

NO. 83815-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In re Personal Restraint of:

ERIC SHERIDAN FLINT,

Petitioner.

PETITIONER'S REPLY TO DOC'S SUPPLEMENTAL BRIEF

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A. INTRODUCTION

On December 22, 2009, the Department was directed to file a supplemental brief addressing State v. Madsen, __ Wn. App. __, __ P.3d __, (2009), WL 4756143, at *7 (Dec. 14, 2009) as it relates to this case. Instead, the State just relabeled the "Petition for Review" they filed on January 14, 2010 in Madsen, added a new introduction, and waited until the last possible moment to file the same brief they had filed a week earlier in Madsen. A brief that does not discuss "Madsen as it relates to this case." A brief that only re-argues the Court of Appeals ruling. This is not the platform for the State to challenge Division One's decision in Madsen.

There is, however, a small (but significant) portion of the ex post facto section of the "Petition for Review" filed in Madsen that the State decided to omit from their "cut-and-paste" supplemental brief they recently submitted in this case: in Madsen, the case where the State is requesting that this Court **grant** review, they make it a point to state that "this petition also presents a significant question of Constitutional law: whether a change in a statute governing the consequences for violating a community custody condition violated the Ex Post Facto Clause in article 1, section 9 of the United States Constitution." Madsen, Petition for Review, pg. 14 at 13. Conversely, in Flint, the case where the State is requesting this Court to **deny** review, a case where Mr. Flint has claimed a "significant question of Constitutional law" the entire time, the State chooses to leave that part out. The question of Constitutional law raised in Flint is just

as significant as the one raised in Madsen; it is, in fact, identical: application of former RCW 9.94A.737(2), to an offender whose underlying offense occurred prior to the statute's enactment, violates the prohibition against ex post facto laws.

As the State points out on page 3 of the "Supplemental Brief" filed in this case, "a new or amended statute violates the Ex Post Facto Clause if it is (1) substantive; (2) retroactive; and (3) disadvantageous to the person affected by it." In re Pers. Restraint of Powell, 117 Wn.2d 175, 185, 814 P.2d 635 (1991). In this case, all three requirements have been met: The 2007 statute is "substantive" (Mr. Flint is in prison because of it); the 2007 statute is "retroactive" (it is being applied to Mr. Flint's 2002 underlying offense); the 2007 statute is "disadvantageous" (it has increased the quantum¹ of punishment by increasing the **required** amount of punishment).

B. IS RCW 9.94A.737(2) SUBSTANTIVE?

The State, in Madsen, has already admitted that the 2007 statute is substantive, that is "criminal" or "punitive". Madsen, (slip op. at 5). They do not appear to argue the substantive nature of the statute here either. Former RCW 9.94A.737(2) has satisfied the first prong of the ex post facto analysis: it is substantive in nature as applied to Mr. Flint.

1. quantum: the **required**, desired, or allowed amount. Black's Law Dictionary, 7th Edition, 1999 (emphasis added)

C. IS RCW 9.94A.737(2) BEING APPLIED RETROACTIVELY?

Is the 2007 statute, as applied to Mr. Flint's 2002 conviction, apply to events that occurred before its enactment? The State claims that the Madsen decision is based on a "misplaced reliance" on the United States Supreme Court decision in Johnson v. United States, 529 U.S. 694, 120 S. Ct. 1795, 146 L. Ed. 2d 727 (2000), but the State fails to come to terms with Greenfield v. Scafati, 277 F. Supp. 644 (Mass. 1967) (three-judge court), summarily aff'd, 390 U.S. 713 (1968) a case "in which a three-judge panel forbade on ex post facto grounds the application of a Massachusetts statute imposing sanctions for violation of parole to a prisoner originally sentenced before its enactment." Johnson, 529 U.S. at 701. The United States Supreme Court affirmed the holding in Greenfield. It is based on **that** holding that Johnson "attribute[d] postrevocation penalties to the original offense." Id., at 701.

Furthermore, the Department has already agreed that "a sanction is part of the original offense", which they furthered by their citation of "State v. DeBello, 92 Wn. App. 723, 727, 964 P.2d 1192 (1998) (modifications of sentences due to violations of community supervision should be deemed punishment for the original offense)." Flint, 83815-1, Response of the DOC to Petitioner's Motion for Discretionary Review, pg. 14 at 2.

Additionally, this Court has already considered an issue similar to this and consistently held that:

"Case law in Washington provides a clear answer to this.

Incarceration for probation violations 'relates back to the original conviction for which probation was granted.' State v. Eilts, 94 Wn.2d 489, 494 n. 3, 617 P.2d 993 (1980); see also State v. King, 130 Wn.2d 517, 522, 925 P.2d 606 (1996); State v. Whitaker, 112 Wn.2d 341, 342, 771 P.2d 332 (1989). It is not the result of merely the probation violation, but rather 'should be deemed punishment for the original crime.' State v. Prado, 86 Wn. App. 573, 578, 937 P.2d 636 (1997); cf State v. Dupard, 93 Wn.2d 268, 276, 609 P.2d 961 (1980) ("Parole revocation ... is a continuing consequence of the original conviction." (citations omitted)); Standlee v. Smith, 83 Wn.2d 405, 407, 518 P.2d 721 (1974) ("Parole is revoked ... as part of the continuing consequences of the crime for which parole was granted.") Thus, case law ... explains in no uncertain terms that **incarceration for probation violations is a result of the original conviction.**"

State v. Watson, 160 Wn.2d 1, 9, 154 P.3d 909 (2007).

The Ninth Circuit has considered the issue and held the same, agreeing that "for double jeopardy purposes, as well as ex post facto purposes, parole and probation revocation **constitutes punishment for underlying crime.**" U.S. v. Soto-Olivas, 44 F.3d 788 (9th Cir. 1995) (emphasis added).

So while the State argues that Madsen was based on "dictum" in Johnson, they fail to recognize the fact that every branch of court, from trial courts to the Washington State Court of Appeals, from the Washington State Supreme Court to the United States Supreme Court, has held the same: "Punishment for a community custody violation is attributed to the crimes for which a defendant was originally convicted, not to the violation." Madsen (slip op. at 1).

D. DOES RCW 9.94A.737(2) DISADVANTAGE MR. FLINT?

The State argues that a mandatory return to prison to serve 647 days under the 2007 statute is not more disadvantageous than the

sanction Mr. Flint would have received under the law prior to 2007. It appears as though they attempt to argue the holding in Lindsey v. Washington, 301 U.S. 397, 57 S. Ct. 797, 81 L. Ed. 1182 (1937), by their reference to California Dept. of Corrections v. Morales, 514 U.S. 499, 506 n. 3, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995). In doing so, they fail to realize that Morales ultimately upheld and agreed with the holding in Lindsey:

"Statutes which made longer sentences possible or eliminated the possibility of shorter sentences have been held to violate the ex post facto clause, where such statutes were applied to crimes committed before enactment, even if the sentence received by a particular claimant might have been possible under the prior law."

Morales, 131 L. Ed. 2d 1043, 1054, supra.

All that needs to be done is to compare the two statutes (former RCW 9.94A.737(1) and the statute in question, former RCW 9.94A.737(2)) in toto to see that subsection (2), the 2007 statute, is far more onerous than subsection (1). Especially when taken into account that the 2007 statute did not replace the previous statute, it was enacted in addition to it. So, while the Department could have relied on the earlier statute, it didn't. It relied, instead, on the requirement statute which wasn't enacted until 2007; Five years after Mr. Flint's crime.

The Ninth Circuit Court of Appeals revisited a question similar to the one raised in Lindsey in their opinion of Hines v. Thompson, 336 F.3d 848, 855-56 (9th Cir. 2003), and held that:

"The Ex Post Facto Clause is violated if a change in law creates a sufficient **risk** of increasing the measure of punishment attached to the covered crimes." Morales, 514 U.S. 510 (emphasis added). The risk is apparent from the face of the changed regulations if, after comparing the two regulatory schemes as a

whole, it is apparent that the new regulations are detrimental. Whether an individual can show definitively that **he** would have received a lesser sentence is not determinative. (emphasis in original); See Miller v. Florida, 482 U.S. 423, 432, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987); Nulph v. Faatz, 27 F.3d 451, 455-56 (9th Cir. 1994). In other words, '[t]he inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual.' Weaver v. Graham, 450 U.S. 24, 33, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981)." And "as Miller demonstrates, changes in sentencing rules can violate the Ex Post Facto Clause when the rules sufficiently circumscribe official discretion, even if the change does not automatically lead to a more onerous result than would have occurred under the prior law. See Miller, 482 U.S. at 432-33. Similarly, a change in law that increases the measure of punishment even if a petitioner cannot show that he would have received a more lenient sentence under the old scheme. See Lindsey, 301 U.S. at 400-01."

Hines, at 855-56

Comparing the two relevant statutes, it becomes obvious that the 2007 statute is indeed more onerous, more detrimental, and more disadvantageous.

"If an offender violates any condition of community custody, the department **may** transfer an offender to a **more restrictive confinement status** to serve up to the remaining portion of the sentence, less credit for any period actually spent in community custody or in detention awaiting the disposition of an alleged violation and subject to the limitations of subsection (3) of this section."

Former RCW 9.94A.737(1). (emphasis and underlines added).

Comparing the previous statute to the 2007 statute, the statute that made it mandatory that when an offender has a third violation hearing the Department "shall" return the offender to total confinement bring to light the clear increase in the quantum of punishment.

"If an offender has not completed his term of total confinement and is subject to a third violation for any violation of community custody and is found to have committed the violation, the department **shall** return the offender to **total confinement** in a state correctional facility to serve up to the remaining

portion of his or her sentence, unless it is determined that returning the offender to a state correctional facility would substantially interfere with the offender's ability to maintain necessary community supports of to participate in necessary treatment or programming and would substantially increase the offender's likelihood of reoffending."

Former RCW 9.94A.737(2) (emphasis added).

Beginning with subsection (1), the statute states: "**may** transfer an offender to a **more restrictive confinement status.**" (emphasis added). On the other hand, subsection (2) states: "**shall** return the offender to **total confinement.**" (emphasis added). The distinction between the legal definitions are so well known that we need not revisit them here. "May" is discretionary; "shall" is mandatory. Once a return to total confinement became mandated, the punishment became more severe. "More restrictive confinement" consists of things such as work release, work crew, house arrest, or any other sanction that makes the community custody "more restrictive", i.e. daily reporting, curfew, geographical restrictions, etc. Alternately, "total confinement" requires an offender to be in confinement 24 hours a day and under constant supervision, i.e. jail or prison. The mandatory "total confinement" alone shows a more onerous punishment.

Then, of course, there is subsection (1)'s statutory requirement that the offender receive credit for "any period ... spent ... in detention awaiting the disposition of an alleged violation." Subsection (2) does not include this credit. In Mr. Flint's case, that increases the punishment. He receives no credit for his time spent "in detention awaiting disposition of an alleged violation" from 03/19/08 through 04/02/08 and 10/24/08 through 11/5/08. A total of twenty-five days Mr.

Flint did not receive credit for because he was sanctioned pursuant to the 2007 statute. See Flint, 83815-1, Response of the DOC to Petitioner's Motion for Discretionary Review, pg. 2-3. The fact that Mr. Flint does not receive credit for his time spent in detention awaiting the disposition of an alleged violation once again increases the measure of punishment from what it was when he committed his underlying offense.

After comparing the operative portions of the two statutes - subsection (1): may, more restrictive, and credit for time; vs. subsection (2): shall, total confinement, and no credit - it becomes clear that subsection (2), the 2007 statute creates a substantial increase in the punishment from what it was when Mr. Flint committed his crime.

The most substantial disadvantage and increase in punishment comes when it is taken into account that the 2007 "return to total confinement to serve the remaining portion of your sentence" sanction was made a requirement. Mr. Flint had imposed upon him the mandatory minimum which was the statutory maximum. To require that the maximum be the minimum punishment has once again made the punishment more onerous. As the Supreme Court noted in Lindsey:

"It would hardly be thought that, if punishment for murder of life imprisonment or death were changed to death alone, the later penalty could be applied to homicide committed before the change. Yet this is only a more striking instance of the detriment which ensues from the revision of a statute providing for a maximum and minimum punishment by making the maximum compulsory."

Lindsey, 301 U.S. 379, 401.

For the above reasons, former RCW 9.94A.737(2) should not be applied to an offender whose underlying offense occurred prior to the stat-

ute's enactment date of July 22, 2007. The effect of doing so violates the Ex Post Facto Clause. U.S. Const., Art. 1, § 9.

E. THE MADSEN/FLINT COMPARISON
(Madsen as it relates to this case)

In both cases, the underlying offense(s) occurred prior to the enactment of the statute in question, the 2007 statute. Madsen's crime was committed in 2004; Flint's crime was committed in 2002. In both cases, the underlying offense that is relevant to the ex post facto inquiry was consummated years before the legislature enacted the 2007 statute.

It is undisputed that in both Madsen and Flint, the third community custody hearing was held after the enactment of the 2007 statute, but as held in Madsen, and admitted by the Department², "punishment for a community custody violation is attributed to the crimes for which a defendant was originally convicted, not to the violation." Madsen, (slip op. at 1).

The similarities continue when we look to the fact that both Madsen and Flint attended their third hearings with recommendation from their community corrections officers of sanctions far less onerous than the ones actually imposed. Sanctions that were authorized under the laws in effect when their underlying offenses were committed. See Madsen, (slip op. at 3). Mr. Madsen's CCO recommended a sanction of sixty days. Mr. Flint's CCO recommended a sanction of only thirty days. Attachment A.

2. See Flint, 83815-1, Response of the DOC to Petitioner's Motion for Discretionary Review, pg. 14 at 2.

That is where the State's reliance on Personal Restraint of Stanphill, 134 Wn.2d 165 (1998) becomes misplaced. In Stanphill, the petitioner could not show that the change affected his punishment because "the Board **retained the same discretion** it had when the crime was committed." Id., at 171 (emphasis added). Here, in both Madsen and Flint, the 2007 statute removed the discretion and **required** a more severe sentence.

The Madsen Court found that, "but for the hearings officer's erroneous reliance on the 2007 statute, 'it is highly probable that a sixty day sanction would have been imposed.'" Madsen, (slip op. at 3). The State did not challenge that finding. Based on DOC's own policy, DOC 320.155 (2002) and DOC 320.155 Attachment 1, both of which were applicable prior to the 2007 statute, it is just as - if not more - "highly probable" that Mr. Flint would have received the recommended thirty day sanction.

Prior to the enactment of the 2007 statute, DOC 320.155 (2002) (and related attachments) entitled "Department of Corrections Community Corrections Division Behavior Sanction Response Guide" ranked community custody violations in four categories, or, "intervention levels": "L" (low), "M" (medium), "H" (high), and "C" (confinement). As stated in the record, and undisputed, Mr. Flint was found guilty of four violations. Three of those violations were ranked as "H" and one violation was ranked as "M". None of Mr. Flint's violations were ranked as "C", or, in other words, carried confinement time as either a recommended sanction³.

3. For a list of sanctions deemed appropriate for violations ranked "H", see Attachment B.

To further the argument that it would have been just as "highly probable" that Mr. Flint would have received the thirty day sanction under pre-2007 law, DOC 320.155 Attachment 1 states that "CCOs must consult with his/her supervisor and obtain approval to impose a sanction that falls above or below the levels shown in this guide." Simply, the CCO wouldn't have even been able to impose **any** confinement time on Mr. Flint without approval. The sanction that Mr. Flint **did** receive, 647 days, was in all reality, a severely exceptional sentence.

So, while the legislature may have allowed for an offender to be transferred to a more restrictive confinement status prior to the 2007 statute, DOC's own policy disavowed it, didn't recommend it, and certainly didn't **require** it. Neither did any state statute ... until former RCW 9.94A.737(2). The new law mandated a punishment far more severe than required under old law. Prior to the 2007 statute, it was virtually unheard of to sanction an offender to serve 647 days⁴ for four violations. Mr. Flint's CCO, Karla Pijaszek of the Bremerton Field Office had never heard of such a thing and noted both her shock and disapproval at the hearing. It becomes even more obvious when taken into consideration that the appropriate sanctions were things such as daily reporting, drug/alcohol treatment, etc.

4. Offenders receiving sanction under the 2007 statute are not allowed to earn or receive any "earned time" on their sanctions. Conversely, offenders receiving sanctions under pre-2007 statutes were entitled to receive sanctions that allowed them to earn thirty-three percent "earned time". The 2007 statute has created the requirement that a mandatory flat-time sanction be imposed. It has, once again, increased the quantum of punishment attached to a crime already committed.

But, basing his decision on the language set forth in the 2007 statute, namely the word "shall", the hearings officer was **required** to reject any recommendation made by the CCO and return Mr. Flint to prison to serve the remaining portion of his 2002 sentence. It was unimportant to the hearings officer how much time was involved. The sanction resulted in an increase of more than 2100% above what the CCO recommended. It is clear that the 2007 statute increased Mr. Flint's punishment beyond what was prescribed at the time of his crime. By over 2100%.

It appears the only real difference between Madsen and Flint is the wildly opposing routes Division(s) One and Two took when presented with virtually identical ex post facto claims. Division One received Madsen as an appeal brought forth by the State subsequent to a June 30, 2008 judgment issued by King County Superior Court. Mr. Madsen had filed a motion under CrR 7.8(b) claiming that the 2007 statute was ex post facto as applied to him. The Honorable Douglas D. McBroom **granted** the motion and in a "Finding of Facts and Conclusions of Law", ordered him immediately released from prison⁵. Agreeing with Madsen, the trial court held that "RCW 9.94A.737(2) is substantive in nature", "RCW 9.94A.737(2) increases the quantum of punishment by removing the discretion from the hearings officer to impose a lesser sanction for a third violation", and "the hearings officer applied RCW 9.94A.737(2) retrospectively in

5. It is unclear exactly how much time Madsen actually served prior to his June 20, 2008 release. Mr. Flint has been in custody since Feb. 4, 2009, approximately 350 days, appealing the unconstitutional application of former RCW 9.94A.737(2) upon him. Mr. Madsen was released because he had "already served more than sixty days", Appendix 1, pg. 4 at 1.

this case". Madsen, KCSC, Finding of Fact and Conclusions of Law, (attached here as Appendix 1). The State appealed.

Eighteen months later, on December 14, 2009, Division One issued the Madsen opinion. They **affirmed** the decision of the trial court. Not only did they reject the State's contention that a CrR 7.8 motion was not the proper remedy (an issue not relevant to Flint), they re-viewed the ex post facto question de novo and ultimately agreed with both Mr. Madsen and the trial court. Relying on two U.S. Supreme Court cases, Division One held that:

"Following Johnson, we conclude that the penalty imposed upon Madsen was punishment attributable to his original offense. Following Lindsey, we conclude that the 2007 statute altered the standard of punishment that existed when Madsen committed his original offense. The Department erred by applying the 2007 statute to Madsen because the effect of doing so violated the prohibition against ex post facto laws."

Madsen, (slip op. at 15).

Conversely, at the same time Division One was reviewing Madsen, Mr. Flint was beginning his pro se personal restraint petition in Division Two. COA# 39212-7-II. Among the issues presented in Flint was a question identical to the one presented in Madsen: Does it violate the Ex Post Facto Clause to apply former RCW 9.94A.737(2) to an offender whose underlying offense occurred prior to the statute's enactment? Mr. Flint even presented some of the same authorities Madsen was eventually decided based on. Authorities such as Johnson. Yet the Acting Chief Judge for Division Two deemed Mr. Flint's petition "frivolous" and dismissed the petition.

For the State, who is the respondent in both Madsen and Flint to

never have spoken up and, as a gesture of good faith, mentioned the fact that neither King County Superior Court nor Division One had found the ex post facto question "frivolous" seems a bit deceptive, distasteful, and unfair. Especially considering that one court had already **held** the application to be ex post facto. Had the State spoken up, they may have saved a lot of time, money, and unlawful restraint. Add to the equation that it was the State who was appealing Madsen, and it becomes apparent that the issue must not be **too** frivolous. But, the State sat by and allowed Flint to be dismissed as frivolous and waited until our Supreme Court brought Madsen to light.

The Acting Chief Judge for Division Two based the dismissal of Flint on the ruling that "[Flint] **does not show** that RCW 9.94A.737(2) is an ex post facto application of the law." Flint, 39212-7-II, Order Dismissing Petition, pg. 2 at 23 (emphasis added). Division Two's decision to not weigh the significance of the issue presented and dismiss as frivolous, left the ex post facto argument open for further and continued interpretation. Division Two never held it to **be** ex post facto, but they never held it **not** to be. They only claimed that Flint didn't "show" it to be.

Two months after the dismissal of Flint, Division One issued the Madsen opinion and, since Division Two chose to sidestep the issue, set precedence and became controlling authority. Unless Madsen is overturned it is good law. Until it is overturned, it is controlling.

Pursuant to the Madsen ruling, Mr. Flint is now being held based

on an unconstitutional application of the law.

F. CONCLUSION

The ex post facto claim raised in both cases is virtually identical. They are so similar that the State felt they could take the CrR 7.8 jurisdiction argument away and submit what was left as briefs in both cases. Why then has Kurt Madsen been fighting this appeal at liberty from the comfort of his home while Mr. Flint has served just under a year pursuant to the same unconstitutional application? Any further confinement is unreasonable and unjust. Any further confinement Mr. Flint has to endure constitutes a complete miscarriage of justice. The statute has already been deemed to violate the Federal Constitution when applied to an offender whose crime occurred prior to July 22, 2007. The State's appeals are only delaying the release Mr. Flint is constitutionally entitled to.

For the above stated reasons, Petitioner respectfully requests this Court to **grant** Mr. Flint's Motion for Discretionary Review. Mr. Flint is still seeking relief from an unlawful restraint.

Respectfully submitted this 27 day of January, 2010.



Eric S. Flint
Petitioner, Pro Se

is an indicator that he has detected an odor of narcotics. The pipe, scale, plastic bags and straw were placed in a bag and secured for evidence.

Officer Gillen returned to Mr. Flint and asked him about the pipe. Mr. Flint admitted the pipe was his, but stated he had not used it. When asked about the scale, plastic bags and straw, Mr. Flint stated he could not explain how they came to be under the seat. While being transported to Kitsap County Jail, Mr. Flint stated, "It's hard not to go out and buy a pound of dope and flood the city with it."

Eric S. Flint came in contact with Officer Justin Gillen on 2/4/2009 while driving his 2004 Hyundai Tiburon in Poulsbo, WA. At that time, he was driving without a valid driver's license and was found to be in possession of drug paraphernalia, contrary to the condition to obey all laws.

On 2/10/2009, I spoke with Officer Justin Gillen of the Poulsbo Police Department. Officer Gillen confirmed the information provided in his report # H09-000142 was true and accurate.

ADJUSTMENT AND SUPERVISION SUMMARY:

Mr. Flint is classified High Violent. His risk factors include attitude/behavior and community employment. He is currently being supervised on First Degree Robbery and Possession of Controlled Substance (methamphetamine) convictions. Besides the instant offenses, Mr. Flint's criminal history includes 3 convictions for Violation of a Protection Order, 2 additional Controlled Substance Violations, 2 Theft convictions, 2 Obstructing convictions, 2 Malicious Mischief convictions, 2 Criminal Trespass convictions, Possession of Stolen Property, Forgery, Criminal Assistance and Burglary. Mr. Flint has an outstanding infraction for Improper Use/Switch/Altered Plates out of Tacoma Municipal Court. He has a court hearing scheduled to address this matter on 3/9/2009. It is expected that Mr. Flint attend this hearing and abide by any Court requirements.

Mr. Flint's adjustment to supervision is guarded. Over the last year, he has appeared at 3 OAA hearings (receiving sanctions at two) and has signed 2 Stipulated Agreements. Mr. Flint completed a Court-ordered substance abuse evaluation 6/4/08 which recommended no treatment at that time. However, given his recent positive urinalysis for methamphetamine, having drug paraphernalia in his vehicle and the statement he made to Officer Gillen about it being "hard not to go out and buy a pound of dope and flood the city with it," it would appear Mr. Flint's risk factors of attitude/behavior are elevated at this time. Therefore, I recommend the following sanctions:

RECOMMENDATION:

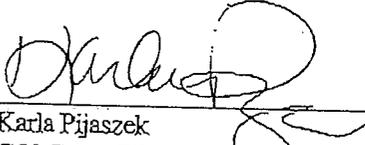
- 30 days confinement with credit for time served.
- Report to assigned CCO within one business day of release and weekly (Wednesdays before 4:00 p.m.) thereafter for four consecutive weeks.

- Obtain an appointment for an updated substance abuse evaluation within 7 days of release. Submit verification to assigned CCO. Follow all treatment recommendations.
- Enroll in Moral Reconciliation Therapy classes within 7 days of release.

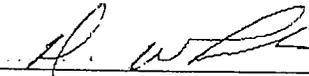
I certify or declare under penalty of perjury of the laws of the state of Washington that the foregoing statements are true and correct to the best of my knowledge and belief.

Submitted By:

Approved By



Karla Pijaszek
COMMUNITY CORRECTIONS OFFICER
Bremerton Field Office
5002 Kitsap Way - Lower Level
Bremerton WA 98312
Telephone (360) 415-5642



Dennis Wheeler
Community Corrections Supervisor

KRP : KRP / 2/9/2009

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forwarded within 72 hours of Hearing.

The contents of this document may be eligible for public disclosure. Social Security Numbers are considered confidential information and will be redacted

Appropriate Sanctions For "H" (high) Violations,

DOC 320.155 Attachment 1 (2002-07) pg. 7

- Daily reporting with option of UA testing
- Daily UA testing
- Detention pending hearing
- Drug/alcohol treatment
- Evaluation and completion of recommended mental health, sexual deviancy, or anger management
- Geographic restrictions

1 II. CONCLUSIONS OF LAW

2 Based on the foregoing Findings of Fact, the Court now draw the following
3 Conclusions of Law.

- 4
- 5 1. The Court has jurisdiction over the Washington State Department of
6 Corrections (DOC) in the above-referenced criminal cause number to hear this
7 motion pursuant to CrR 7.8(b).
8
- 9 2. RCW 9.94A.737(2) is substantive in nature.
10
- 11 3. RCW 9.94A.737(2) increases the quantum of punishment by removing the
12 discretion from the hearing officer to impose a lesser sanction for a third violation.
13
- 14 4. RCW 9.94A.737(2) applies prospectively only.
15
- 16 5. The hearing officer applied RCW 9.94A.737(2) retrospectively in this case.
17
- 18 6. The hearing officer's reliance on RCW 9.94A.737(2) resulted in her sentencing
19 Madsen "to serve the remainder of sentence per 6157."
20
- 21 7. The hearing officer's retroactive application of RCW 9.94A.737(2) violated the
22 ex post facto clause.
23
- 24 8. The hearing officer's retroactive application of RCW 9.94A.737(2) worked a
25 disadvantage to Madsen, who would very likely otherwise have received the sixty day
26 sanction recommended by the DOC CCO.
27
- 28 9. The Community Custody hearing was a "proceeding" for purposes of CrR
29 7.8(b).
30
10. This motion is not barred by RCW 10.73.090 and the defendant has made a
substantial showing the he is entitled to relief. CrR 7.8(c)(2).

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11. The defendant has already served more than sixty days.

Based on the foregoing Findings of Fact and Conclusions of Law, the Court

Ordered the defendant's immediate release from jail and prison on June 30, 2008.

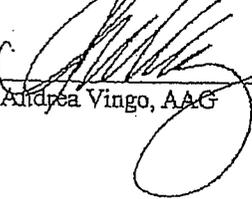
DONE IN OPEN COURT this 20 day June/July, 2008.


The Honorable Douglas McBroom
Judge, King County Superior Court

Presented by:


Juanita E. Holmes, WSBA #15583
Ellis, Holmes & Witchley
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Copy received, approved for entry:


Andreea Vingo, AAG #20183

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I. FINDINGS OF FACT

1. The defendant's offenses of conviction occurred on September 2, 2004.
2. The defendant was sentenced on August 9, 2006.
3. ESSB 6157 was approved on May 15, 2007, effective July 22, 2007.
4. ESSB amended RCW 9.94A.737 to add subsection (2), which reads as follows:

If an offender has not completed his or her maximum term of total confinement and is subject to a third violation hearing for any violation of community custody and is found to have committed the violation, the department shall return the offender to total confinement in a state correctional facility to serve up to the remaining portion of his or her sentence, unless it is determined that returning the offender to a state correctional facility would substantially interfere with the offender's ability to maintain necessary community supports or to participate in necessary treatment or programming and would substantially increase the offender's likelihood of reoffending.
5. A Community Custody hearing was held on April 23, 2008 for the defendant's third violation.
6. At the hearing, the Community Corrections Officer (CCO) recommended a sanction of sixty days.
7. The hearings officer found the violations committed and, relying on RCW 9.94A.737(2), sentenced Madsen "to serve the remainder of sentence per 6157."
8. But for the hearings officer's reliance on RCW 9.94A.737(2), it is highly probable that a sixty day sanction would have been imposed.

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JUN 30 2008

ATTORNEY GENERAL'S OFFICE
CORRECTIONS DIVISION

IN THE SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

KURT RANDALL MADSEN,

Defendant.

) NO. 04-1-06136-5 SEA

) FINDINGS OF FACT AND
) CONCLUSIONS OF LAW ON
) DEFENSE MOTION FOR RELIEF
) FROM PROCEEDINGS

This matter came before the Court pursuant to the *Defense Motion For Relief From Proceeding Pursuant to Cr.R 7.8(b) and Supporting Declaration and Memorandum.*

The Court reviewed pleadings submitted by the defendant through his counsel, Juanita Holmes; and by the Washington State Department of Corrections, through its counsel, Andrea Vingo, Assistant Attorney General for the Office of the Attorney General of Washington, Corrections Divison. A hearing was held on June 27, 2008. At the hearing, the defendant was present in person and by counsel. AAG Andrea Vingo appeared telephonically. The Court having heard argument from counsel, and having considered the pleadings submitted, now makes the following Findings of Fact.