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January 14, 2013  
Court of Appeals  
Division I  
State of Washington

NO. 67173-1-I

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

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STATE OF WASHINGTON,

Plaintiff,

v.

ESMOND HOLMES aka WILLIAM HENRY SAFFO,

Appellee.

v.

WASHINGTON STATE DEPARTMENT OF CORRECTIONS,

Appellant.

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**APPELLANT'S REPLY BRIEF**

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## I. ARGUMENT

### A. *Flint* Is Consistent With United States Supreme Court Precedent

Holmes claims that the Washington Supreme Court's decision in *In re Flint*, 174 Wn.2d 539, P.3d 657 (2012), conflicts with controlling United States Supreme Court precedent. In fact, *Flint* is consistent with such precedent.

In *Landgraf v. USI Film Prods.*, 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994), the United States Supreme Court discussed at length the various situations in which retroactive application might appear to be present but actually is not. *Landgraf*, 511 U.S. at 269-284. A statute does not operate retroactively "merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *State v. Pillatos*, 159 Wn.2d 459, 471, 150 P.3d 1130 (2007) (quoting *Landgraf*, 511 U.S. at 269-70).

Consistent with this reasoning in *Landgraf*, the Washington Supreme Court in *Flint* held that former RCW 9.94A.737(2) did not attach new legal consequences to conduct occurring before its enactment, and it did not operate retroactively against the offender. *Flint*, 174 Wn.2d at 546-551. While the maximum period of confinement and the period of

community custody are determined by the sentencing court following conviction (and cannot be changed by the Department), an offender's opportunity to remain in community custody depends on his or her conduct while in community custody, not on the conduct for which he or she was convicted. This was the law under former RCW 9.94A.737(2) and under its predecessor statute, former RCW 9.94A.737(1). Like the offender in *Flint*, Holmes's return to confinement resulted from his refusal to comply with community custody conditions, not the conduct for which he was convicted and sentenced.

Likewise, in *Pillatos*, the Washington Supreme Court explained that a statute or amendment is not retroactive merely because it applies to conduct that predated its effective date. *Pillatos*, 159 Wn.2d at 471. Rather, it is considered to be retroactive if the "triggering event" for its application happened before its effective date. *Id.*, citing *State v. Belgarde*, 119 Wn.2d 711, 722, 837 P.2d 599 (1992). *Accord In re Estate of Burns*, 131 Wn.2d 104, 110-11, 928 P.2d 1094 (1997). *Flint* is consistent with both *Pillatos* and *Landgraf*.

Holmes relies on *Johnson v. U.S.*, 529 U.S. 694, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000), to conclude that sanctions for violating community custody conditions should be treated not as sanctions for violating community custody conditions, but as part of the penalty for the

initial offense. However, unlike the lengthy ex post facto discussion in *Landgraf*, the ex post facto discussion in *Johnson* is dictum. In *Johnson*, the Court did not consider the ex post facto clause. Because United States District Courts had authority in that case to impose an additional term of supervised release under the prior law, “we find that consideration of the *Ex Post Facto* Clause is unnecessary.” 529 U.S. at 696.

*Johnson* does not constitute controlling precedent with regard to ex post facto law. *Flint* therefore was correct in distinguishing *Johnson*. *Flint*, 174 Wn.2d at 552-554.

**B. The Only Vehicle For The Court To Gain Jurisdiction Over The DOC Is A Lawsuit In Which The DOC Is A Named Party**

Holmes claims that the DOC’s argument regarding CrR 7.8 motions is that only a personal restraint petition can confer jurisdiction over the DOC. However, this is not what the DOC is arguing. Rather, the DOC is arguing that the court has jurisdiction only if the DOC is a named party to the lawsuit. Hence, Holmes could have filed a habeas corpus petition in superior court *or* a personal restraint petition in this Court. The superior court ruled against the DOC despite the fact that the DOC is not a party to the criminal cause. This is clearly improper and should not be allowed.

**C. The Proper Remedy For Any Ex Post Facto Problem Would Be To Allow The DOC To Re-Do Its Violation Hearing**

Holmes claims that if the DOC violates his rights in a community custody hearing, he should simply be given credit toward his community custody term for all the confinement time served on his termination of early release, where ordinarily such time is not credited toward community custody. *See* RCW 9.94A.171(3) (“sanctions that result in the imposition of the remaining sentence or the original sentence will continue to toll the period of community custody”).

But Holmes violated his sentence conditions seriously enough to warrant a termination of early release. Allowing him credit for his bad behavior would let his violation behavior go unpunished. The trial court should have instead allowed the DOC simply to re-sanction Holmes under its pre-existing authority to terminate early release, or alternatively, it should have ordered the DOC to do the violation hearing over. Instead, the trial court removed the sanction completely because the DOC hearing officer merely cited the wrong subsection of the statute when she imposed the sanction of termination of early release. (And in hindsight, as *In re Flint* has shown, the DOC did not use the wrong subsection of the statute). Removing the sanction completely was an abuse of discretion by the trial court.

Holmes also discusses at length his theory of why it is proper to shorten an offender's community custody term by any time spent erroneously in prison—a theory rejected by the Washington Supreme Court in *State v. Jones*, 172 Wn.2d 236, 257 P.3d 616 (2011). Assuming for the sake of argument that the DOC had no pre-existing authority to terminate early release and that the DOC had in fact wrongfully terminated Holmes's early release, the proper remedy would have been to require the DOC to re-sanction Holmes under RCW 9.94A.633(1)(a).

Under such a hypothetical, after such re-sanctioning, Holmes might have received a jail sanction of 30 days. And by that time, if he had, for example, already been in total confinement for 438 days (CR 28), that would leave 408 days that he spent in total confinement beyond what he should have. Under RCW 9.94A.171(3), time spent in jail serving a sanction under RCW 9.94A.633(1)(a) is credited toward the offender's community custody term, if the offender is not a sex offender.<sup>1</sup> Thus, he would have received 438 days of credit toward his 18-month community custody term. As such, Holmes's argument is moot because the law now requires credit toward community custody for time spent in confinement

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<sup>1</sup> Holmes distinguishes his case from that of sex offenders. He acknowledges that in *Jones*, there were public policy considerations favoring community custody for sex offenders. Response of Holmes, at 24.

due to jail sanctions for non-sex offenders (other than sanctions that are a termination of early release).<sup>2</sup>

## II. 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 14th day of January, 2013.

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<sup>2</sup> Although Holmes's argument is moot, the DOC's claims are not moot. Although Holmes is no longer under the DOC's jurisdiction after having been release from prison on another sentence in August 2012, if this Court rules in the DOC's favor, Holmes will have community custody to serve still on his 2003 King County cause.

**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:

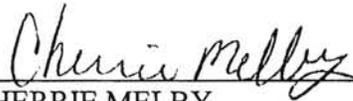
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I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED this 14th day of January, 2013 at Olympia, WA.

  
\_\_\_\_\_  
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Legal Assistant