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BY RONALD R. CARPENTER

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

CLIFF JONES,

Petitioner.

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ON DISCRETIONARY REVIEW FROM  
THE COURT OF APPEALS, DIVISION II  
Court of Appeals No. 37002-6-II  
Kitsap County Superior Court No. 00-1-01046-8

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SUPPLEMENTAL BRIEF OF RESPONDENT

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DATED February 4, 2010, Port Orchard, WA

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**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT.....4

A. JONES’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: (1) COMMUNITY CUSTODY BY DEFINITION MUST BE SERVED “IN THE COMMUNITY;” AND, (2) 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.” .....4

B. THIS COURT SHOULD REJECT DIVISION THREE’S ANALYSIS IN *IN RE KNIPPLING* (WHERE THE COURT HELD THAT A DEFENDANT IS ENTITLED TO HAVE ANY EXCESS PRISON TIME CREDITED AGAINST HIS OR HER COMMUNITY CUSTODY TERM) BECAUSE IT IGNORES THE PLAIN LANGUAGE OF FORMER RCW 9.94A.170(3) AND CREATES A CONFLICT BETWEEN TWO STATUTES. ....9

IV. CONCLUSION.....15

**TABLE OF AUTHORITIES**  
**CASES**

*Davis v. Dep't of Licensing*,  
137 Wn. 2d 957, 977 P.2d 554 (1999).....14

*In re Personal Restraint of King*,  
110 Wn. 2d 793, 756 P.2d 1303 (1988).....11

*In re Personal Restraint of Knippling*,  
144 Wn. App. 639, 183 P.3d 365 (2008).....9, 10, 12, 14

*State v. Alvarado*,  
164 Wn. 2d 556, 192 P.3d 345 (2008).....5

*State v. Danner*,  
79 Wn. App. 144, 900 P.2d 1126 (1995).....11

*State v. Donaghe*,  
152 Wn. App. 97, 215 P.3d 232 (2009).....13, 14

*State v. Gartrell*,  
138 Wn. App. 787, 158 P.3d 636 (2007).....8

*State v. Jones*,  
151 Wn. App. 186, 210 P.3d 1068 (2009).....3, 4, 7, 8, 13

*State v. Keller*,  
143 Wn. 2d 267, 19 P.3d 1030 (2001).....5

*State v. O'Brien*,  
115 Wn. App. 599, 63 P.3d 181 (2003).....11

*State v. O'Neill*,  
103 Wn. 2d 853, 700 P.2d 711 (1985).....11

**STATUTES**

RCW 9.94A.010 (1981).....7

RCW 9.94A.030(4) (1997) .....	7, 8, 10, 11, 12
RCW 9.94A.120 .....	5, 6
RCW 9.94A.170(3) (1993) .....	1-3, 6, 8-12, 15
RCW 9.94A.207 .....	6
RCW 9.94A.625(3).....	2, 3, 6, 10
RCW 9.94A.670(10).....	8
RCW 9.94A.710(3).....	5
RCW 9.94A.715(1).....	10, 12
RCW 9A.20.021 (1982).....	2
RCW 9A.44.083 .....	2

## I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Jones'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: (1) community custody by definition must be served "in the community;" and, (2) 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. Whether this Court should reject Division Three's analysis in *In re Knippling* (where the court held that a defendant is entitled to have any excess prison time credited against his or her community custody term) when that opinion ignores the plain language of former RCW 9.94A.170(3) and creates a conflict between two statutes?

## II. STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY AND FACTS

The history of the present case was summarized by the Court of Appeals as follows:

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

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<sup>1</sup> The Court of Appeals affirmed Jones's sentence in an unpublished opinion. *See State v. Jones*, noted at 109 Wn. App. 1063, 2001 WL 1660085 (2001). The Court also dismissed a later PRP Jones filed challenging his exceptional sentence. *See Order Dismissing Pet., In re*

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 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

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*Pers. Restraint of Jones*, No. 29487-7-II (Mar. 4, 2003).

<sup>2</sup> Former RCW 9.94A.170(3) has been recodified without substantive change at RCW 9.94A.625(3).

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.

*State v. Jones*, 151 Wn. App. 186, 188-90, 210 P.3d 1068 (2009).

The Court of Appeals affirmed the trial court and held that it did not err when it declined to credit Jones with time served towards his community custody term. *Jones*, 151 Wn. App. at 188, 195. The Court began by noting that the State conceded that Jones was incarcerated beyond his standard range sentence of 51 months. *Jones*, 151 Wn. App. at 190. The Court, therefore, explained that the central issue was “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.” *Jones*, 151 Wn. App. at 190. The Court of Appeals ultimately held (based its opinion on the plain language of several statutes, the stated purposes of Washington's sentencing statutes, and the substantial public policy goal of improving the

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

supervision of convicted sex offenders in the community upon release from incarceration) that Jones's term of community custody did not begin until he was released into the community. *Jones*, 151 Wn. App. at 192-93.

Following the Court of Appeals decision, Jones filed a petition for review, which this Court granted on January 5, 2010.

### III. ARGUMENT

- A. **JONES'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: (1) COMMUNITY CUSTODY BY DEFINITION MUST BE SERVED "IN THE COMMUNITY;" AND, (2) 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."**

As the Court of Appeals noted, it is undisputed that Jones was incarcerated beyond his standard range sentence of 51 months. *Jones*, 151 Wn. App. at 190. The central issue, therefore, 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." *Jones*, 151 Wn. App. at 190. Jones 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. Petition for Review at 2. This claim is without merit because Jones' request for credit is not authorized by statute, is contrary to the plain language several statutes, and is contrary to the substantial public policy goal of improving the supervision of convicted sex offenders in the community upon release from incarceration.

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). On appeal, an appellate courts' purpose when interpreting a statute is to determine and enforce the intent of the legislature. *State v. Alvarado*, 164 Wn.2d 556, 561-62, 192 P.3d 345 (2008). Where the meaning of statutory language is plain on its face, the court 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, a court is to 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, 192 P.3d 345.

In the present case the trial court was required by the plain language of former RCW 9.94A.120(10)<sup>4</sup> to impose 36 months of community

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<sup>4</sup> Former RCW 9.94A.120(1) was subsequently renumbered as RCW 9.94A.710(3).

custody.<sup>5</sup> Nothing in RCW 9.94A.120(10) authorized the court to give an offender credit against his term of community custody for excess time he spent in prison following a favorable appeal.

Rather, the plain language of former RCW 9.94A.170(3)(1993)<sup>6</sup> states that any period of community custody shall be tolled during any period of time that the offender is in confinement “for any reason.” As the meaning of this statute is clear on its face, the courts below were required to assume that the legislature meant exactly what it said.

Applying the plain language of RCW 9.94A.170(3)(1993) to the present case, the trial court correctly held that Jones’s term of community custody “shall” be tolled during the period that he was in confinement, regardless of the reason. Thus, Jones’s 36 month term of community custody was tolled during the time that Jones was in prison, regardless of the reason.

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<sup>5</sup> 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. Former RCW 9.94A.120(10).

<sup>6</sup> Former RCW 9.94A.170(3) has been recodified at RCW 9.94A.625(3). As in the Court of Appeals opinion, this brief will refer to former RCW 9.94A.170, the provision in effect at the time Jones committed his offense. 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 or requirement of supervision, time spent in confinement due to such detention shall not toll to [the] period of supervision.

Other statutes in effect at the time also defined community custody and explained its purpose. For instance, former RCW 9.94A.030(4) (1997) defined “[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.) See, *Jones*, 151 Wn. App. at 192-93.

Further, as the Court of Appeals noted, 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 “protecting the public,” and “offering the offender an opportunity to improve him or herself.” See, *Jones*, 151 Wn. App. at 193, *citing* former RCW 9.94A.010(4), (5) (1981). In addition, the Court noted that community custody serves a distinct and important function and that,

Requiring an offender, particularly a sex offender, to serve his community custody term “in the community” serves the purposes of helping the offender “improve himself” by providing the offender with time and resources necessary to reintegrate into the community, while at the same time “protecting 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.

*Jones*, 151 Wn. App. at 193.<sup>7</sup>

Given these facts, the trial court did not err in denying Jones’s motion for credit against his community custody term because community custody by definition must be served in the community and because the plain language of former RCW 9.94A.170(3) stated that Jones’s term of community custody was tolled while he was in custody, regardless of the reason.<sup>8</sup>

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<sup>7</sup> The Court of Appeals also noted that a contrary holding would be inconsistent with this Court’s recognition that “by 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.” *Jones*, 151 Wn. App. at 193-94, citing *In re Pers. Restraint of Dalluge*, 162 Wn.2d 814, 815, 177 P.3d 675 (2008).

<sup>8</sup> 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

**B. THIS COURT SHOULD REJECT DIVISION THREE'S ANALYSIS IN *IN RE KNIPPLING* (WHERE THE COURT HELD THAT A DEFENDANT IS ENTITLED TO HAVE ANY EXCESS PRISON TIME CREDITED AGAINST HIS OR HER COMMUNITY CUSTODY TERM) BECAUSE IT IGNORES THE PLAIN LANGUAGE OF FORMER RCW 9.94A.170(3) AND CREATES A CONFLICT BETWEEN TWO STATUTES.**

As Jones correctly notes in his petition, the Court of Appeals decision below conflicts with the majority opinion of Division Three of the Court of Appeals in *In re Pers. Restraint of Knippling*, 144 Wn. App. 639, 183 P.3d 365 (2008), where the court held that a defendant is entitled to have any excess prison time credited against his term of community custody. The Court of Appeals in the present case, however, rejected the majority opinion in *Knippling* and instead agreed with the analysis provided by Judge Sweeney's dissenting opinion in *Knippling*. The State urges this Court to do the same.

In *Knippling*, the defendant was resentenced, following a successful appeal, to a term of 17 months. *Knippling*, 144 Wn. App. at 641. The

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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 Jones'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.

defendant, however, had already served 41 months in prison by the date of the resentencing and thus argued 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.170(3).<sup>9</sup>

The majority held that RCW 9.94A.170(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. at 642-43. 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. at 643-44, citing RCW 9.94A.030(5). In addition, Judge Sweeney found that the plain language of RCW 9.94A.170(3) was controlling, and that the term of

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<sup>9</sup> The *Knippling* opinion refers to RCW 9.94A.625(3) as opposed to its former designation as RCW 9.94A.170(3). For the sake of consistency with the Court of Appeals decision in the

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

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present case, this brief will refer to former RCW 9.94A.170(3).

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) 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.” *See* RCW 9.94A.030(5).

If, on the other hand, this Court were to apply RCW 9.94A.170(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.170(3) and harmonizes and reconciles its meaning with RCW 9.94A.030(5), this construction is the preferred construction under Washington law.<sup>10</sup>

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<sup>10</sup> Furthermore, even if this Court were to conclude that the term of community custody is said to “begin” upon completion of the term of confinement (even if the defendant is not actually released on that date), the actual “clock” on the 36 month period of community custody would not start running on that date, since former RCW 9.94A.170 provides that the term of community custody is tolled while the offender remains in custody. Thus, even if RCW 9.94A.715(1) can be read to require that Jones’s community custody term was to begin once he had served 51 months in prison, the actual 36 month term of community custody was immediately tolled since Jones remained in custody. Thus the issue of whether the community custody term began (but was immediately tolled) after Jones had served 51 months or whether the term did not begin until Jones was actually released from custody has

The Court of Appeals in the present case chose to reject the majority opinion in *Knippling* precisely because of the conflict it created. Specifically, the Court of Appeals below stated that,

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.)

*Jones*, 151 Wn. App. at 192-93.

A separate panel of judges from Division Two also recently declined to follow the *Knippling* majority and agreed with the analysis of the Court of Appeals in the present case. In *State v. Donaghe*, 152 Wn. App. 97, 215 P.3d 232 (2009) the defendant argued that his community custody term began to run when he was transferred from DOC custody to the Special Commitment Center (SCC) where he was confined as a sexually violent predator.

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no real practical effect. Rather, it is a distinction without a difference.

In addition, all of the relevant statutory provisions can be read harmoniously (including RCW 9.94A.715(1)), as long as the plain language of former RCW 9.94A.170(3) is properly applied and the "clock" on the community custody term is tolled as required by the statute. The primary error in the *Knippling* decision, therefore, was not the fact that the court read RCW 9.94A.715(1) as requiring that the community custody term "begin" on the date the term of confinement ended, but rather the error was in the Court's decision to ignore the plain language of RCW 9.94A.170(3) and to essentially hold that the statute's language that said that the term was tolled while an offender is in custody "for any reason" really meant that the term was only tolled while an offender was in custody for some new crime or for a probation violation. See *Knippling*, 144 Wn. App. at 642-43. This Court should reject that analysis and hold that "for any reason" means "for any reason."

*Donaghe*, 152 Wn. App. at 100, 108. The *Donaghe* court held that the majority's reasoning in *Knippling* was not persuasive and instead adopted Judge Sweeney's reasoning from the dissent and held that community custody must be served *in the community*. *Donaghe*, 152 Wn. App. at 108 (emphasis in original), citing *Knippling*, 144 Wn. App. at 644 (Sweeney, J., dissenting).

The *Donaghe* court also noted that "community custody" was defined by statute as that portion of an offender's sentence that is "served in the community." *Donaghe*, 152 Wn. App. at 110. The court then noted that,

In ignoring this language, the *Knippling* majority departs from a well-settled rule of statutory construction--to give effect to all language and to render no portion meaningless.

*Donaghe*, 152 Wn. App. at 110, citing *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554(1999)). The *Donaghe* court then went on to hold that,

We agree with Judge Sweeney that (1) "[t]he term community custody ... clearly contemplates time spent in the community"; and (2) the legislature intended "continued control for a period of time after a defendant is released." *Knippling*, 144 Wn. App. at 643, 183 P.3d 365 (Sweeney, J., dissenting). Further, in our view, this reasoning applies equally to community placement: The statutory scheme clearly contemplates that a term of "community placement" will be served in the community, under continued DOC control, in order to ensure the offender's smooth and safe transition back into the community.

*Donaghe*, 152 Wn. App. at 110-11.

The State respectfully asks that this Court adopt the analysis of Judge Sweeney's dissent in *Knippling*, the Court of Appeals decision in *Donaghe*, and the Court of Appeals decision in the present case, and reject the majority opinion in *Knippling* because it fails to follow the plain language of former RCW 9.94A.170(3) and creates an unnecessary conflict among statutory provisions.

Furthermore, the State asks that this Court hold that community custody is defined as that portion of offender's sentence that is served in the community and that the plain language of former RCW 9.94A.170(3) states that a period of community custody is tolled while an offender is in custody "for any reason." Consequently, this Court should hold that the trial court below did not err when it declined to credit Jones's excess prison time against his period of community custody since the trial court was required to impose a 36 month term of community custody and, pursuant to the plain language of the relevant statutes, that term of community custody was tolled while Jones was in custody and thus did not begin until Jones was released into the community.

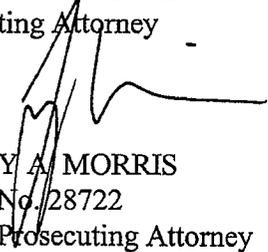
#### IV. CONCLUSION

For the foregoing reasons, the trial court's denial of Jones's CrR7.8 motion (requesting that his excess time in confinement be credited against his term of community custody) should be affirmed.

DATED February 4, 2010.

Respectfully submitted,

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