

No. 44393-7-II  
(consolidated with 44396-1-II)

COURT OF APPEALS OF THE STATE OF WASHINGTON,  
DIVISION II

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STATE OF WASHINGTON,

Appellant,

vs.

ADAM CHIEF LEWIS,

Respondent.

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BRIEF OF RESPONDENT

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## STATEMENT OF THE CASE

On May 13, 2011, Vancouver Law enforcement Officers arrested the defendant based upon a burglary and robbery the defendant committed on May 2, 2011, and an assault and unlawful possession of a firearm he committed on May 5, 2011. CP 1-2, 193-195. The defendant was unable to make bail. CP 158-166. As a result, he was held continuously in the Clark County jail from May 13, 2011, until his sentencing on both sets of offenses on December 14, 2012. CP 158-166, 168-181, 218-231. The total time he was held on both of these two sets of offenses was 581 days. *Id.* On May 14, 2011, the Clark County Prosecutor charged the defendant with the May 2<sup>nd</sup> crimes under Clark County Cause No. 11-1-00815-1, and charged the defendant with the May 5<sup>th</sup> crimes under Clark County Cause No. 11-1-00816-9. CP 1-2, 193-195.

In fact, the defendant had also committed another felony during this same time period. CP 141-156. This offense was failure to register as a sex offender committed between April 19, 2011, and May 13, 2011 (the day of his arrest on the other matters). *Id.* On August 10, 2011, the Clark County Prosecutor filed an information charging the defendant with this offense and had him arrested and held on it in the Clark County Jail while he was being held on the two other sets of offenses. *Id.* Thus, after August 10, 2011, the defendant was also held in the Clark County Jail on the failure to register. *Id.*

**BRIEF OF RESPONDENT - 1**

On August 31, 2012, the defendant pled guilty and was sentenced on the failure to register charge. CP 141-156. At the time of sentencing the court gave the defendant 387 days credit for time served. *Id.* This represented the time from service of the information upon the defendant and his arrest in jail to the time the court sentenced him. *Id.* On October 26, 2012, the defendant pled to the burglary and robbery charges from the 11-1-00815-1 cause number. CP 5-16, 168-181. On November 2, 2012, the defendant pled to the assault and unlawful possession of a firearm charges from the 11-1-00816-9 cause number. CP 199-215, 218-231. Finally, on December 14, 2012, the court sentenced the defendant on both of these matters and gave him credit for 581 days served, representing the time the defendant was held on both of these matters starting from his arrest up to the sentencing date. CP 168-181, 218-231. The following sets out all of these facts chronologically:

- (1) **4/19/11 to 5/13/11:** the defendant commits the crime of failure to register;
- (2) **5/2/11:** the defendant commits the crimes of burglary and robbery;
- (3) **5/5/11:** the defendant commits the crimes of assault and unlawful possession of a firearm;
- (4) **5/13/11:** the defendant is arrested on the 5/2/11 and 5/5/11 offenses and booked into the Clark County Jail and is continuously held on both sets of offenses until his sentencing on 12/14/12;

(5) **5/26/11:** state files an Information under Cause No. 11-1-00815-1 charging the defendant with the 5/2/11 offenses; state files a second Information under Cause No. 11-1-00816-9 charging the defendant with the 5/5/11 offenses;

(6) **8/10/11:** state files an Information under Cause No. 11-1-01336-7 charging the defendant with the 4/19/11 to 5/13/11 failure to register and has him served and arrested on it in the Clark County jail and thereafter the defendant is held on this matter as well as the other two sets of offenses;

(7) **8/31/12:** defendant pleads guilty, is sentenced within the standard range on the failure to register charge and gets 387 days credit for time served from 8/10/11 to 8/31/12;

(8) **10/26/12:** defendant pleads guilty on the 5/2/11 offenses;

(9) **11/5/12:** defendant pleads guilty on the 5/5/11 offenses; and

(10) **12/14/12:** court sentences the defendant within the standard range on the 5/2/11 and 5/5/11 offenses, giving him 581 days credit for time served from his arrest on May 13, 2011, to the date of sentencing.

Following imposition of sentences on the 5/2/11 and 5/5/11 sentencing the state appealed arguing that the defendant was not entitled to credit for time served from 8/10/11 to 8/31/12 because he had received credit for this time against his sentence for failure to register. CP 189, 239; *see also* Brief of Appellant. Defendant now responds to this claim.

## ARGUMENT

### **THE TRIAL COURT DID NOT ERR WHEN IT GAVE THE DEFENDANT CREDIT FOR ALL TIME SERVED ON ALL CHARGES UNDER HIS THREE CAUSE NUMBERS.**

In the case at bar the state has argued that the trial court erred when it gave the defendant credit for the time he had served on the May 2<sup>nd</sup> and May 5<sup>th</sup> crimes because the court had previously sentenced him on the failure to register and given him credit from the time he was arrested and charged on that offense to the date he pled and was sentenced. Brief of Appellant, 6-7. Specifically the state argues that the court violated RCW 9.94A.505(6). *Id.* As the following explains the state's argument is erroneous.

In RCW 9.94A.505(6) the legislature set out the following criteria for determining the application of credit for time served. This statute states:

(6) The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

RCW 9.94A.505(6).

Under RCW 9.94A.505(6) the legislature unambiguously created a statutory right to credit for pre-conviction confinement served. However, even absent this statute, the same right exists as part of the defendant's right to equal protection guaranteed under Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment. Division I of the

Court of Appeals stated the following on this issue under the predecessor statute to RCW 9.94A.505(6):

Former RCW 9.94A.120(12) simply represents the codification of the constitutional requirement that an offender is entitled to credit for time served prior to sentencing. Sentencing Guidelines Commissioner's Implementation Manual, Comments, at II-23 (1988). The former statute therefore entitled Williams to nothing more than the constitution required.

*State v. Williams*, 59 Wn.App 379, 382, 796 P.2d 1301 (1990).

For example, in *Reanier v. Smith*, 83 Wn.2d 343, 517 P.2d 949 (1974), four defendants in prison filed applications for writs of habeas corpus after the Department of Corrections refused to give them credit against their maximum and mandatory minimum terms for pre-sentencing detention time spent at Western State Hospital undergoing treatment, or for pre-sentencing detention time spent in jail because of the inability to post bail. Specifically, the defendants argued that the failure to give them credit for this time denied them their rights to due process, equal protection, and freedom from multiple punishments under the United States Constitution, Fifth and Fourteenth Amendments. The Washington State Supreme Court agreed and granted the relief requested. The court held:

Fundamental fairness and the avoidance of discrimination and possible multiple punishment dictate that accused person, unable to or precluded from posting bail or otherwise procuring his release from confinement prior to trial should, upon conviction and commitment to a state penal facility, be credited as against a maximum and a mandatory minimum term with all time served in

detention prior to trial and sentence. Otherwise, such a person's total time in custody would exceed that of a defendant likewise sentenced but who had been able to obtain pretrial release. Thus, two sets of maximum and mandatory minimum terms would be erected, one for those unable to procure pretrial release from confinement and another for those fortunate enough to obtain such release. Aside from the potential implications of double jeopardy in such a situation, it is clear that the principles of due process and equal protection of the law are breached without rational reason.

*Reanier v. Smith*, 83 Wn.2d at 346-47 (footnote omitted).

The last two words in this quote appear to indicate that a court should employ a "rational basis" test when evaluating the constitutionality of the court's refusal to give credit for pre-sentencing time served. However, in *Reanier*, the Court quotes from *Culp v. Bounds*, 325 F.Supp. 416 (D.N.C. 1971), wherein the Federal District Court for the District of North Carolina specifically held that the constitutionality of the court's refusal to give credit for pre-sentencing time under the Fourteenth Amendment should be evaluated under the "compelling governmental interest" standard, not under the rational basis test. The language quoted states as follows in part:

Pre-trial detention is nothing less than punishment. An unconvicted accused who is not allowed or cannot raise bail is deprived of his liberty. His incarceration is indistinguishable in effect from that of one, such as [North Carolina v.] Pearce, [395 U.S. 711 23 L.Ed.2d 656, 9 S.Ct. 2072 (1969)], who is retried after obtaining post-conviction relief. In both instances, the power of the state has been utilized to punish the complainant. Fundamental notions of fair play as well as the double jeopardy clause require that Culp receive credit for pre-commitment incarceration. Alternatively, the state's refusal to give Culp credit for pre-trial detention is an unconstitutional discrimination on the basis of wealth prohibited by

the Fourteenth Amendment. As outlined above, wealthy defendants (except where no bail is allowed) are able to remain out of prison until conviction and sentencing; the poor stay behind bars. While such a situation may often be compelled by the present (especially state) bail procedures, it should not be compounded by refusal to credit prisoners in Culp's situation with time incarcerated prior to trial and commitment. Such a distinction, which, in effect, provides for differing treatment on the basis of wealth, is unconstitutional absent some "compelling governmental interest."

*Reanier v. Smith*, 83 Wn.2d at 340 (quoting *Culp v. Bounds*, 325 F.Supp. at 419 (citations omitted)).

As the Washington Supreme Court clarifies in *Reanier*, the reason and purpose of pre-commitment incarceration is really irrelevant to the analysis. The defendant might be in custody because he could not make bail, he might have made bail and had it revoked, or he might be held in a mental institution for pre-disposition evaluation or treatment. In addition, the defendant might have been held in custody pending an appeal that was ultimately successful, but was followed by a retrial and new conviction. The relevant fact is that the defendant was in custody, because as the Culp court notes, "[p]re-trial detention is nothing less than punishment" because the person has been "deprived of his liberty." Thus, the failure to give credit for pre-disposition time served in custody violates a defendant's right to due process and equal protection, and it constitutes a violation of the right to be free from double

jeopardy.<sup>1</sup>

In the case at bar the state argues that the trial court erred and violated the plain meaning of RCW 9.94A.505(6) when it gave the defendant credit for all pre-sentencing time the defendant served in these two cases because it had previously given him credit for a block of the same time when it sentenced him on the failure to register case. In essence the state argues that if the defendant was concurrently serving pre-disposition time on two or more offenses then he can only get credit for that time on one of the sentences. This interpretation is not only too restrictive, but it would violate the defendant's constitutional right to credit for time served. Indeed, were the state's interpretation correct, then the court only had authority to give the defendant credit for the time he had served on the burglary charge in Clark County cause number 11-1-00815-1, and not the robbery in the same Clark County cause number nor the assault and unlawful possession of a firearm charges in Clark County cause number 11-1-00816-9 because these were other "offenses" for which the defendant was also being sentenced.

In making this argument the state principally relied upon the

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<sup>1</sup>In *Reanier* the court explains the double jeopardy violation as follows: "This refers to the aspect of double jeopardy prohibiting multiple punishments and arises from the possibility of serving more actual time in confinement on a maximum or mandatory sentence than provided by law." *Reanier*, 83 Wn.2d at 347, footnote 4.

Washington Supreme Court's decision from *In re Schillereff*, 159 Wn.2d 649, 152 P.3d 345 (2007). However, a careful review of this case does not support the state's argument. In *Schillereff* the defendant was arrested, charged with a felony and released on bail. When he later failed to appear the state filed a bail jump charge and the court issued a warrant for the defendant's arrest solely on the new bail jump charge. In fact, the defendant had fled to the State of Texas where he committed a new crime. He was later arrested on the new offense in Texas, charged and sentenced. After his sentence was declared the State of Texas returned the defendant to the State of Washington pursuant to our warrant along with a hold for his return to serve the sentence on his Texas conviction. Thus, when returned to Washington the defendant was only being held on the Texas sentence.

The defendant later pled guilty to his original charges pursuant to an agreement with the state that it drop the bail jump charges and recommend that the trial court give him credit for the time he had served on his Texas sentence. However the trial court refused to follow the state's recommendation and did not give the defendant credit for any time served on the Texas matter. The defendant then appealed arguing that the court erred when it failed to give him credit for the time served on his Texas sentence. The Washington Supreme Court ruled as follows on this argument.

The commissioner, however, correctly determined that *Schillereff*

was not entitled to credit while he was in “constructive” and “actual” custody in Washington. Between June 2003 and September 2004, *Schillereff* was not confined in Washington. And from September 16, 2004 until October 7, 2004 *Schillereff* was confined in Washington solely because he was a convicted felon in Texas. Absent his Texas conviction, he would have been free on bail. Therefore, his confinement was not “solely in regard to the offense” for which *Schillereff* was sentenced. See RCW 9.94A.505(6). *Schillereff* is not entitled to credit for the time served between June 2003 and October 7, 2004.

*In re Schillereff*, 159 Wn.2d at 651-652.

There are two critical distinctions between the facts in *Schillereff* and the facts in the case at bar. The first distinction is that in *Schillereff* the defendant committed the Washington offense, was charged, and was released on bail before he fled to Texas and committed a new offense there. By contrast in the case at bar the defendant committed the failure to register and the other two sets of offenses within a short period of time before he was arrested and charged with any of them. The second distinction is that in *Schillereff* the defendant was not being held on his Washington matters when serving time on his Texas conviction and was thus not serving any confinement time on the Washington matters. By contrast in the case at bar the defendant never did make bail on any of the three matters and he was held on both sets of convictions here at issue for the entire time from his initial arrest to his eventual sentencing. Thus the decision in *Schillereff* does not support the state’s argument.

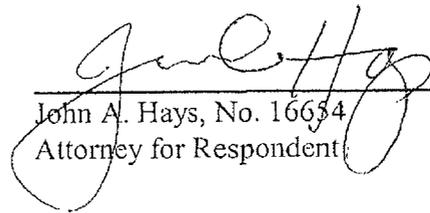
Finally, as was noted in *Reanier*, the critical question in determining whether or not a defendant is entitled to credit for time served on any particular sentence is the following: Was the pretrial detention a result of the defendant's inability to make bail on that charge that ultimately resulted in a conviction and sentence? If the answer is in the affirmative, then under Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment, the defendant is entitled to credit for that time against the sentence imposed. In the case at bar there is no question that on both cause numbers before this court on appeal the defendant's pretrial detention from the date of his initial arrest to the date of his ultimate sentencing was the result of his inability to make bail on these two sets of matters. Thus, he was entitled to credit for the entire time he served as the trial court ruled. Any other interpretation of RCW 9.94A.505(6) would violate both Washington Constitution, Article 1, § 12, as well as United States Constitution, Fourteenth Amendment.

**CONCLUSION**

The trial court did not err when it calculated the defendant's credit for time served in these two cases.

DATED this 10<sup>th</sup> day of October, 2013.

Respectfully submitted,



John A. Hays, No. 16654  
Attorney for Respondent

**APPENDIX**

**RCW 9.94A.505(6)**

(6) The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 12**

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

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

State of Washington,  vs.  Adam Chief Lewis,	Respondent,    Appellant.	No. 44393-7-II ·  AFFIRMATION OF OF SERVICE
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Donna Baker states the following under penalty of perjury under the laws of Washington State. On October 10, 2013, I personally e-filed and/or placed in the United States Mail the following document with postage paid to the indicated parties:

1. Brief of Respondent

Adam C. Lewis - DOC# 881592  
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Dated this 10<sup>th</sup> day of October, 2013, at Longview, Washington.



Donna Baker  
Legal Assistant

# HAYS LAW OFFICE

**October 10, 2013 - 2:32 PM**

## Transmittal Letter

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Brief of Respondent

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