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**SUPREME COURT OF THE
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL HERBERT PANNELL, APPELLANT

Court of Appeals, Division II
COA No. 39895-8

Pierce County Superior Case No. 02-1-04226-2

Supplemental Brief of the State

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A. ISSUES PRESENTED FOR REVIEW.

1. Must a sentencing court give an offender credit for time spent in community custody under a SSOSA when the suspended sentence is later revoked and the original sentence imposed?

B. STATEMENT OF THE CASE.

The State charged Daniel Herbert Pannell (the defendant) with one count of incest in the first degree on September 10, 2002. CP 1-2. The State later amended the charge, adding four counts of child molestation in the second degree. CP 19-21. Defendant pleaded guilty to all charges; the court sentenced him to 116 months on August 22, 2003. CP 50-52. Pursuant to RCW 9.94A.670¹, the court suspended the sentence and placed the defendant in community custody as part of the special sex offender sentencing alternative (SSOSA). *Id.*

On May 26, 2006, the defendant's Community Corrections Officer (CCO) filed a violation report regarding the defendant. The CCO reported that the defendant's therapist had terminated the defendant from treatment. CP 57-76. The State petitioned for a revocation hearing on May 16. CP 53-56. On June 23, 2006, after considering the facts of the violation

¹ RCW 9.94A.345 states that "Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." Pursuant to statute, the sentencing guidelines in effect during September 2002 will be cited throughout the brief.

report, the court revoked the suspended sentence, committing the defendant to the Department of Corrections for the original sentence for 116 months, with an additional three to four years of community placement. CP 80-81.

On June 22, 2009, the defendant filed a motion to vacate the sentence and remand for re-sentencing under CrR 7.8(b). CP 82-86. The defendant corresponded with the Prosecuting Attorney's office over the following months, explaining that the sentence imposed exceeded the statutory maximum sentence. CP 114-120. The State agreed that the combined term of confinement and post-confinement community custody required clarifying language to be in compliance with *In re Personal Restraint of Brooks*, 166 Wn.2d 664, 673, 211 P.3d 1023 (2009); CP 114. The defendant disagreed with the suggested clarifying order as it did not count time spent in community custody under his SSOSA. CP 119-120. The State scheduled a hearing to address his concerns. CP 122.

At a hearing on September 25, 2009, the court determined that the sentence should be clarified to reflect that the total time of the sentence that may be imposed on the defendant is ten years. RP 5-6. *See, Brooks, supra*. The court issued an order specifying that this time included incarceration in the Pierce County Jail, time within the Department of Corrections, and any time spent in community custody once released from the Department of Corrections. CP 123.

On October 14, 2009, defendant filed a notice of appeal to the Court of Appeals, seeking review of the Superior Court's judgment. CP 124. On November 16, 2010, the Court of Appeals affirmed the decision of the Superior Court below in an unpublished opinion. *State v. Pannell*, 158 Wn. App 1041 (2010)(2010 WL 4630935). The Supreme Court granted review on March 29, 2011.

C. ARGUMENT.

1. THE SENTENCING REFORM ACT DOES NOT REQUIRE THE COURT, WHEN REVOKING A SUSPENDED SENTENCE, TO GRANT CREDIT TO AN OFFENDER FOR TIME SPENT IN COMMUNITY CUSTODY UNDER A SSOSA.

The Special Sex Offender Sentencing Alternative (SSOSA) remains as the only provision under the Sentencing Reform Act in which the court can "suspend the imposition or execution of sentence[.]" RCW 9.94A.575. Whether or not community custody under a suspended sentence should be credited towards the reinstated sentence is a matter of statutory interpretation, requiring de novo review. *State v. Ramirez*, 140 Wn. App. 278, 290, 165 P.3d 61 (2007); *State v. Armendariz*, 160 Wn.2d. 106, 110, 156 P.3d 201 (2007). When interpreting statutes that are plain on their face, the court considers the plain meaning as the expression of the intended legislative purpose for the statute. *State v. Flowers*, 154 Wn.

App. 462, 225 P.3d 476 (2010). In cases where the meaning of the statute is ambiguous, the court may “consider the legislative history and circumstances surrounding the statute's enactment to determine legislative intent.” *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 527, 243 P.3d 1283 (2010). After reviewing the SSOSA statute itself, related sentencing statutes, and the definitions given under the Sentencing Reform Act, the trial court correctly denied credit to the defendant for community custody time served under the SSOSA.

- a. The SSOSA statute only authorizes credit for time spent in confinement prior to the revocation of a SSOSA.

The court can only give offenders credit towards a sentence for confinement time prior to the imposition of the sentence. During standard sentencing, the court “shall give the offender credit for all confinement time served before the sentencing.” RCW 9.94A.505(6). For offenders with a suspended sentence pursuant to a SSOSA assignment that is later revoked, “[a]ll *confinement time served during the period of community custody* shall be credited to the offender if the suspended sentence is revoked.” RCW 9.94A.670(10) (emphasis added). Further, RCW 9.94A.670(10) specifically distinguishes between confinement time and the period of community custody as a whole, granting credit for confinement only. Based on the SSOSA statute alone, the defendant does not warrant credit for time spent in community custody under a SSOSA.

When the plain meaning of the statute is ambiguous, the court may look to other factors such as legislative history to determine the intent of the legislature when drafting the statute. *Lake*, 169 Wash.2d at 527. The 1997 Legislature also clarified that offenders sentenced under SSOSA are not eligible to accrue earned early release time while serving a suspended sentence. *See*, former RCW 9.94A.120(8)(a)(ii)(C), 1997 Laws of Washington, ch. 69 § 1; *see, also* STATE OF WASH. SENTENCING GUIDELINES COMM'N, ADULT SENTENCING GUIDELINES MANUAL cmt. at II-123 (2002). Although not determinative, the clarification of the intent of the legislature further illuminates the meaning of the relevant statute.

- b. The defendant, while under the SSOSA, did not serve out any period of "Confinement" as defined under the Sentencing Reform Act.

The Sentencing Reform Act (SRA) states that "Confinement" means total or partial confinement." RCW 9.94A.030(10). Total confinement "means confinement inside the physical boundaries of a facility or institution ... for twenty-four hours a day." 9.94A.030(42). The defendant did not reside within a state facility or institution during the period of community custody. CP 35-49. Given the statutory definition for confinement, the defendant was not under confinement during his SSOSA.

“Partial confinement” is defined as “confinement for no more than one year” either in a facility appropriate for total confinement or as “work release, home detention, work crew, and a combination of work crew and home detention.” RCW 9.94A.030(31). Here, the court sentenced the defendant to community custody for the extent of his original sentence pursuant to a SSOSA arrangement; it did not include work release, work crew, or home detention programs. CP 35-49. Since he did not participate in one of the programs constituting partial confinement, nor did he reside in a state facility, his period of community custody cannot be credited towards his reinstated sentence.

In the appellate court below, the defendant argued that the time spent on community custody constitutes confinement: “partial confinement, also, states that it’s being on – that it’s being out on community custody.” RP 7. However, defendant did not participate in any of the programs that fall under community custody. Further, community custody under a SSOSA does not constitute any kind of confinement warranting credit upon revocation. Therefore, the trial court did not err when it refused to grant the defendant credit for his time spent in community custody.

The defendant also argued below that by failing to acknowledge time spent in community custody, the court violated the statutory maximum sentence imposed by RCW 9.94A.505(5). App. Br. at 5.

Although community custody can be a part of a sentence, it may also be “imposed pursuant to [RCW 9.94A.670 and other statutes].” RCW 9.94A.030(5). The community custody associated with the SSOSA fell under the provisions of RCW 9.94A.670 and not a part of the standard sentencing.

When the court imposes a SSOSA, it “may suspend the execution of the sentence and impose the following conditions of suspension: (a) The court shall place the offender on community custody for the length of the suspended sentence...” RCW 9.94A.670(4) (emphasis added). The court orders community custody as an alternative to the original sentence. Furthermore, “[t]he court may revoke the suspended sentence at any time during the period of community custody and order execution of the original sentence [under specific conditions].” RCW 9.94A.670(10) (emphasis added). Upon revocation, the SSOSA reverts to the sentence originally imposed; the court need only credit the original sentence for “[a]ll confinement time served during the period of community custody ...” *Id.* As long as the court credits all confinement time, a judgment and sentence valid under RCW 9.94A.505(7) at original sentencing remains valid when reinstated.

- c. The Washington courts have previously held that upon revocation of a SSOSA, the sentencing court need not credit the defendant for time spent on community custody pursuant to the SSOSA.

Time spent in community custody does not constitute confinement and does not apply to a sentence reinstated by a SSOSA revocation; nothing obligated nor permitted the court to credit the defendant with the period of time spent in community custody pursuant to RCW 9.94A.670(10). The Court of Appeals came to the same conclusion in *State v. Gattrell*, where a defendant with a previously revoked SSOSA claimed credit for time spent in community custody. 138 Wn. App. 787, 158 P.3d 636 (2007). The court held that “[t]he court properly refused to credit community custody time against the reimposed sentence.” *Id.* at 791. See *State v. Miller*, 159 Wn. App. 911, 247 P.3d 457 (2011) (holding that not crediting an offender for time served in community custody under a SSOSA does not violate the Double Jeopardy clause of the Fifth Amendment). The statutory analysis coupled with precedent direct the appropriate outcome. The court’s decision was in accord with the applicable statutes and the ruling of *Gattrell*.

- d. **Gattrell is consistent with previous holdings regarding the previous sentencing scheme under RCW 9.92 and 9.95.**

Historically, offenders have been entitled to credit for confinement time, but not time spent on probation or community supervision. Prior to the SRA, probation under a suspended sentence was very common. See former RCW 9.92.060; 9.95.210. One of the major changes brought by the SRA was the abolition of felony probation under suspended and deferred sentences. See RCW 9.92.900.

Washington Courts have never held that a defendant is entitled to credit for non-detention time spent under conditions of a suspended sentence. An offender is entitled to credit against his maximum sentence for detention time served pre-trial and as a condition of his probation. *In re Personal Restraint of Phelan*, 97 Wn.2d 590, 592, 647 P.2d 1026 (1982)(*Phelan I*). This includes electronic home monitoring (EHM). *State v. Speaks*, 119 Wn.2d 204, 206, 829 P. 2d 1096 (1992). But credit is not constitutionally mandated for probation time served outside jail. *Phelan*, 97 Wn.2d at 598; *Speaks*, 119 Wn.2d at 20; *Harris v. Charles*, 151 Wn. App. 929 940, 214 P. 3d 962 (2009); *review granted* 168 Wn.2d 1031 (2010).

A SSOSA is a suspended sentence which permits the defendant to be in the community under various conditions. It essentially puts the defendant on probation. Defendants have never been given credit against their sentences for non-detention time on probation. The SSOSA statute did not change that. The defendant is not entitled to this credit against his sentence.

- e. The statutes and case law of other jurisdictions generally do not obligate courts to give credit for time spent on probation while not confined.

Most other jurisdictions, including federal courts, have held that time spent on a suspended sentence (or probation) does not count towards a reimposed sentence. Federal courts have repeatedly held that a defendant does not receive credit towards a sentence when the court revokes probation. *Holder v. United States*, 546 F.2d 616 (5th Cir. 1977); *Smith v. United States*, 603 F.2d 722, 723 (8th Cir. 1979); *United States v. Shead*, 568 F.2d 678, 683 (10th Cir. 1978); *United States v. Guzzi*, 275 F.2d 725 (3rd Cir. 1960); *Allen v. United States*, 209 F.2d 353 (6th Cir. 1953), *cert. denied*, 347 U.S. 970, 74 S. Ct. 782, 98 L.Ed. 1111 (1954). The Ninth Circuit, deciding similarly to the other federal circuits in relation to pretrial probation, held that “[t]his circuit has yet to grant credit for time served on pretrial probation.” *United States v. Freeman*, 922 F.2d 1393, 1397 (9th Cir. 1991) (emphasis in original). Further, “[t]he

relevant sections of the United States Code are bereft of any mention of credit for time served on probation.” *Id.*

Other states are in accord with this principle. For example, the Supreme Court of Oregon, when considering the issue under Oregon’s statutory framework, concluded that an offender who had his probation revoked would not receive any credit on imposition of sentence for time spent on probation. *West v. Gladden*, 249 Or. 18, 436 P.2d 556 (Or. 1968). California, in comparison, provides credit for many different forms of confinement: “In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, including, but not limited to, any time spent in a jail, camp, work furlough facility, halfway house, rehabilitation facility, hospital, prison, juvenile detention facility, or similar residential institution, *all days of custody of the defendant, including days served as a condition of probation in compliance with a court order*, and including days credited to the period of confinement pursuant to Section 4019, shall be credited upon his or her term of imprisonment[.]” Cal. Pen. Code §2900.5(a) (West 2011) (emphasis added). Per statute, only probation in which an offender was in custody count towards an offender’s imposed sentence. Like Oregon, California specifically does not credit time spent outside of custody while on probation.

Alabama allows the court to grant an offender credit for time spent in custody when the revoking a suspended sentence: “If revocation results

in a sentence of confinement, credit shall be given for *all time spent in custody prior to revocation*. Full credit shall be awarded for *full-time confinement in facilities such as city or county jails, state prisons, and boot camps*.” Ala. Code § 15-18-175 (West 2011) (emphasis added).

Other states more explicitly grant the court permission to deny an offender credit for time spent on probation. “The term on probation, conditional discharge or supervision shall not be credited by the court against a sentence of imprisonment or periodic imprisonment unless the court orders otherwise.” 730 Ill. Comp. § 5/5-6-4(h) (West 2011).

The Supreme Court of Alaska, finding in accordance with multiple federal courts on the same issue, held that the defendant “was not entitled to have the period he served on probation credited against his sentence.” *Paul v. State*, 560 P.2d 754, 758 (Alaska 1977). See *Thomas v. United States*, 327 F.2d 795 (10th Cir. 1964), cert. denied, 377 U.S. 1000, 84 S. Ct. 1936, 12 L.Ed.2d 1051 (1964); *United States v. Guzzi*, 275 F.2d 725 (3rd Cir. 1960); *Allen v. United States*, 209 F.2d 353 (6th Cir. 1953), cert. denied, 347 U.S. 970, 74 S. Ct. 782, 98 L.Ed. 1111 (1954). Other state courts have drawn similar conclusions regarding crediting an offender for time spent on probation. *State v. Tritle*, 15 Ariz.App. 325, 488 P.2d 681 (Ariz. Ct. App. 1971); *State v. Sutton*, 113 Idaho 832, 748 P.2d 416 (Idaho Ct. App. 1987); *People v. Linzy*, 45 Ill.App.3d 612, 359 N.E.2d 1230 (Ill.App. 1977) (holding that the Illinois statute which allowed a court to deny credit for time spent on probation as constitutional).

Where states allow an offender credit for time on probation or a suspended sentence, the statute explicitly uses language to that effect. The New Mexico Statute directs the court, when revoking probation, to “require the probationer to serve the balance of the sentence imposed ... If imposition of sentence was deferred, the court may impose any sentence which might originally have been imposed, but credit shall be given for time served on probation” N. M. Stat. § 31-21-15(B) (formerly 41-17-28.1(B)); see *State v. Reinhart*, 79 N.M. 36, 38, 439 P.2d 554, 556 (1968) (holding that the New Mexico statute requires the court to give offenders credit for time spent on probation).

Except where state statutes specifically require a court to credit an offender for time spent on probation or a suspended sentence, state and federal courts have repeatedly held that a court has no obligation to grant an offender such credit. Consistent with the statutes and rulings of courts across the United States, when a sex offender has a SSOSA revoked, the courts of Washington need not give the offender credit towards the imposed sentence for time not under confinement.

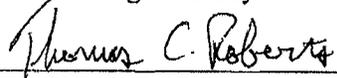
D. CONCLUSION.

When a court revokes a defendant’s suspended sentence, he cannot claim credit for the community custody time. RCW 9.94A.670(10) only allows credit for confinement time during the SSOSA period. The relevant statutes indicate that community custody time does not fall within

the bounds of confinement. Washington courts have come to this conclusion previously in *Gattrell*. Further, when considering the relevant statutes and case law of other jurisdictions, the holding of the court in *Gattrell* is consistent. Therefore, the court properly amended the defendant's sentence to be consistent with applicable statute and the rule set forth in *Brooks*. For the reasons argued, the State respectfully requests that the defendant's sentence be affirmed.

DATED: April 26, 2011

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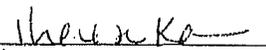


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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4.28.11 
Date Signature