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AUG 10 2009  
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STATE OF WASHINGTON

83451-2

No. 00-1-01046-8  
COA No. 37002-6-II

IN THE SUPREME COURT OF WASHINGTON

\_\_\_\_\_  
\_\_\_\_\_

STATE OF WASHINGTON,  
Respondent

v.

CLIFF ALAN JONES,  
Petitioner

\_\_\_\_\_  
\_\_\_\_\_

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KITSAP COUNTY

FILED  
COURT OF APPEALS  
DIVISION II  
09 AUG -6 AM 9:28  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPT. OF JUSTICE

The Honorable M. Kalrynn Haberly, Judge

\_\_\_\_\_  
\_\_\_\_\_

PETITION FOR REVIEW

\_\_\_\_\_  
\_\_\_\_\_

ROGER A. HUNKO  
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A. IDENTITY OF PETITIONER

Petitioner Cliff Jones, the appellant below, asks this Court to review the following Court of Appeals decision.

B. COURT OF APPEALS DECISION

Jones seeks review of Division Two's decision in State v. Jones, No. 37002-6-II (July 7, 2009), attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Division Three held in In re Pers Restraint of Knippling, 149 Wn. App. 639, 641, 183 P.3d 365 (2008) that an offender's term of community custody began at the completion of his term of confinement and that he was entitled to credit against his term of community custody for the period he remained incarcerated beyond his term of confinement.

In State v. Jones, COA No. 37002-6-II, however, Division Two expressly disagreed with Knippling and held that the term of community custody does not begin until the offender has been released from incarceration, and therefore the offender should not receive credit for the time spent incarcerated beyond the term of confinement. Should this Court grant review to resolve the conflict between these published decisions? RAP 13.4(b)(2). Because community custody is punitive, should time spent in custody in excess of the imposed sentence be credited toward a term of community custody?

D. STATEMENT OF THE CASE<sup>1</sup>

Jones pleaded guilty to first degree child molestation and the trial court sentenced him to 130 months of incarceration and 36 months of community custody. Division II granted Jones' personal restraint petition (PRP) and remanded for resentencing. *See Order Granting Ret., In re Pers. Restraint of Jones*, No. 34872-1-II (Jan. 9, 2007). The trial court resentenced Jones to 51 months incarceration and 36 months of community custody and it credited the 81 months Jones spent incarcerated toward his 51 month prison sentence, but it did not apply the time he spent incarcerated toward his community custody term. Jones appealed his sentence arguing that the trial court was statutorily required to apply the time he spent in prison in excess of 51 months toward his community custody term.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. DENYING CREDIT TOWARDS COMMUNITY CUSTODY FOR TIME SERVED INCARCERATED IN EXCESS OF THE IMPOSED SENTENCE IS IN CONFLICT WITH OTHER COURT OF APPEALS DECISIONS AND RAISES QUESTIONS OF PUBLIC IMPORTANCE.

On appeal, Jones argued that the trial court erred when it failed to give him credit for the 30 months he was incarcerated in excess of his 51 month sentence towards a 36 month term of community custody. Division Three had recently decided this same issue in *In Re Pers. Restraint of Knippling*, 144 Wn. App. 639, 183 P.3d 365 (2008), holding that the period in excess of the sentence should be credited as the period of community custody begins upon the

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<sup>1</sup> Citations to the record and trial transcripts are set forth in full in the Brief of Appellant, at 5-6.

completion of the term of confinement. Both courts addressed the language of former RCW 9.94A.170(3) which has been recodified as RCW 9.94A.625(30).

Former RCW 9.94A.170(3) states, in relevant part, that [a]ny period of community custody, community placement, or community supervision shall be tolled by any period of time the offender is in confinement for any reason. Division Three held that the plain language of this statute was not controlling because it must be read in the context of the entire sentencing scheme. 144 Wn. App. at 642. The Knippling court then looked to RCW 9.94A.715(1) to determine when an offender's community custody begins. Id. RCW 9.94A.170(3) states in relevant part that "community custody shall begin...[u]pon completion of the term of confinement." The Knippling court relied on the statute's use of the term "completion" rather than "release" and held that Knippling's community custody term began when he completed his term of confinement, 24 months before he was actually released into the community. Id. at 642, n. 3.

Division Three's interpretation is consistent with Division One's reasoning in State v. Cameron, 71 Wn. App. 653, 861 P.2d 1069 (1993). Cameron held that the "for any reason" language applied to the circumstances where, at the end of the sentence on which community supervision was imposed, the defendant remained incarcerated for a different crime. Cameron, 71 Wn. App. at 657

Division Two, however, in Jones, declined to follow this reasoning, ignoring the language of former RCW 9.94A.120(10)(a), recodified as RCW 9.94A.715(1). Instead, the Court looked to the definition of community custody in former RCW 9.94A.030(4), which

defines “[c]ommunity custody” as that portion of an inmate’s sentence of confinement....served in the community,” and the “substantial policy goal of “improving the supervision of sex offenders in the community upon release from incarceration.” See Laws of 1996, ch. 275, § 1, Slip Op. at 10-12.

This Court should accept review for two reasons. First, the court of appeals erred in ignoring the language of former RCW 9.94A.120 (10)(a) which determines when the period of community custody begins, subjecting a defendant to a loss of freedom, which is a constitutional issue of substantial public importance. RAP 13.4 (b)(3), (4).

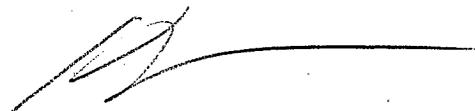
Second, the court of appeals decision conflicts with Division One’s analysis in Cameron and with Division Three’s analysis in Knippling. RAP 13.4(b)(1).

F. CONCLUSION

This Court should grant review to resolve the conflict between the Divisions and to provide guidance to Washington’s trial and appellate courts. RAP 13.4(b)(2), 13.6.

DATED this 6<sup>th</sup> day of August, 2009.

Respectfully submitted,



ROGER A. HUNKO, WSBA 9295  
Attorney for Petitioner

FILED  
COURT OF APPEALS  
DIVISION II

09 AUG -6 AM 9:28

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

CERTIFICATE OF SERVICE

I certify that on the 6<sup>th</sup> day of August, 2009, I caused a true and correct copy of this Petition for Review to be served on the following in the manner indicated: hand delivered the original to: Clerk of the Court, David Ponzoha, Washington State Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402-4454.

By: \_\_\_\_\_

Roger A. Hunko, WSBA 9295

Attorney for Petitioner

# APPENDIX A

FILED  
COURT OF APPEALS  
DISTRICT I

09 JUL 7 AM 8:40

STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

CLIFF ALAN JONES,

Appellant.

No. 37002-6-II

PUBLISHED OPINION

QUINN-BRINTNALL, J. — Cliff Alan Jones pleaded guilty to first degree child molestation and the trial court sentenced him to 130 months of incarceration and 36 months of community custody. We granted Jones's personal restraint petition (PRP) and remanded for resentencing. *See Order Granting Ret., In re Pers. Restraint of Jones*, No. 34872-1-II (Jan. 9, 2007). The trial court resentenced Jones to 51 months of incarceration and 36 months of community custody and it credited the 81 months Jones spent incarcerated toward his 51-month prison sentence, but it did not apply the time he spent incarcerated in excess of 51 months toward his community custody term. Jones appeals his sentence, arguing that the trial court was statutorily required to apply the time he spent in prison in excess of 51 months toward his community custody term. Jones also argues that the trial court's refusal to credit time served toward his community custody term violates his right to be free from double jeopardy. Because community custody is that portion of an offender's sentence spent *in the community*, the trial

court did not err when it declined to credit Jones with time served toward his community custody term. We affirm.

#### FACTS

Jones pleaded guilty to first degree child molestation committed between November 1998 and November 1999. On November 20, 2000, the trial court sentenced Jones to an exceptional sentence of 130 months incarceration and 36 months community custody.<sup>1</sup> Jones filed a PRP, arguing that the trial court erred when it calculated his offender score by considering his prior washed-out juvenile offenses when the law at the time he committed his offenses precluded the trial court from considering them. The State conceded error and, on January 9, 2007, we granted Jones's petition and remanded for resentencing.

On April 30, 2007, the trial court amended Jones's original judgment and sentence to reflect an offender score of zero and resentenced Jones to 51 months of incarceration and 36 months of community custody. By this time, Jones had already served 81 months in incarceration. The trial court credited Jones with time served toward his 51-month incarceration term and ordered his release. But the trial court did not credit the time Jones served in excess of 51 months toward his 36-month community custody term.

On September 21, 2007, Jones filed a CrR 7.8(b)(4) motion for relief from judgment, arguing that the judgment was invalid because his prison term, when added to his community custody term, exceeded the statutory maximum penalty for the offense. On October 18, 2007, Jones filed a second memorandum of authorities, arguing that the trial court should credit time he

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<sup>1</sup> We affirmed Jones's sentence in an unpublished opinion. *See State v. Jones*, noted at 109 Wn. App. 1063 (2001). We also dismissed a later PRP Jones filed challenging his exceptional sentence. *See Order Dismissing Pet., In re Pers. Restraint of Jones*, No. 29487-7-II (Mar. 4, 2003).

spent incarcerated in excess of 51 months toward his 36-month community custody term. The State asserted that Jones's sentence did not exceed the statutory maximum because, pursuant to RCW 9A.44.083 and former RCW 9A.20.021 (1982), the statutory maximum for Jones's offense, a Class A felony, was life in prison. The State also argued that the trial court did not have authority to credit Jones with time served in incarceration toward his community custody term under the plain language of former RCW 9.94A.170(3) (1993).<sup>2</sup>

At an October 19, 2007 hearing on the CrR 7.8(b)(4) motion, the trial court made an oral ruling denying Jones's request for relief from judgment. On November 2, 2007, the trial court issued its findings of fact and conclusions of law. The trial court found that Jones's judgment and sentence were valid because the statutory maximum for Jones's offense was life in prison. The trial court also found that a community custody term is distinguishable from a prison term because it serves a unique purpose, particularly in regard to sex offenses. Additionally, the trial court determined that it had no statutory authority to credit Jones with time served in excess of 51 months toward his community custody term because, under the plain language of former RCW 9.94A.170(3),<sup>3</sup> "[a]ny period of community custody, community placement, or community supervision shall be tolled during any period of time the offender is in confinement **for any reason**' (Emphasis added)." Clerk's Papers (CP) at 45. Jones timely appeals the trial court's denial of his CrR 7.8 motion for relief from judgment.

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<sup>2</sup> Former RCW 9.94A.170(3) has been recodified without substantive change at RCW 9.94A.625(3). This opinion will hereafter refer to former RCW 9.94A.170, the statutory provision in effect at the time Jones committed his offense.

<sup>3</sup> The record cites the renumbered statutory provision RCW 9.94A.625(3).

ANALYSIS

Jones argues that, under former RCW 9.94A.120(16) (1997),<sup>4</sup> the trial court was required to credit prison time served in excess of that ordered toward his community custody term.<sup>5</sup> The State concedes that Jones was incarcerated beyond his standard range sentence of 51 months but argues that, under the plain language of former RCW 9.94A.170(3), Jones's community custody term was tolled while he was incarcerated. Thus, the central issue underlying this appeal is whether Jones's community custody term began at the completion of his 51-month incarceration term or whether it was tolled until he was actually released into the community.

We review issues of statutory interpretation de novo. *State v. Alvarado*, 164 Wn.2d 556, 561, 192 P.3d 345 (2008). Our purpose when interpreting a statute is to determine and enforce the intent of the legislature. *Alvarado*, 164 Wn.2d at 561-62. Where the meaning of statutory language is plain on its face, we must give effect to that plain meaning as an expression of legislative intent. *Alvarado*, 164 Wn.2d at 562. In discerning the plain meaning of a provision, we consider the entire statute in which the provision is found, as well as related statutes or other provisions in the same act that disclose legislative intent. *Alvarado*, 164 Wn.2d at 562.

Former RCW 9.94A.170(3) states:

Any period of supervision shall be tolled during any period of time the offender is in confinement for any reason. However, if an offender is detained pursuant to RCW 9.94A.207 or 9.94A.195 and is later found not to have violated a condition

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<sup>4</sup> Former RCW 9.94A.120(16) has been recodified at RCW 9.94A.505(6). This opinion will hereafter refer to former RCW 9.94A.120(16), the statutory provision in effect at the time Jones committed his offense. Former RCW 9.94A.120(16) states: "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."

<sup>5</sup> Jones does not reassert his argument below that his sentence was invalid for exceeding the statutory maximum penalty for his offense.

or requirement of supervision, time spent in confinement due to such detention shall not toll to [the] period of supervision.

Division Three of this court recently addressed whether former RCW 9.94A.170(3)<sup>6</sup> prohibited a trial court from crediting time spent incarcerated in excess of that ordered toward the offender's community custody term. *In re Pers. Restraint of Knippling*, 144 Wn. App. 639, 183 P.3d 365 (2008). Like Jones, Knippling similarly challenged the trial court's refusal to credit time served in incarceration toward his community custody term following resentencing that placed Knippling in confinement for 24 months beyond his sentence. *In re Knippling*, 144 Wn. App. at 641-42. The *Knippling* court found that the plain language of former RCW 9.94A.170(3) was not controlling because it must be read in the context of the entire sentencing scheme. 144 Wn. App. at 642. The *Knippling* court then looked to RCW 9.94A.715(1) to determine when an offender's community custody term begins. 144 Wn. App. at 642. RCW 9.94A.715(1)<sup>7</sup> states in part that "community custody shall begin . . . [u]pon completion of the term of confinement." The *Knippling* court relied on the statute's use of the term "completion" rather than "release" and held that Knippling's community custody term began when he completed his term of confinement, 24 months before he was actually released into the community. 144 Wn. App. at 642 n.3.

The State asks that we reject Division Three's interpretation of the sentencing statutes and instead adopt the reasoning of the dissent in *Knippling*, which found that the "for any reason" language in former RCW 9.94A.170(3) applied to time incarcerated in excess of that

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<sup>6</sup> The opinion refers to the renumbered provision RCW 9.94A.625(3).

<sup>7</sup> Identical language is found in former RCW 9.94A.120(10)(a), the provision in effect at the time Jones committed his offense.

ordered and, thus, an offender's community custody term is tolled until he is actually released into the community. 144 Wn. App. at 643-44 (Sweeney, J., dissenting). The dissent also relied on RCW 9.94A.030(5), defining "community custody" as "that portion of an offender's sentence . . . served *in the community* subject to controls placed on the offender's movement and activities by the department." *Knippling*, 144 Wn. App. at 643 (Sweeney, J., dissenting) (alterations in original) (quoting RCW 9.94A.030(5)). The State also points us to former RCW 9.94A.120(10)(a) and (c)<sup>8</sup> to distinguish the facts here from *Knippling*. We agree with the State and decline to follow the majority opinion in *Knippling*.

The *Knippling* court's conclusion that an offender's community custody term may begin before the offender is released into the community conflicts with the statute's definition of "community custody." Former RCW 9.94A.030(4) (1997) defines "[c]ommunity custody" as "that portion of an inmate's sentence of confinement . . . served *in the community* subject to controls placed on the inmate's movement and activities by the department of corrections." (Emphasis added.)

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<sup>8</sup> The State cites the renumbered provision RCW 9.94A.710(3), but former RCW 9.94A.120(10) was the provision in effect at the time Jones committed his offense. Former RCW 9.94A.120(10) states in pertinent part:

(a) When a court sentences a person to the custody of the department of corrections for an offense categorized as a sex offense committed on or after June 6, 1996, the court shall, in addition to other terms of the sentence, sentence the offender to community custody for three years . . . . The community custody shall begin . . . upon completion of the term of confinement.

(c) At any time prior to the completion of a sex offender's term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions imposed pursuant to this section for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW, regardless of the expiration of the offender's term of community custody.

The requirement that an offender serve his community custody term “in the community” is consistent with several of the stated purposes of Washington’s sentencing statutes, such as “[p]rotect[ing] the public,” and “[o]ffer[ing] the offender an opportunity to improve him or herself.” Former 9.94A.010(4), (5) (1981). Requiring an offender, particularly a sex offender, to serve his community custody term “in the community” serves the purposes of helping the offender “improve him[self]” by providing the offender with time and resources necessary to reintegrate into the community, while at the same time “[p]rotect[ing] the public” by subjecting the offender to controls by the Department of Corrections. Former RCW 9.94A.010(4), (5). The legislature has noted the vital role community custody plays in a sex offender’s reintegration into the community.

The legislature finds that improving the supervision of convicted sex offenders in the community upon release from incarceration is a substantial public policy goal, in that effective supervision accomplishes many purposes including protecting the community, supporting crime victims, assisting offenders to change, and providing important information to decision makers.

LAWS OF 1996, ch. 275, § 1.

Allowing Jones to begin his community custody term before his release into the community would contravene both the plain language of former RCW 9.94A.030(4), which defines “[c]ommunity custody” as “that portion of an inmate’s sentence of confinement . . . served in the community,” and the “substantial public policy goal” of “improving the supervision of convicted sex offenders in the community upon release from incarceration.” See LAWS OF 1996, ch. 275, § 1.

We also note that *Knippling* is inconsistent with our Supreme Court’s recognition that “[b]y design, the whole ‘period’ of community custody must be served in the community. . . .

[A]ny time an offender spends in jail does not count toward serving a community custody sentence.” *In re Pers. Restraint of Dalluge*, 162 Wn.2d 814, 815, 177 P.3d 675 (2008).

We respectfully disagree with the majority in *Knippling* and find that the trial court did not err when it refused to credit Jones’s incarceration time in excess of 51 months toward his 36-month community custody term. Accordingly, we affirm.

#### DOUBLE JEOPARDY

Next, Jones argues that the trial court’s refusal to credit his community custody term with time served in excess of 51 months violates his right to be free from double jeopardy. We disagree.

The United States Constitution provides that a person may not be “subject for the same offense to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V. And the Washington State Constitution provides that a person may not be “twice put in jeopardy for the same offense.” WASH. CONST. art. I, § 9. This provision of the Washington State Constitution provides the same protection against double jeopardy as the Fifth Amendment to the federal constitution. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). One aspect of double jeopardy protects a defendant from being punished multiple times for the same offense. *State v. Adel*, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998).

Because Jones’s double jeopardy claim does not involve the consequences of a prior trial, we merely examine whether the legislature intended to require that Jones serve his mandatory 36-month community custody term *in the community* notwithstanding the time he spent incarcerated in excess of that authorized by Jones’s standard sentencing range. *See State v. Nguyen*, 134 Wn. App. 863, 868, 142 P.3d 1117 (2006) (“unless the question involves the consequences of a prior trial, double jeopardy analysis is an inquiry into legislative intent.”),

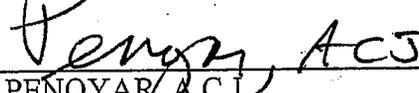
*review denied*, 163 Wn.2d 1053, *cert. denied*, 129 S. Ct. 644 (2008); *State v. Sulayman*, 97 Wn. App. 185, 190, 983 P.2d 672 (1999) (“the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended”) (quoting *Jones v. Thomas*, 491 U.S. 376, 381, 109 S. Ct. 2522, 105 L. Ed. 2d 322 (1989)).

Here, former RCW 9.94A.120(10) clearly states the legislature’s intent that trial courts sentence convicted sex offenders to a mandatory 36-month community custody term. And, under former RCW 9.94A.170(3), the legislature also stated its intent that an offender’s community custody term does not begin until he is released into the community. Accordingly, the sentencing court did not violate Jones’s right to be free from double jeopardy, and we affirm.

  
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QUINN-BRINTNALL, J.

We concur:

  
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HOUGHTON, J.

  
\_\_\_\_\_  
PENOYAR, A.C.J.

**NO. 37002-6-II**

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

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**STATE OF WASHINGTON,**

**Respondent,**

**v.**

**CLIFF ALAN JONES**

**Appellant.**

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**ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 00-1-01046-8**

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**BRIEF OF APPELLANT**

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**A. INTRODUCTION**

The defendant, Clifford Jones, appeals the trial court's ruling denying the defendant credit for the time served in custody prior to his re-sentencing towards the period of court order community custody. Mr. Jones' appeal is based upon statutory construction of the law as it was when the acts occurred which gave rise to the conviction, and based upon equal protection and double jeopardy provisions of the United States Constitution and the Constitution of the State of Washington.

**B. ASSIGNMENTS OF ERRORS**

- 1. THE TRIAL COURT ERRED BY REFUSING TO APPLY THE TIME DEFENDANT SERVED PRIOR TO RE-SENTENCING THAT WAS IN EXCESS OF THE PERIOD OF INCARCERATION ORDERED DURING RE-SENTENCING, AGAINST THE PERIOD OF TIME OF COMMUNITY CUSTODY ORDERED BY THE COURT AT RE-SENTENCING.**

**C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- 1. IS THE SENTENCING COURT REQUIRED TO GIVE CREDIT FOR THE TIME SERVED IN CUSTODY PRIOR TO SENTENCING (APPROXIMATELY 81 MONTHS) FOR NOT ONLY THE INCARCERATION PERIOD ORDERED BY THE COURT AT SENTENCING (51 MONTHS) BUT ALSO CREDIT FOR ANY TIME IN EXCESS OF THE SENTENCE OF INCARCERATION PREVIOUSLY SERVED AGAINST ANY PERIOD OF COMMUNITY CUSTODY ORDERED IN THE CASE AT SENTENCING?**

D. STATEMENT OF THE CASE

**Procedural History**

Appellant was convicted of Child Molestation in the First Degree and sentenced for that crime on November 20, 2000. The crime was committed from November, 1998 to November 1999. CP 102. He was sentenced by the trial court to a period of confinement above the standard range based upon an exceptional sentence of 130 months with 36 months of community custody following his term of incarceration. Eventually, the Appellant filed a personal restraint petition and that petition was granted by the Court of Appeals on January 9, 2006. CP 77. The matter was remanded to the trial court for re-sentencing.

On April 30, 2007, Appellant was re-sentenced by the trial court to a term of 51 months incarceration. CP 83, PR 7. The court ordered 36 months of community custody. RP 7. The trial court gave appellant credit for the time he served up to the 51 months of incarceration time. RP 8. Appellant filed a Motion for Relief of Judgment pursuant to CrR 7.8(b)(4). The court denied that motion with the Findings of Fact and Conclusions of Law for Hearing on Defendant's CR 7.8 Motion presented to the court and signed by the court on November 2, 2007. CP 102. On October 19, 2007, during the hearing on the Defendant's Motion for Relief of Judgment, the court refused

to give any credit for time served while incarcerated beyond the 51 month sentence of incarceration against the period of community custody ordered by the court. RP 33.

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Appellant filed a notice of appeal in a timely manner on November 19, 2007. CP 103.

**E. SUBSTANTIVE FACTS**

Appellant plead guilty to one count of Child Molestation in the First Degree and was sentenced on that charge on November 20, 2000. The allegations that gave rise to the conviction occurred between November, 1998 and November 1999. CP 102. Following unsuccessful direct appeal and personal restraint petitions, Appellant filed a second personal restraint petition which was granted by Division II of the Court of Appeals. The case was remanded to the trial court for re-sentencing. Re-sentencing occurred on April 30, 2007. The trial court sentenced Appellant to 51 months incarceration and 36 months of community placement custody. CP 80, RP 8. The sentencing court granted Appellant credit for the time he had served pursuant to RCW 9.94A.120 (17)<sup>1</sup>, for the 51 months of incarceration. Appellant had served 81 months prior to the April 30, 2007 sentencing. CP 81. The court refused to grant credit for the additional 30

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<sup>1</sup>Statute citations are to the 1999 Revised Code of Washington rather than the current version.

months served in custody towards the community placement custody portion of the sentence. RP 33.

Appellant moved the court for relief from judgment concerning the ~~36 months of community placement custody. The court denied the motion~~ and entered written findings of fact and conclusions of law. CP 102.

**F. ARGUMENT**

**Summary of Argument**

The trial court erred in refusing to credit pre-sentence incarceration time in excess of the incarceration time ordered by the court at the time of sentencing, against the period of community custody ordered by the court which is a violation of RCW 9.94A.120 (17). In addition the failure to credit pre-sentence incarceration time in excess of the incarceration time ordered by the sentencing court at the time of sentencing against the period of community custody ordered by the court at the time of sentencing violates the constitutional provisions of the double jeopardy clauses as set forth in the Fifth Amendment to the Constitution of the United States and Article 1 Section 9 of the Constitution of the State of Washington.

**Standard of Review**

The review of this case is a de novo review of error of law in sentencing, *State v. Williams*, 149 Wn. 2d 143, 65 P.3d 1214 (2003).

## Argument

### 1. STATUTES REQUIRE THE COURT TO ORDER CREDIT FOR TIME SERVED ON COMMUNITY CUSTODY<sup>2</sup>

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In imposing sentence, the 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.120 (17)<sup>3</sup>. The statute requires the court to give credit for time served in confinement. *In re Pers. Restraint of Schillereff*, 159 Wn.2d 649, 650, 152 P.3d 345 (2007).

The record is clear that Mr. Jones served 81 months prior to the most recent re-sentencing. RP 4 and 5.

"Community custody," is defined, in pertinent part, as "that portion of an offender's sentence of confinement in lieu of earned release time or imposed pursuant to . . . served in the community subject to controls placed on the offender's movement and activities by the department." RCW 9.94A.030(5) (emphasis added, irrelevant statute citations omitted)<sup>4</sup>.

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<sup>2</sup> Eric Bowman provided significant help in the writing of this brief.

<sup>3</sup> This statute has been renumbered and is now found at RCW 9.94A.505 (6).

<sup>4</sup> This definition has also been renumbered and the statutes cited within this definition have been renumbered. For the purposes of the argument, the old or new statute number cited within the statute are not particularly helpful.

"Community custody," as defined above, is a subset of "confinement."

The relevant statutes require the sentencing court to give credit for pre-sentence confinement when sentencing a person under the Sentencing Reform Act. Since community custody is a type of confinement, though less restrictive than a locked up confinement, the 30 months of pre-sentence confinement not credited to the 51 month sentence should be credited to the less restrictive community custody confinement.

RCW 9.94A.170 (3)<sup>5</sup> in part provides: "Any period of community custody, community placement, or community supervision shall be tolled during any period of time the offender is in confinement for any reason. . ."

The state relied, in part, on this statute to argue against the crediting of pre-sentence confinement time against the 36 months of community custody. CP 91 page 5 of 6. However, before a period of confinement is tolled, it must be imposed. Pre-sentence confinement may not toll any post sentence community custody, because the community custody period had not yet been ordered. At the time of Mr. Jones service of the pre-sentence confinement, there was nothing to toll as far as this sentence is concerned. The position of having pre-sentence confinement tolling post sentence

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<sup>5</sup>Now RCW 9.94A.625 (3).

community custody would put RCW 9.94A.170(3) and RCW 9.94A.120 (17) in direct conflict. One can not give credit for confinement and toll the period of confinement for the same period of actual confinement. The

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courts should read the two statutes together, giving the appropriate meaning to both to allow for the two statutes to both have effect. The second portion of RCW 9.94A.170 (3) makes it even more clear that the statute is crafted to apply only to post sentence confinement. That portion provides: ". . . However, if an offender is detained pursuant to RCW 9.94A.207 or 9.94A.195 and is later found not to have violated a condition or requirement of community custody, time spent in confinement due to such detention shall not toll the period of community custody, community placement, or community supervision." Both RCW 9.94A.207 and RCW 9.94A.195 applied to violations of conditions of a sentence and violations of conditions of community placement or custody. These are both post-sentencing proceedings where a person subject to being confined in jail pending hearing on a violation of the terms of sentence or community custody or placement.

It is clear from the plain language of RCW 9.94A.170 (3) that the statute applies to post-sentence confinement.

**2. FAILURE TO GIVE CREDIT FOR TIME SERVED IS A  
VIOLATION OF THE DOUBLE JEOPARDY CLAUSES OF  
THE CONSTITUTIONS OF THE UNITED STATES AND  
STATE OF WASHINGTON.**

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The double jeopardy clauses of the state<sup>6</sup> and federal<sup>7</sup> constitutions guarantee three separate protections, including the protection against "multiple punishments for the same offense." *State v. Gocken*, 127 Wn.2d 95, 101, 896 P.2d 1267 (1995) (citations omitted); accord *State v. Womac*, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007). The double jeopardy clause also requires that punishment already served be fully credited on re-sentencing if an initial sentence is reversed as unlawful. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969)<sup>8</sup>.

In *Pearce*, the court held "the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence

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<sup>6</sup> Const. art. I, § 9 provides: "[n]o person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense."

<sup>7</sup> In relevant part, the Fifth Amendment to the United States Constitution provides: "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . ."

<sup>8</sup>Portions of the *Pearce* holdings have been overruled in *Alabama v. Smith*, 490 U.S. 794, 109 S. S. Ct. 2201, 104 L. Ed. 2d 865 (1989), however, the portion of the *Pearce* case concerning the issue of credit for all time served remains intact.

upon a new conviction for the same offense." Pearce, at 718-19 (note omitted).

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Mr. Jones was re-sentenced following a successful personal restraint petition, where the original sentence was illegal. CP 77.

As previously stated, community custody is a subset of confinement by definition of statute. When the sentencing court declines to give credit for the entire time of confinement when re-sentencing Mr. Jones, it violates the double jeopardy clauses of the state and federal constitutions. The trial court must give credit for prior confinement against all confinement ordered in the re-sentencing. Confinement includes both total confinement as defined by RCW 9.94A.030 (38) and community custody confinement as defined by RCW 9.94A.030 (4)<sup>9</sup>.

#### **G. CONCLUSION**

The trial court erred as a matter of law in failing to give credit for the 30 months of confinement served prior to sentencing in excess of the 51 month standard sentence imposed by the court towards the 36 months of community custody ordered by the court.

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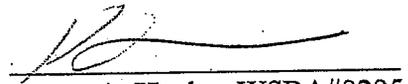
<sup>9</sup>The citations are to the Revised Code of Washington 1999 version.

**H. RELIEF REQUESTED**

The Appellant ask this court to remand this case to the trial court  
with directions to enter a judgment and order giving credit for time served in  
confinement in excess of 51 months towards the 36 month period of  
community custody ordered by the court at the time of sentencing.

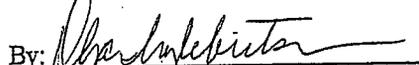
Respectfully Submitted this 22<sup>nd</sup> day of April, 2008.

  
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**CERTIFICATE OF SERVICE**

I certify that on the 22 day of April, 2008, I cause a true correct original of the Brief of the Appellant to be served on the following in the manner indicated: via U.S. Mail, David Ponzoham Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402; a copy hand-delivered to, Jeremy A. Morris, Kitsap County Prosecutor's Office, 614 Division Street, MS-35, Port Orchard, WA 98367; and a copy via U.S. Mail to Appellant, Cliff Jones, 9118 Hipkins Road SW, Lakewood, WA 98498.

By:   
Olga Inglebritson, Legal Assistant

NO. 37002-6-II

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

RECEIVED

AUG 14 2008

STATE OF WASHINGTON,

WECKER - HUNKO

Respondent,

v.

CLIFF JONES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 00-1-01046-8

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED August 13, 2008, Port Orchard, WA

Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway,  
Tacoma WA 98402; Copy to counsel listed at left.

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## I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Defendant's claim that the trial court erred in failing to credit his excess prison time against his term of community custody is without merit when the plain language of RCW 9.94A.625(3) states that any period of community custody shall be tolled during any period of time the offender is in confinement for any reason?

2. Although Division Three recently held in *State v. Knippling* that a defendant is entitled to have any excess prison time credited against his or her community custody term, the State respectfully asks this court to follow the dissenting opinion in *Knippling* and hold that: (1) the plain language of RCW 9.94A.625(3) prohibits such a credit; and, (2) that the *Knippling* opinion was wrongly decided because it ignores the plain language of RCW 9.94A.625(3) and creates a conflict between two statutes.

## II. STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY AND FACTS

On November 20, 2000 the Defendant was sentenced after entering a guilty plea to a charge of Child Molestation in the First Degree (committed from November 1998 to November 1999). CP 42, App.'s Br. at 2.<sup>1</sup> The court

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<sup>1</sup> The Appellant's brief contains citations to the Clerk's Papers that do not appear to correspond to the Index of Clerk's Papers that the State has received. The facts of the present case, however, are essentially not in dispute. The State's citations will be to the Index of Clerk's Papers and to the Appellant's Brief.

imposed an exceptional sentence of 130 months in prison, followed by 36 months of community custody. CP 42. The Defendant appealed the exceptional sentence, but this Court affirmed the sentence in an unpublished opinion. *See, State v. Jones*, No. 26697-1-II, filed December 28, 2001. This court also dismissed later petition in which the Defendant challenged his exceptional sentence. *See Order Dismissing Pers. Restraint of Jones*, No. 29487-7-II, filed March 4, 2003.

In 2006, the Defendant filed a motion challenging (for the first time) the inclusion of certain juvenile convictions in the calculation of his offender score. The Defendant's motion was transferred to the Court of Appeals as a personal restraint petition, and in January of 2007 the Court of Appeals granted the Defendant's petition after the State conceded error. *See Order Granting Pers. Restraint of Jones*, No. 34872-1-II, filed January 9, 2008.

As a result, the trial court amended the Defendant's Judgment and Sentence on April 30, 2007. CP 5. The trial court amended the Judgment and Sentence by imposing 51 months in prison (rather than the original 130 months), but the court did not amend the previous imposition of 36 months of community custody. CP 51.

On September 21, 2007 the Defendant filed a CrR 7.8 motion and a memorandum of authorities arguing that the sentence of 51 months in prison

followed by 36 months of community custody exceeded the statutory maximum because the total time imposed (when the prison term and community term were added together) exceeded the top of the standard range.

CP 9-13. In a second memorandum of authorities filed on October 18, 2007 the Defendant argued that any time he spent in prison in excess of 51 months should be credited against his 36 month term of community custody. CP 28.

In response to the Defendant's motion, the State argued that the court's sentence did not exceed the statutory maximum because the statutory maximum was life in prison pursuant to RCW 9A.44.083 and RCW 9A.20.021. CP 21. The State also argued that there was no statutory authority for crediting time in prison against a community custody term and that the plain language of RCW 9.94A.625(3) precluded the court from awarding the credit sought by the Defendant. CP 21.

The trial court denied the Defendant's motion and entered written Findings of Fact and Conclusion of Law. CP 42. With respect to the issue of crediting any excess prison time against the community custody term, the trial court specifically held that,

**VI.**

That there is no statutory authority allowing the court to award credit against a term of community custody for time spent in prison, even if the prison time was ultimately in excess of the term imposed at a resentencing hearing. Rather, RCW 9.94A.625(3) provides that "Any period of community custody, community placement, or community supervision

shall be tolled during any period of time the offender is in confinement **for any reason.**"(Emphasis added).

**VII.**

That because the Defendant's request for credit against his community custody term is not authorized by any statute and because the request is contrary to the plain language of RCW 9.94A.625(3), the Defendant's request must be denied.

**VIII.**

That, in addition to the analysis set out above, because of the unique and important functions that are served by community custody, this court is not inclined to reduce a community custody term following a conviction for a sex offense without specific authority requiring (or even allowing) the court to do so.

CP 42. This appeal followed.

**III. ARGUMENT**

**A. THE DEFENDANT'S CLAIM THAT THE TRIAL COURT ERRED IN FAILING TO CREDIT HIS EXCESS PRISON TIME AGAINST HIS TERM OF COMMUNITY CUSTODY IS WITHOUT MERIT BECAUSE THE PLAIN LANGUAGE OF RCW 9.94A.625(3) STATES THAT ANY PERIOD OF COMMUNITY CUSTODY SHALL BE TOLLED DURING ANY PERIOD OF TIME THE OFFENDER IS IN CONFINEMENT FOR ANY REASON.**

In the present appeal the Defendant notes that he had already served more than 51 months in prison and the time the trial court amended the judgment and sentence and the Defendant argues that the trial court erred in denying his request that the time he spent in prison in excess of 51 months be credited against the 36 month community custody term. App.'s Br. at 1.

This claim is without merit because the Defendant's request for credit is contrary to the plain language of RCW 9.94A.625(3), which states that any period of community custody shall be tolled during any period of time the offender, is in confinement for any reason.

The State does not dispute that the Defendant was in prison for longer than 51 months. The Defendant was originally sentenced to an exceptional sentence of 130 months on November 20, 2000, and as outlined above, this court affirmed the Defendant's conviction and sentence. See, CP 42; *State v. Jones*, No. 26697-1-II, filed December 28, 2001; *Order Dismissing Pers. Restraint of Jones*, No. 29487-7-II, filed March 4, 2003. Approximately five years later, in 2006, the Defendant filed a CrR 7.8 motion (that was eventually transferred to the court of appeals as a PRP), and, after a concession by the State that the Defendants juvenile convictions washed out, the court of appeals remanded the case. See *Order Granting Pers. Restraint of Jones*, No. 34872-1-II, filed January 9, 2008. The trial court then amended the judgment and sentence and imposed a sentence of 51 months, but by this time the Defendant had spent more than 51 months in custody and the trial court, therefore, ordered that the Defendant be released immediately. CP. 7.

The Defendant's argument that any time he spent in prison in excess of 51 months should be credited against the 36 months term of community custody, however, is contrary to the plain language of RCW 9.94A.625(3)

which states that community custody is tolled while an offender is in prison for any reason, and thus the trial court did not err.

RCW 9.94A.710 provides, among other things, that when a court sentences a person for a sex offense committed on or after June 6, 1996, and before July 1, 2000, the court shall, in addition to other terms of the sentence, sentence the offender to community custody for three years or up to the period of earned release awarded pursuant to RCW 9.94A.728, whichever is longer.

As the Defendant's crime occurred from November of 1998 to November of 1999, RCW 9.94A.710 required the court to impose 36 months of community custody. In addition, the statute provides that at any time prior to the completion of a sex offender's term of community custody, if the court finds that public safety would be enhanced, the court may impose and enforce an order extending any or all of the conditions imposed pursuant to this section for a period up to the maximum allowable sentence for the crime as it is classified in chapter 9A.20 RCW, regardless of the expiration of the offender's term of community custody. RCW 9.94A.710(3). Nothing in RCW 9.94A.710 authorizes the court to give an offender credit against his term of community custody for excess time he spent in prison following a favorable appeal.

The only statute that specifically addresses the issue before this court is RCW 9.94A.625(3), which provides that,

Any period of community custody, community placement, or community supervision shall be tolled during any period of time the offender is in confinement for any reason.

The trial court cited RCW 9.94A.625(3) in its findings of fact and conclusions of law and held that the Defendant's request for credit must be denied because it was "contrary to the plain language of RCW 9.94A.625(3)." CP 42. As outlined below, the trial court did not err.

When the meaning of a statute is clear on its face, a court is to assume that the legislature means exactly what it says, giving criminal statutes literal and strict interpretation. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

Applying the plain language of RCW 9.94A.625(3) to the present case, the Defendant's term of community custody "shall" be tolled during the period that he was in confinement, regardless of the reason. Thus, the Defendant's 36 month term of community custody (which was imposed as part of his original sentence and was not disturbed by the 2007 order amending the judgment and sentence) was tolled during the time that the Defendant was in prison, regardless of the reason.

Although not squarely on-point, Division One of the Court of Appeals dealt with a similar issue in *State v. Gartrell*, 138 Wn. App. 787, 158 P.3d 636 (2007). In *Gartrell*, the defendant was given a SSOSA sentence in which he was to serve six months in confinement followed by three years of community custody, with the rest of the sentence suspended. *Gartrell*, 138 Wn. App. at 789. Eleven months into his term of community custody, the court revoked the SSOSA sentence and imposed 20 months confinement followed by 36 to 48 months of community custody. *Gartrell*, 138 Wn. App. at 789. Pursuant to RCW 9.94A.670(10), the trial court gave the defendant credit for the six months he had spent in prison prior to the revocation, but the court refused to give the defendant credit against his 36 to 48 months of community custody for the eleven months he had already spent on community custody prior to the revocation. *Gartrell*, 138 Wn. App. at 789. On appeal, the court held that “the trial court properly refused to credit community custody time against the reimposed sentence, noting that community custody was different than confinement, and that the statute did not require the credit the defendant sought. *Gartrell*, 138 Wn. App. at 790-91.

In the present case, the Defendant’s situation (and any perceived unfairness in this regard) is substantially the same as the situation of the defendant in *Gartrell*, where the court of appeals found no basis for a credit against a mandatory community custody term.

**B. ALTHOUGH DIVISION THREE RECENTLY HELD IN *STATE V. KNIPPLING* THAT A DEFENDANT IS ENTITLED TO HAVE ANY EXCESS PRISON TIME CREDITED AGAINST HIS OR HER COMMUNITY CUSTODY TERM, THE STATE RESPECTFULLY ASKS THIS COURT TO FOLLOW THE DISSENTING OPINION IN *KNIPPLING* AND HOLD THAT: (1) THE PLAIN LANGUAGE OF RCW 9.94A.625(3) PROHIBITS SUCH A CREDIT; AND, (2) THAT THE *KNIPPLING* OPINION WAS WRONGLY DECIDED BECAUSE IT IGNORES THE PLAIN LANGUAGE OF RCW 9.94A.625(3) AND CREATES A CONFLICT BETWEEN TWO STATUTES.**

Although not cited by the Defendant, a recent majority opinion of Division Three of the Court of Appeals held that a defendant is entitled to have any excess prison time credited against his term of community custody. *See, In re Pers. Restraint of Knippling*, 144 Wn. App. 639, 183 P.3d 365 (2008).<sup>2</sup> Judge Sweeney, however, filed a dissenting opinion in *Knippling*, and the State urges this court to follow the reasoning in Judge Sweeney's dissent as it follows the plain language of the RCW 9.94A.625(3) and points out that the majority's reading of the statute creates a conflict with other another statute.

In *Knippling*, the defendant was resentenced, following a successful appeal, to a term of 17 months. *Knippling*, 144 Wn. App. 639, 183 P.3d at

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<sup>2</sup> Appellant's counsel would have been unaware of the *Knippling* opinion because the opinion was filed on May 20, 2008, roughly a month after the Appellant filed his brief in the present

366. The defendant, however, had already served 41 months in prison by the date of the resentencing, and the defendant argues that he should have been given credit against his 18 to 36 months of community custody for the extra 24 months he was incarcerated beyond his eventual standard range sentence. *Id.* The State argued that credit was not authorized due to RCW 9.94A.625(3).

The majority held that RCW 9.94A.625(3) was not controlling and that RCW 9.94A.715(1) stated that community custody begins upon completion of the term of confinement or at such time as the offender is transferred to community custody in lieu of earned release. *Knippling*, 144 Wn. App. 639, 183 P.3d at 366-67. The majority, therefore, reasoned that the defendant had completed his term of confinement 24 months before he was actually released from prison and that his community custody thus began 24 months before he was released. *Id.*

In the dissenting opinion, Judge Sweeney stated that, by definition, community custody means that portion of the sentence served “in the community,” and that the defendant was not “in the community” during those months when he was in prison. *Knippling*, 144 Wn. App. 639, 183 P.3d at 367, citing RCW 9.94A.030(5). In addition, Judge Sweeney found that the

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case.

plain language of RCW 9.94A.625(3) was controlling, and that the term of community custody began only when the defendant was released from confinement into the community. *Id.*

The State urges this court to adopt the reasoning of Judge Sweeney's dissent for the reasons stated by Judge Sweeney and because the majority opinion in *Knippling* creates a conflict between two statutes.

Under Washington law, when two statutes apparently conflict, they are read to harmonize and to reconcile their meanings whenever possible. *In re Personal Restraint of King*, 110 Wn.2d 793, 799, 756 P.2d 1303 (1988); *State v. Danner*, 79 Wn. App. 144, 149, 900 P.2d 1126 (1995). Statutes must be read together to achieve a "harmonious total statutory scheme ... which maintains the integrity of the respective statutes." *State v. O'Neill*, 103 Wn.2d 853, 862, 700 P.2d 711 (1985). Furthermore, the rule of lenity does not apply where statutes are unambiguous or can be reconciled in a way that reflects the legislature's clear intent. *See State v. O'Brien*, 115 Wn. App. 599, 603, 63 P.3d 181 (2003).

The *Knippling* majority opinion creates a conflict whereby an offender's term of community custody is deemed to begin while the offender is in prison despite the fact that RCW 9.94A.030(5) defines "community custody" as a portion of an inmate's sentence "served in the community

subject to controls placed on the offender's movement and activities by the department.” If an inmate's term of community custody were not tolled while in confinement, it would be possible for the term of community custody to begin (and potentially expire) expire even though the inmate never lived in the community subject to conditions imposed by the Department. This circumstance would conflict with the statutory definition of “community custody” because it would allow a term of community custody to be served in confinement and not “in the community” subject to Department controls. See RCW 9.94A.030(5). In short, the Knippling opinion (citing 9.94A.715(1)) holds that community custody can be deemed to have started while an offender is still in prison despite the fact that community custody is, by definition, a portion of a sentence served in the community. RCW 9.94A.030(5).

If, on the other hand, this court were to apply RCW 9.94A.625(3) according to its plain language and hold that the term of community custody is tolled during any period of incarceration, then community custody would not begin until the offender was actually in the community and there would be no conflict with RCW 9.94A.030(5). As this approach follows the plain language of RCW 9.94A.625(3) and harmonizes and reconciles its meaning with RCW 9.94A.030(5), this construction is the preferred construction under Washington law.

For all of these reasons, the State respectfully asks this court to follow the reasoning outlined in Judge Sweeney's dissent and hold that the plain language of RCW 9.94A.625(3) controls, and that the reasoning of the majority opinion in *Knippling* is incorrect and creates an unnecessary conflict among statutory provisions.

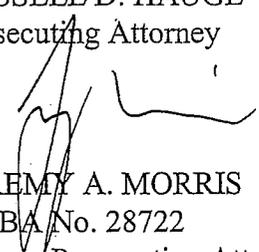
#### IV. CONCLUSION

For the foregoing reasons, the trial court's denial of the Defendant's CrR7.8 motion should be affirmed.

DATED August 13, 2008.

Respectfully submitted,

RUSSELL D. HAUGE  
Prosecuting Attorney



JEREMY A. MORRIS  
WSBA No. 28722  
Deputy Prosecuting Attorney

DOCUMENT1

**FILE COPY**

**NO. 37002-6-II**

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

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**STATE OF WASHINGTON,**

**Respondent,**

**v.**

**CLIFF ALAN JONES**

**Appellant.**

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**ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 00-1-01046-8**

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**REPLY BRIEF OF APPELLANT**

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

STATE OF WASHINGTON,

Respondent,

vs.

CLIFF ALAN JONES.

Appellant.

NO. 37002-6-II

REPLY BRIEF OF APPELLANT

I. STATEMENT OF THE CASE

Appellant, Cliff Jones, incorporates by reference the Statements of the Case set forth in his Opening Brief of Appellant under this cause number.

II. ARGUMENT AND AUTHORITIES

1. Reply to the State's argument that the excess time that Jones served tolled his community custody under RCW 9.94A.625(3).

In its Brief of Respondent, the State argues that crediting time Jones served in excess of his legal sentence is contrary to the plain language of RCW 9.94A.625(3).<sup>1</sup> To support its argument, the State cites RCW 9.94A.710 which states: "...the court shall, in addition to other terms of the sentence, sentence the offender to community custody for

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<sup>1</sup> Brief of Respondent, page 5-6.

three years or up to the period of earned release awarded pursuant to RCW 9.94A.728, whichever is longer.”<sup>2</sup> Mr. Jones respectfully disagrees with this assertion.

The State also argues, that while not on point, Gartrell, Division One addressed a similar issue.<sup>3</sup> State v. Gartrell, 138 Wn. App. 787, 158 P.3d 636 (2007). However, Gartrell addressed community custody imposed as part of a Special Sex Offender Sentencing Alternative (SSOSA), under a totally different statute. See RCW 9.94A.670(10). The SSOSA statute says that upon revocation of the suspended sentence under the statute, [a]ll confinement time served during the period of community custody shall be credited to the offender.... There the court held that the community custody portion of the sentence was not confinement. Gartrell, 138 Wn. App. at 790. The Court went on to explain how the SSOSA statute itself differentiates between confinement and community custody. Id. Gartrell is not on point.

However, Division One did address the language of former RCW 9.94A.170(3) which has since been recodified as RCW 9.94A.625(3). See, State v. Cameron, 71 Wn. App. 653, 861 P.2d 1069 (1993). In Cameron, the trial court sentenced Cameron to concurrent terms of 14 months for a burglary and 4 months for TMVWOP. The trial court also sentenced Cameron to 12 months’ community supervision on the taking and riding charge. Both sentences were within the standard ranges for the offenses. Cameron, 71 Wn. App. at 654. Cameron argued that his community supervision should start at the completion of his sentence for the crime in which it was imposed. Id. at 656. The State

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<sup>2</sup> Brief of Respondent, page 6

<sup>3</sup> Id. at 8

originally conceded the issue, and then on motion for reconsideration cited former RCW 9.94A.170(3), arguing that the community supervision on the shorter term is tolled during the time Cameron remains incarcerated on the other conviction. *Id.* The Court held that the plain meaning of the provision is controlling *in the circumstances of this case.* (emphasis mine). *Id.* The Court held that the “for any reason” language applied to the circumstances where, at the end of the sentence on which community supervision was imposed, the defendant remained incarcerated for a different crime. *Id.* at 657. The Court went on to say that RCW 9.94A.170(3) resolves the issue of multiple sentences and community supervision in the instant case. *Id.*

RCW 9.94A.625(3) is identical in language to that of former RCW 9.94A.170(3). Division One’s interpretation that the language solved issues relating to multiple sentences is instructive. Here, Jones was not serving multiple sentences. He served one sentence for one crime. On remand the trial court sentenced Jones to 51 months of incarceration and the required 36 months of community custody. Under RCW 9.94A.715(1) a term of community custody begins upon the offenders *completion* of the term of confinement. Therefore, Jones community custody commenced after he had served 51 months in custody. The fact that he served 30 additional months, based on an illegal sentence is not grounds for tolling the community custody. He was not serving a sentence on a different crime. Therefore, Jones should receive credit for community custody during the time of his confinement in excess of his 51 month appropriate sentence.

**2. Reply to the State's argument that this Court should not follow the majority opinion in State v. Knippling, but adopt the reasoning of the Knippling dissent.**

In its Brief of Respondent, the State urges this Court to find that Division Three wrongly decided this issue and follow the dissent's reasoning. See, State v. Knippling, 144 Wn. App. 639; 183 P.3d 365 (2008).<sup>4</sup> However, the dissent and the State urge this court to consider the plain language of RCW 9.94A.625(3) without consideration of RCW 9.94A.715(1) which governs when community custody begins.

State v. Knippling is exactly on point with Jones' case. Knippling's conviction was affirmed on direct appeal, but the case was remanded for resentencing consistent with Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed. 2d 403 (2004). Knippling, 144 Wn. App. at 639. He was resentenced to concurrent sentences with the longest period being 17 months. He had already served 41 months. Id. Knippling asked the court to give him 24 months of credit towards his 18-36 months of community custody. Id. Division Three held that RCW 9.94A.625(3) was not controlling and must be read in the context of the entire sentencing scheme. Id. The court focused on the term 'completion' and distinguished from 'released' and held that Knippling's community custody began at the completion of his sentence and 24 months before he was released.

Knippling held that RCW 9.94A.625(3) deals with the tolling of community custody after the community custody began. Community custody does not run during the time in confinement for new crimes or for community custody violations. Id. This interpretation is consistent with Cameron. RCW 9.94A.715(1) addresses the point in time

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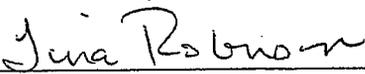
<sup>4</sup> Brief of Respondent, page 9

at which the term of community custody begins, and the statute is clear that the term of community custody begins when the offender completes his confinement time. Id. Here, Mr. Jones completed his confinement time 30 months before he was released. Therefore, Jones should be credited 30 months of community custody time towards his 36 months of community custody.

### III. CONCLUSION

Because this court interprets the statutes in context of the entire sentencing scheme, RCW 9.9A.625(3) and RCW 9.94A.715(1) read together are consistent with the interpretation that community custody begins at the time the sentence was completed, and unless Jones was serving time on another crime or for violating conditions of community custody, excess time served in custody should be credited toward his community custody. Therefore, because Jones completed his term of confinement 30 months before he was actually released; his community custody commenced 30 months before he was released. This court should follow Knippling and credit Mr. Jones with 30 months of community custody for time served prior to his actual release. .

Respectfully submitted this 16 day of September, 2008.

  
\_\_\_\_\_  
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CERTIFICATE OF SERVICE

I certify that on the 17<sup>th</sup> day of September, 2008, I caused a true and correct copy of this Reply Brief of Appellant to be served on the following in the manner indicated: the original to David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402, via facsimile and U.S. Mail; Jeremy A. Morris, Kitsap County Prosecutor's Office, 614 Division Street, MS-35, Port Orchard, WA 98366, via hand-delivery; Cliff Alan Jones, 9118 Hipkins Road SW, Lakewood, WA 98498 via U.S. Mail.

By: Amie Broussard  
April Broussard, Legal Assistant