBIT A

ATTACHMENT



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS
P.O. Box 41100 • Olympia, Washington 98504-1100

June 30, 2009

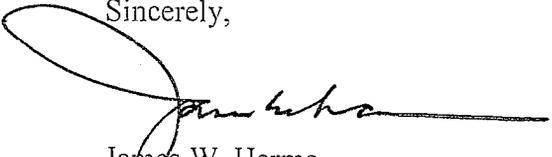
Eric Flint 09-03149 R442932 AF
Yakima County Jail
111 N. Front Street
Yakima, WA 98901

Dear Mr. Flint:

I am responding to two letters from you, one addressed to me and one addressed to Secretary Eldon Vail regarding section 13 of ESSB 5288 which expires August 1, 2009. It is true that this section expires, but RCW 9.94A.714 which becomes effective August 1, 2009 states "*(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 of community custody and is found to have committed the violation, the department shall return the offender to total confinement...*" Therefore, you must serve the remainder of your sentence in total confinement and you are not due for release until you have completed your sanction.

In your letter to Secretary Vail you state that based on new legislation you deserve, at the very least, a new hearing. You have had your hearing. Your appeal was heard and the Appeals Panel upheld the sanctioning decision. Even with the new legislative changes, your current ~~*~~ confinement is not retroactive and the decision stands. I do not believe that there was a violation in due process.

Sincerely,


James W. Harms
Regional Administrator

JWH:jec:DEP10792/SEC6234

cc: Eldon Vail, Secretary
Karen Daniels, Assistant Secretary
Carlos Sandoval, Community Corrections Officer 2
File

"Working Together for SAFE Communities"



Washington State Court of Appeals
Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, Issue Summaries, and General Information at <http://www.courts.wa.gov/courts>

October 29, 2009

Eric Sheridan Flint
#733044 / M-A-57U
Airway Heights Corr. Ctr.
P.O. Box 2049
Airway Heights, WA, 99001-2049

Donna H. Mullen
Attorney at Law
Attorney General Ofc
PO Box 40116
Olympia, WA, 98504-0116

CASE #: 39212-7-II

Personal Restraint Petition of: Eric Sheridan Flint

Dear Mr. Flint/Counsel:

This court is in receipt of your motion for reconsideration of the decision of the Acting Chief Judge dismissing your personal restraint petition in the above-noted case. No provision exists for filing a motion for reconsideration of a decision **dismissing** a personal restraint petition. See RAP 12.4(a). Rather, review may only be obtained by filing a motion for discretionary review with the Supreme Court. See RAP 16.14(c).

Therefore, I am forwarding your motion and the court file to the Supreme Court for its consideration as a motion for discretionary review.

Very truly yours,

David C. Ponzoha
Court Clerk

DCP:ldr

Cc: Washington State Supreme Court

WASHINGTON STATE SUPREME

COURT

PERSONAL RESTRAINT)

PETITION)

OF:

ERIC SHERIDAN)
FLINT)

No: COA - 39292-7-II

**DECLARATION OF SERVICE
BY MAILING**

I, ERIC SHERIDAN FLINT, PETITIONER, in the above entitled cause, do hereby declare that I have served the following documents;
MOTION FOR DISCRETIONARY REVIEW

Upon: WASHINGTON STATE SUPREME COURT
RONALD R. CARPENTER, CLERK
TEMPLE OF JUSTICE
P.O. BOX 40929
OLYMPIA, WA 98504-0929

I deposited with the M-Unit Officer Station, by processing as *Legal Mail*, with first-class postage affixed thereto, at the Airway Heights Correction Center, P.O. Box 2049, Airway Heights, WA 99001-2049.

On this 3rd day of NOVEMBER, 2009.

I certify under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Respectfully Submitted,


Petitioner