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STATE OF WASHINGTON,

Respondent,

v.

JOHN CHARLES FRANKLIN,

Petitioner.

ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

SECOND SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUE PRESENTED

Laws 2009 c 375 9 directs the Department of Corrections (DOC) to recalculate the term of community custody for offenders sentenced before RCW 9.94A.701 went into effect in mid-2009. This Court has asked for supplemental briefing to address how this section applies to Mr. Franklin's case.

B. ARGUMENT

When the legislature created RCW 9.94A.701, its intent was "to simplify the supervision provisions" of the SRA and "increase the uniformity of its application." Laws 2009 c 375 10. To this end, RCW 9.94A.701 requires courts to sentence offenders to a fixed term of community custody. And subsection (9) of the statute provides that the fixed term of community custody be reduced to another fixed term when, in combination with the imposed term of confinement, the statutory maximum is exceeded.

These changes apply retroactively to offenders who are "currently on community custody" or "currently incarcerated with a term of community custody." Laws 2009 c 375 20. In order to carry out the retroactivity provision without resentencing every offender already sentenced to community custody, the legislature

directed DOC to recalculate their term of community custody in accordance with RCW 9.94A.701:

The department of corrections shall recalculate the term of community custody and reset the date that community custody will end for each offender currently in confinement or serving a term of community custody for a crime specified in RCW 9.94A.701. The recalculation shall not extend a term of community custody beyond that to which an offender is currently subject.

Laws 2009 c 375 § 9.

In most cases, this should be a straightforward process, since DOC merely needs to convert the community custody range to a specific term in accordance with RCW 9.94A.701. However, since RCW 9.94A.505 and RCW 9.94A.701 mandate that community custody be imposed by the court, the trial court is ultimately responsible for ensuring that a proper sentence is imposed.

Applying RCW 9.94A.701 to Mr. Franklin, subsections (3)(a) and (c) specify a one-year term of community custody for assault in the third degree (which is a crime against persons) and for the felony drug offense. RCW 9.94A.701(9) then requires that since he has already been sentenced to the statutory maximum term of

confinement for those offenses, the one-year term of community custody be reduced all the way down to zero.

So that RCW 9.94A.701 can be properly carried out, this Court needs to provide guidance as to its meaning. A recent Court of Appeals decision held that despite the clear wording of RCW 9.94A.701, an offender already sentenced to the statutory maximum term of confinement was still subject to community custody under RCW 9.94A.729. Winkle, 159 Wn. App. at 330. The decision in Winkle is incorrect, and should be overturned.

RCW 9.94A.505(2)(a)(ii) directs the sentencing court to impose community custody pursuant to RCW 9.94A.701 and 702 (702 concerns sentences of one year or less). Contrary to the court's reasoning in Winkle, RCW 9.94A.729 cannot require that community custody be imposed in lieu of earned early release time, because community custody can only be imposed pursuant to RCW 9.94A.701.

Significantly, Laws 2009 c 375 9 references RCW 9.94A.701, not RCW 9.94A.729. This is because RCW 9.94A.729 does not authorize the imposition of community custody, it only guides DOC regarding when to start the term of community

custody imposed under RCW 9.94A.701. RCW 9.94.729(5)(a) states:

A person who is eligible for earned early release as provided in this section and who is convicted of a sex offense, a violent offense, any crime against persons under RCW 9.94A.411(2), or a felony offense under chapter 69.50 or 69.52 RCW, shall be transferred to community custody in lieu of earned release time.

Winkle cites to RCW 9.94A.701(9), but gives it no meaning.

It also cites to this Court's decision in In re the Personal Restraint Petition of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009). Relying on RCW 9.94A.715, Brooks upheld a sentence tying the term of community custody to earned early release time. RCW 9.94A.715 has since been repealed. This provision was put in the 2008 version of RCW 9.94A.701 but then removed before it took effect. See Appendix B at page 32 in Petitioner's First Supplemental Brief. RCW 9.94A.701 does not authorize the court to impose a term of community custody in lieu of earned early release.

Once RCW 9.94A.701 came into effect, Mr. Franklin's sentence was no longer proper. The decision of the Court of Appeals (State v. Franklin, 154 Wn. App. 1004, 2010 WL 60175 (2010)) upheld his sentence, despite the fact that RCW 9.94A.701 had taken effect and applies retroactively. A motion to reconsider

was filed and summarily denied by the court. This Court must reverse the decision of the Court of Appeals and strike the imposition of community custody.

Respectfully submitted this 3<sup>rd</sup> day of June, 2011.

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Attached is petitioner's supplemental brief requested by the Court. Please include my co-counsel in any further correspondence as I will be out of the country next week.

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