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

STATE OF WASHINGTON,

Plaintiff,

v.

ESMOND HOLMES aka WILLIAM HENRY SAFFO,

Respondent

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Appellant.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

After Holmes was released early from prison to community custody on a 2003 conviction in King County, he violated his conditions of community custody several times. At his sixth violation hearing before the Department of Corrections (DOC), the DOC terminated his early release, as authorized by former RCW 9.94A.737(2), and returned him to confinement to finish his prison term. After he finished serving the remainder of his prison term, he was again released to community custody in 2009. But he then committed a new felony and was sent back to prison in 2010 on a new sentence. At that time, the DOC tolled his remaining community custody time on the 2003 conviction.

While Holmes was in prison for his 2009 felony, he filed a CrR 7.8 motion for relief from judgment under his 2003 criminal cause asking the King County Superior Court to vacate the DOC's previous termination of early release under the 2003 cause. He also requested that the court order the DOC to credit the termination confinement time toward his 2003 community custody term. The superior court granted the request, finding that the DOC's application of RCW 9.94A.737(2) violated the ex post facto clauses of both the state and federal constitutions. When the DOC complied with the order, the confinement time credits wiped out Holmes's remaining community custody.

The superior court's order in Holmes's case was based on *State v. Madsen*, 153 Wn. App. 471, 228 P.3d 24 (2009), in which this Court had held that the DOC's application of RCW 9.94A.737(2) to terminate early release violated the ex post facto clause of the federal constitution. The offender in *Madsen* had committed his underlying crimes before RCW 9.94A.737(2) was enacted.

While the DOC's appeal in Holmes's case was pending, the Washington Supreme Court filed its opinion in *In re Flint*, 174 Wn.2d 539, 277 P.3d 657 (2012), which reversed *Madsen* in part, holding that the DOC's application of former RCW 9.94A.737(2) to terminate early release had not violated the ex post facto clause. But the *Flint* Court did not address a second issue decided in *Madsen*, which was whether the trial court had properly exercised its jurisdiction in deciding a CrR 7.8 motion against the DOC under the criminal cause.

As a threshold issue, this Court should hold that the criminal cause is meant solely for actions and claims that pertain to the conviction and sentence, not actions involving a third party. It should hold that the superior court did not have jurisdiction in the context of a CrR 7.8(b) motion for relief from judgment to enter an order against the DOC—a nonparty under Holmes's criminal cause.

Even if this Court does not overrule *Madsen* on the jurisdiction issue, it should nevertheless vacate the superior court's April 1, 2011, order in Holmes's case because *Flint* is directly on point regarding the ex post facto issue.

II. ASSIGNMENTS OF ERROR

1. The superior court erred when it issued an order on a CrR 7.8(b) motion under the criminal cause directed at the Department of Corrections, a nonparty.

2. The superior court erred when it held that the DOC's termination of Holmes's early release under former RCW 9.94A.737(2) violated the ex post facto clauses of the state and federal constitutions.¹

3. The superior court erred when it credited Holmes's community custody term with confinement time, instead of requiring a new violation hearing.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where CrR 7.8 is narrowly tailored only to challenges to the criminal judgment itself, did the trial court lack subject matter jurisdiction under CrR 7.8(b) to decide the validity of a hearing officer's

¹ The superior court found a violation of the ex post facto clauses of both the state and federal constitutions. CP 166. However, Holmes had not argued that the State's ex post facto clause provides any more protection than its federal counterpart under these circumstances, and thus, this Court may assume without deciding that it does not provide more protection. See *State v. Pillatos*, 159 Wn.2d 459, 475 n.7, 150 P.3d 1130 (2007).

decision in a civil proceeding that had no impact on the underlying criminal judgment?

2. Did the trial court lack personal jurisdiction under CrR 7.8(b) to decide the validity of the DOC's actions where the DOC is not a party to the criminal cause?

3. Was the DOC's termination of Holmes's early release constitutional?

4. Was the proper remedy for any alleged constitutional violation a new violation hearing?

5. Did the trial court violate RCW 9.94A.171(3) when it ordered the DOC to credit Holmes's community custody term with confinement time as a remedy for the alleged constitutional violation?

IV. STATEMENT OF THE CASE

In 2003, Holmes pleaded guilty to second degree robbery. CP 60. The King County Superior Court (the Honorable Carol A. Schapira) imposed 63 months of confinement and 18 to 36 months of community custody. CP 63-64. The DOC later modified the community custody to a term of 18 months, pursuant to Laws of 2009, ch. 375, § 9. *See* CP 73 ("Supervision Length: 0Y, 18M, 0D").

Holmes was released on early release time from prison to community custody on November 1, 2006. CP 77 (showing community

custody “INTAKE”); CP 74 (showing early release date in November 2006). He was then in and out of confinement several times because he violated conditions of community custody. CP 81. Finally, at his sixth DOC violation hearing in December 2007, the DOC hearing officer terminated his early release as authorized by former RCW 9.94A.737(2) and returned him to confinement to finish the remainder of his prison term.² CP 103 (at entry dated 12/13/2007); CP 54; CP 76 (“CCP Return”).

Then, Holmes was released back to community custody in February 2009. CP 54; CP 76 (“CCP VIOLATION RETURN”). After committing a few more violations, ultimately Holmes committed a felony, was convicted, and received a new prison sentence before he could finish his community custody term for the 2003 conviction. CP 54-55. He went back to prison in April 2010. CP 54; CP 76; CP 78 (“Admission To Prison . . . Initial Classification”). Meanwhile, the DOC

² Former RCW 9.94A.737(2) stated:

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 treatment or programming and would substantially increase the offender's likelihood of reoffending.

tolled his community custody term on the 2003 conviction. CP 73 (showing scheduled end date for cause AD as “Tolling”); CP 55.

While he was in prison at the Monroe Correctional Complex, Twin Rivers Unit, in Snohomish County, he filed a CrR 7.8(b) motion for relief from judgment under the 2003 cause number, asking the trial court to order the DOC to credit his community custody term with the time he was in confinement due to the DOC’s termination of his early release on the 2003 conviction. CP 70 (showing location as “MCC-TRU”); CP 31. He claimed the DOC’s prior termination of his early release constituted a violation of the ex post facto clauses of the state and federal constitutions under *State v. Madsen*, 153 Wn. App. 471, 228 P.3d 24 (2009). CP 25. *Madsen* held that where an offender was returned to prison pursuant to former RCW 9.94A.737(2) because of multiple community custody violations, doing so violated the ex post facto clause because the offender’s underlying crimes occurred before enactment of the statute. *Madsen*, 153 Wn. App. at 484. Holmes further asked for the remedy of credits toward community custody based on *In re Knippling*, 144 Wn. App. 639, 183 P.3d 365 (2008). CP 31; VRP 2.³ At that time, neither *Madsen* nor *Knippling* had yet been overruled.

³ The verbatim report of proceedings fails to include page numbers. Appellant assumes that page 1 is the first page of transcribed hearing testimony.

Counsel for the DOC responded that the trial court should stay the CrR 7.8 motion for relief from judgment because the Washington Supreme Court was then reviewing the issue presented in *Knippling*, namely whether the proper remedy for overstay in prison is to credit the community custody term with the amount of overstay. VRP 3. However, the trial court refused to stay the case and ordered the DOC to credit Holmes's community custody term with time spent in custody serving the remainder of his prison term after termination of early release. CP 166; VRP 4-5. This wiped out his community custody term so that when he was released from prison on August 27, 2012,⁴ he had no community custody to serve. CP 54.

The Supreme Court subsequently overruled *Knippling*. See *State v. Jones*, 172 Wn.2d 236, 245-49, ¶¶ 15-19, 257 P.3d 616 (2011) (community custody term is tolled while offender is in prison; even if prison term is later amended and shortened, overstay time cannot count toward community custody). The Supreme Court also subsequently overruled *State v. Madsen*, holding instead that termination of early release for multiple community custody violations did not violate the ex post facto clause even where the offender committed his underlying

⁴ Holmes's early release date was September 4, 2012. CP 70. But the DOC has authority to release offenders up to ten days prior to their release dates. See RCW 9.94A.728(7).

crime before the legislature enacted the statute authorizing termination of early release. *See In re Flint*, 174 Wn.2d 539, 277 P.3d 657 (2012).

V. STANDARD OF REVIEW

A trial court's decision to grant relief from judgment under CrR 7.8(b) is reviewed for abuse of discretion. *State v. Robinson*, 104 Wn. App. 657, 662, 17 P.3d 653, 657 (2001). However, questions of law, like whether former RCW 9.94A.737(2) violated the ex post facto clause, are reviewed de novo. *State v. Lord*, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007). Moreover, a court's subject-matter jurisdiction over a cause or proceeding is a question of law that this Court reviews de novo. *Young v. Clark*, 149 Wn.2d 130, 132, 65 P.3d 1192 (2003). And a trial court's ruling on personal jurisdiction is also a question of law reviewable de novo when the underlying facts are undisputed. *Lewis v. Bours*, 119 Wn.2d 667, 669, 835 P.2d 221 (1992). The underlying facts in this case are undisputed and only questions of law remain.

VI. ARGUMENT

A. **The Trial Court Lacked Jurisdiction To Order The DOC To Credit Holmes's Community Custody With Confinement Time**

The threshold issue in this case is whether the superior court had jurisdiction. *See, e.g., Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 70-71, 170 P.3d 10 (2007)

“As a threshold issue, we first determine whether the superior court had subject matter jurisdiction to decide Indoor Billboard's claim”). And in this case, that issue is dispositive. The superior court lacked subject matter jurisdiction in the context of a CrR 7.8(b) motion under the criminal cause to adjudicate the violation hearing claim, and it lacked personal jurisdiction over the DOC, as a non-party under the criminal cause.

1. The Court Lacked Subject Matter Jurisdiction

The criminal cause is meant solely for actions and claims that pertain to the conviction and sentence, not actions involving a third party. Here, the trial court lacked subject matter jurisdiction over the DOC in the context of a criminal proceeding.

“In order for a trial court to have jurisdiction over a particular matter, it must have both ‘subject matter jurisdiction’ and ‘personal jurisdiction.’” *State v. B.P.M.*, 97 Wn. App. 294, 298, 982 P.2d 1208 (1999). “A court has subject matter jurisdiction where it has the authority to adjudicate the type of controversy in the action.” *In re Stoudmire*, 141 Wn.2d 342, 353, 5 P.3d 1240 (2000), *distinguished on other grounds by In re Turay*, 153 Wn.2d 44, 53, 101 P.3d 854, 859 (2004).

Washington superior courts have jurisdiction “in all cases . . . in which jurisdiction shall not have been by law vested in some other court.”

In re Schneider, 173 Wn.2d 353, 360, 268 P.3d 215 (2011) (quoting Const. art. IV, § 6). The trial court in this case would have had subject matter jurisdiction if Holmes had brought a petition for writ of habeas corpus, provided he was in custody in King County. *Conway v. Cranor*, 37 Wn.2d 303, 304, 223 P.2d 452, 453 (1950) (holding that under article IV, section 6, or the Washington Constitution the Washington Supreme Court and Walla Walla County Superior Court “are the only courts open to original petitions for a writ of habeas corpus for one who is in the penitentiary at Walla Walla”). But he was not in custody in King County. He was in Snohomish County in the Monroe Correctional Complex. CP 70. Therefore, Snohomish County had jurisdiction over any claim he could have brought by way of a habeas corpus petition. Because jurisdiction was “by law vested in some other court” (i.e., Snohomish County Superior Court), King County Superior Court did not have jurisdiction. *Schneider*, 173 Wn.2d at 360.

Even if he had been in custody in King County, it is still improper to bring a claim against a third party under the criminal cause. It is like an inmate trying to file a motion to withdraw his guilty plea under the same cause that was created by his civil suit for a slip and fall tort claim in prison. A tort lawsuit is civil and pertains to an agency’s treatment of him, while the motion to withdraw the plea is criminal and pertains to his

underlying conviction. Likewise, a petition for a writ of habeas corpus against the DOC is a civil action that pertains to the DOC's treatment of an inmate. *Honore v. Board of Prison Terms & Paroles*, 77 Wn.2d 660, 663-64, 466 P.2d 485 (1970). And a motion under the criminal cause challenging the judgment and sentence is a criminal action that pertains to the underlying conviction. Because a claim against the DOC does not involve the underlying conviction, it cannot be brought in a CrR 7.8(b) motion. The criminal cause is meant solely for actions and claims that pertain to the conviction and sentence, not actions involving a third party.

“Upon the entry of a final judgment and sentence of imprisonment, legal authority over the accused passes by operation of law to the [DOC and the Indeterminate Sentencing Review Board] and those agencies of the executive branch bear full responsibility for executing the judgment and sentence or granting parole” *January v. Porter*, 75 Wn.2d 768, 773-74, 453 P.2d 876 (1969). The courts have long recognized this “transfer of jurisdiction over a finally convicted felon from the judicial to the executive branch of government.” *Id.*, 75 Wn.2d at 774; accord *State v. Harkness*, 145 Wn. App. 678, 685, 186 P.3d 1182 (2008); see also *In re Chatman*, 59 Wn. App. 258, 262-263, 796 P.2d 755 (1990) (sentencing court cannot direct DOC where to house an offender or how to calculate good time). A trial court has no inherent authority and only

limited statutory authority to modify sentences post-judgment. *Harkness*, 145 Wn. App. at 685. The trial courts retain limited jurisdiction to vacate or alter final judgments in criminal or civil cases “only in those limited circumstances where the *interests of justice most urgently require.*” *State v. Shove*, 113 Wn.2d 83, 88, 776 P.2d 132 (1989) (emphasis added) (citing CrR 7.8(b); CR 60(b)).

Under CrR 7.8(b), a sentencing court may consider a motion to “relieve a party from a final judgment, order, or proceeding” only for:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void; or

(5) Any other reason justifying relief from the operation of the judgment.

CrR 7.8(b). A challenge to the DOC’s administration of an offender’s sentence is not listed as one of the specific reasons authorizing a motion under CrR 7.8(b)(1) through (4).

On first glance, such a challenge might be possible under the broad language of CrR 7.8(b)(5), but Washington courts consistently have

interpreted subsection (5) as applying only in extraordinary circumstances where the irregularities are such that vacation of the sentence is warranted. No Washington court, except the *Madsen* court, has interpreted subsection (5) as authorizing a challenge to the actions of a third party under the criminal cause. The *Madsen* court appears to have come to its conclusion without having been provided the benefit of historical perspective on CrR 7.8 motions and a more in depth analysis.

Washington courts have traced the origin of CrR 7.8(b)(5) to CR 60(b)(11), which contains the same language. *See e.g., State v. Brand*, 120 Wn.2d 365, 842 P.2d 470 (1992). CR 60(b)(11) has been interpreted as applying only to situations “involving *extraordinary circumstances* not covered by any other section of the rule.” *Id.* (emphasis added). *Accord State v. Gomez-Florencio*, 88 Wn. App. 254, 259, 945 P.2d 228 (1997); *State v. Cortez*, 73 Wn. App. 838, 841-42, 871 P.2d 660 (1994); *State v. Dennis*, 67 Wn. App. 863, 865, 840 P.2d 909 (1992).

In *State v. Keller*, 32 Wn. App. 135, 647 P.2d 35 (1982), the court explained that CR 60(11) is “not a blanket provision authorizing reconsideration for all conceivable reasons;” rather the reasons “must relate to ‘irregularities which are extraneous to the action of *the court* or go to the question of the regularity of *its proceedings*.’” *Id.* at 141

(citation omitted, emphasis added). Thus, CR 60(11) is meant to address the proceedings of the court, not the proceedings of a third party.

Also, questions of law do not justify vacation; the only remedy where there is a question of law is to appeal from the judgment. *Id.* at 140. Holmes challenged the DOC's legal conclusions. But this is not the type of claim that can be challenged under CR 60(11); likewise, it is not the type of claim that can be challenged under CrR 7.8(b)(5).

The Supreme Court's analysis in *State v. Robinson*, 153 Wn.2d 689, 107 P.3d 90 (2005), confirms that CrR 7.8 is narrowly tailored only to a limited number of challenges to the criminal judgment itself:

Originally, postconviction relief was detailed in former CrR 7.7. That rule provided that petitions for postconviction relief were to be made to the chief judge of the Court of Appeals in the district where the petitioner was convicted. Former CrR 7.7(a) (1973) (rescinded 1976). . . . In 1976, the Rules of Appellate Procedure were adopted, and RAP 16.3-.15, the rules governing PRPs, superseded the relief previously available under former CrR 7.7. The procedure for presenting a PRP and obtaining counsel is similar to that formally provided in CrR 7.7.

We adopted CrR 7.8 in 1986. CrR 7.8 is narrower than former CrR 7.7, and allows for relief from judgment due to mistakes, inadvertence, surprise, excusable neglect, newly discovered evidence, or other irregularities, but *not for errors in law*.

Robinson, 153 Wn.2d at 695 (emphasis added). In this case, the trial court used CrR 7.8(b) to correct a perceived error of law by a DOC hearing

officer. But as *Robinson* explains, this is not a proper use of CrR 7.8(b). Furthermore, the word “judgment” as used in CrR 7.8(b) clearly refers to the trial court’s judgments under the criminal cause, not to decisions of third parties.

CrR 7.8 is narrower than the personal restraint petition (PRP) rules (RAP 16.3 through 16.15) and allows for relief from judgment only for the reasons enumerated in the rule. While the Court in *Robinson* analogized “certain kinds of relief sought under CrR 7.8 and relief sought in PRPs,” it never equated filing a CrR 7.8(b) motion with filing of a PRP. Rather, the Court held only that CrR 7.8 motions are subject to the “same limitations, when appropriate, that apply to PRPs.” *Robinson*, 153 Wn.2d at 695-96 (citing statutory limitations on collateral attacks such as the time bar and successive petition bar).

The *Madsen* court concluded that a claim involving the DOC’s administration of a sentence could be brought in a CrR 7.8(b) motion because case law held that “[a] motion in the trial court under CrR7.8(b) is the functional equivalent of a personal restraint petition in the Court of Appeals.” *Madsen*, 153 Wn. App. at 475. *Madsen* cited *In re Becker*, 143 Wn.2d 491, 20 P.3d 409 (2001), for this proposition.

But *Becker* in no way stands for the proposition that a claim involving a third party can be brought in a CrR 7.8(b) motion. Rather,

Becker merely holds that CrR 7.8 motions, just like personal restraint petitions, are subject to the successive petition bar for collateral attacks: “We have recognized that certain motions are considered the functional equivalent of personal restraint petitions *for the purpose of applying statutory limitations* on successive writs.” *Becker*, 143 Wn.2d at 496 (emphasis added). The *Becker* Court said nothing about a trial court’s jurisdiction over third parties under the criminal cause. The *Madsen* court extended the holding of *Becker* to a new context that is not supported by case law or by the history of CrR 7.8(b).

A CrR 7.8(b) motion is limited to attacks on the criminal judgment itself, not attacks on decisions of a third party. A challenge to the DOC’s administration of a sentence must be brought in a personal restraint petition or a habeas corpus petition. Thus, Holmes’s attempt to raise a question of law—whether the DOC’s application of former RCW 9.94A.737(2) to him violated the ex post facto clause of the Constitution—cannot be raised in a CrR 7.8(b) motion. It can be raised only in a personal restraint petition or a habeas petition.

Unlike CrR 7.8(b), RAP 16.3 through RAP 16.15 provide offenders with a straightforward avenue to seek review of the issues related to the way the DOC implements their sentences, including administering community custody. *See, e.g.*, RAP 16.4(c)(6) and (7)

(allowing a challenge to the conditions or manner of restraint or the legality of the restraint); RAP 16.12 through RAP 16.14 (allowing transfer from the appellate court to the superior court if a factual hearing is required). *See also In re Chatman*, 59 Wn. App. at 264 (proper forum for appealing the findings from a community custody hearing is the court of appeals, as provided by court rule and statute). Most importantly for purposes of this case, RAP 16.6 specifically requires the agency responsible for the petitioner's restraint to respond to the petition, which would resolve the jurisdictional problems here, because the DOC would have been required to answer Holmes's petition if he had properly filed it in the Court of Appeals.

Post-conviction review is now a well established part of this state's criminal process. *Toliver v. Olsen*, 109 Wn.2d 607, 610, 746 P.2d 809 (1987). The post-conviction relief rules were adopted in order to provide a "single unitary post-conviction remedy" called a personal restraint petition. *Id.* at 610-11 (internal quotations omitted). The rules of appellate procedure state that the personal restraint petition rules supersede the appellate procedure formerly available for post-conviction relief, with the exception of habeas corpus petitions in the superior court:

The procedure established by rules 16.3 through 16.15 and rules 16.24 through 16.27 for a personal restraint petition supersedes the appellate procedure formerly

available for a petition for writ of habeas corpus and for an application for post-conviction relief, unless one of these rules specifically indicates to the contrary. These rules do not supersede and do not apply to habeas corpus proceedings initiated in the superior court.

RAP 16.3(b). The rule exempts habeas petitions but it does not exempt CrR 7.8(b) motions.

After Holmes was sentenced, jurisdiction transferred from the superior court to the DOC. *January v. Porter*, 75 Wn.2d at 774. Just as a trial court does not have subject matter jurisdiction to direct the DOC where to house an inmate or how to calculate good time, it does not have subject matter jurisdiction in the context of a CrR 7.8(b) motion under the criminal cause to direct the DOC on how to sanction an offender who has violated conditions of community custody. *See Chatman*, 59 Wn. App. at 262-263 (sentencing court cannot direct DOC where to house an offender or how to calculate good time). Because the court lacked subject matter jurisdiction, its order concerning the DOC is void.

2. The Trial Court Lacked Personal Jurisdiction Over The DOC In A CrR 7.8(b) Motion

While the DOC is statutorily charged with implementing and administering criminal sentences, the DOC is not a party to a criminal prosecution and sentencing. Consequently, when a convicted offender files a motion under CrR 7.8(b) attempting to challenge the DOC's

administration of a sentence, the offender is asking the sentencing court to review an action of a nonparty—an entity over which it lacks personal jurisdiction.

CrR 7.8(b) does not grant the sentencing court personal jurisdiction over the DOC, nor does any statute authorize the sentencing court to assert personal jurisdiction over the DOC when a CrR 7.8(b) motion is filed in a criminal prosecution. As explained above, the appropriate means of challenging the DOC's implementation or administration of a criminal sentence is through a PRP filed under RAP 16.3 through RAP 16.15.

The DOC is not a party to the criminal action and Holmes did not complete any of the steps necessary to make the DOC a party to a civil action. Simply because someone has a case pending in a superior court of the State of Washington does not mean that person can litigate any issue against any person in the State of Washington.

While Civil Rule 24(a)(2) allows intervention of right to applicants who are “so situated that the disposition of the action may as a practical matter impair or impede [their] ability to protect that interest,” no rule authorizes third-party intervention in a criminal case. *See also State v. Cloud*, 95 Wn. App. 606, 611, 976 P.2d 649 (1999). Because Holmes filed his motion in superior court under his criminal cause number, the DOC's lack of authority to intervene could hamper its ability to

adequately respond. For example, because it is not a party, the DOC is not entitled to appeal as a matter of right. *See* RAP 2.2.

By using a CrR 7.8(b) motion instead of a personal restraint petition, Holmes short-circuited the established procedure for challenging the DOC's implementation of sentences and administration of community custody, and he did so in a proceeding in which the DOC is not even a party. Because the court lacked personal jurisdiction and subject matter jurisdiction, the Court of Appeals should vacate the trial court's order on that basis alone.

B. The DOC's Termination Of Holmes's Early Release Was Not An Ex Post Facto Violation

Even if the trial court had jurisdiction to enter the order at issue here, the Washington Supreme Court recently overruled *Madsen*, holding instead that the DOC's termination of an offender's early release under former RCW 9.94A.737(2) does not constitute an ex post facto violation, even where the offender's underlying crimes occurred before the enactment of the statute. *See In re Flint*, 174 Wn.2d 539, 277 P.3d 657 (2012) (overruling *State v. Madsen*, 153 Wn. App. 471).

In this case, just as in *Madsen*, the DOC applied RCW 9.94A.737(2) to community custody violations that occurred after the law was enacted. The trial court held, based on *Madsen*, that this constituted

an ex post facto violation because Holmes's underlying crime was committed before RCW 9.94A.737(2) was enacted. Because *Flint* overruled that ex post facto holding of *Madsen*, *Flint* also requires this Court to vacate the order in Holmes's case.

C. The Trial Court Improperly Ordered Credit Toward Community Custody For Confinement Time

The Washington Supreme Court has also recently held that an offender who has been held in confinement too long is not entitled to credit against his or her community custody term for the period of overstay. See *State v. Jones*, 172 Wn.2d at 245-49, ¶¶ 15-19 (overruling *In re Knippling*, 144 Wn. App. 639). Furthermore, the Legislature has determined that confinement that results from termination of early release tolls community custody. RCW 9.94A.171(3)(a) provides in part, "sanctions that result in the imposition of the remaining sentence or the original sentence will continue to toll the period of community custody."

Thus, the trial court's remedy for the purported ex post facto clause violation was also incorrect. Instead of requiring the DOC to credit Holmes's community custody term with the alleged illegal confinement, the trial court should instead have ordered the DOC to hold a new violation hearing. See, e.g., *In re Higgins*, 152 Wn.2d 155, 163, 95 P.3d 330 (2004) ("Here, the DOC's decision to expunge the record in response

to petitioner's PRP and to hold a rehearing was an adequate remedy under the circumstances. We hold that a pending PRP does not operate to divest the DOC of jurisdiction or authority to conduct a rehearing of the infraction”).

The order requiring the DOC to credit Holmes's community custody term with confinement time has no support in the law after *Jones*, and this is another reason why this Court should vacate the trial court's order.

VII. CONCLUSION

The DOC requests that the Court vacate the superior court's order and hold that the court was without jurisdiction in the context of a CrR 7.8(b) motion under the criminal cause.

RESPECTFULLY SUBMITTED this 5th day of October, 2012.

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CERTIFICATE OF SERVICE

I certify that on the date indicated below, I served a true and correct copy of the foregoing document on all parties or their counsel of record as follows:

- US Mail Postage Prepaid
- United Parcel Service, Next Day Air
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by _____

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

EXECUTED this 5th day of October, 2012 at Olympia, WA.



CHERRIE MELBY
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