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NO. 61629-3-I

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

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JOSHUA HARRIS,

Respondent,

v.

HON. EDSONYA CHARLES, DIRECTOR OF KING COUNTY ADULT  
DETENTION, and CITY OF SEATTLE,

Appellants.

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BRIEF OF RESPONDENT

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**ORIGINAL**

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**A. ISSUES PRESENTED FOR REVIEW**

1. Should this court dismiss the City's appeal as moot where the Seattle Municipal Court implemented the superior court's order to credit the 140 days of electronic home detention against Harris' 90 day sentence before the City appealed the superior court's order, the City did not obtain a stay of the order granting the writ and acquiesced in the execution of the judgment? Does double jeopardy and due process preclude a court from re-sentencing Harris when he has completed the original sentence?
2. Because he had served the statutory maximum sentence on electronic home detention, Harris would have been illegally detained the moment he set foot in the jailhouse. Under these circumstances, was Harris restrained by the judgement and sentence imposing an illegal jail term and entitled to challenge that sentence by writ of habeas corpus even when he was not yet in jail?
3. Was Harris entitled to credit for 140 days served on pre-trial electronic home detention against his 90 day sentence for DWLS3rd, a simple misdemeanor with a maximum sentence of 90 days in jail? Do equal protection, double jeopardy and due process require credit for pretrial

electronic home detention?

**B. STATEMENT OF THE CASE**

In addition to the statement set forth in the City's brief, Harris provides the following relevant facts.

On March 7, 2008<sup>1</sup>, Seattle Municipal Court Judge Edsonya Charles sentenced Harris to 90 days in jail for DWLS 3rd degree<sup>2</sup> consecutive to a 90 day suspended sentence for driving without an ignition interlock device. CP 13. The judge refused to credit Harris credit with the 140 days he served pre-adjudication on electronic home detention. CP 14<sup>3</sup>. Harris was ordered to report to jail on April 9. Harris filed a writ of habeas corpus on March 31, 2008. His petition alleged the denial of credit for time served on electronic home detention violated his right to equal protection of the law. CP 5-7.

The writ was heard on April 4. The superior court granted the writ on

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<sup>1</sup>The docket lists the date of sentencing as March 7, but the date on the judgement and sentence is March 8. CP 9, 13.

<sup>2</sup>90 days is the statutory maximum jail term for this crime. SMC 11.56.320(D); SMC 12A.02.070.

<sup>3</sup>Electronic home detention was imposed in addition to \$5,000 bail, which Harris posted. He was not released until the home detention was arranged. CP 11-13. The electronic home detention device included a breathalyzer. CP 2, 11.

April 7 and ordered the Seattle Municipal Court to credit Harris the electronic home detention against his 90-day jail term. CP 38-39. The City did not seek a stay of the superior court order. On April 8, 2008, Judge Charles complied with the order and credited Harris with 90 days time served.

Appendix 1. Consequently, Harris jail sentence was completed.

The City filed a notice of appeal from the superior court's order on May 5, 2008.

### **C. AUTHORITY AND ARGUMENT**

- 1. The City's appeal should be dismissed as moot because no relief can be granted. Double jeopardy prevents re-sentencing and remanding Harris into custody because he has a legitimate expectation in the finality of his completed sentence.**

This court should dismiss the City's appeal because it is moot and re-sentencing would constitute double jeopardy under the facts of this case.<sup>4</sup>

State v. Veazie, 123 Wash.App. 392, 397-98, 98 P.3d 100 (2004). A question is moot when the court cannot grant relief. State v. Turner, 98 Wash.2d 731, 733, 658 P.2d 658 (1983). This court cannot grant the City the

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<sup>4</sup>RAP 10.4(d) permits a party to include in its brief a motion which disposes of the appeal.

relief sought: to take away the credit for the time served on electronic home monitoring, re-sentence him to 90 days in jail and remand him into custody. Under the facts of this case, re-imposition of the 90 day jail term would violate the constitutional prohibition against double jeopardy.

The constitutional prohibition against multiple punishments may prevent the government from re-sentencing a defendant.<sup>5</sup> State v. Hardesty, 129 Wn.2d 303, 310, 915 P.2d 1080 (1996). Double jeopardy and due process protect a defendant's legitimate expectation of finality in the original sentence. Hardesty, 129 Wn.2d at 312, citing DeWitt v. Ventetoulo, 6 F.3d 32 (1<sup>st</sup> Cir. 1993), cert. denied, 114 S.Ct. 1542 (1994).

[T]he defendant acquires a legitimate expectation of finality in a sentence, substantially or fully served, *unless the defendant is on notice the sentence might be modified due to either a pending appeal or the defendant's own fraud in obtaining the erroneous sentence.*

.....

What matters for purposes of double jeopardy is not the *legality or illegality of the sentence* under the sentencing statute, but the defendant's expectation of finality.

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<sup>5</sup>Washington's state double jeopardy clause is interpreted in the same manner as the federal provision. Hardesty, 129 Wn.2d at 310, note 2.

(emphasis added) Hardesty, 129 Wn.2d at 312-13, 315. A defendant's expectation of finality is determined in each case by examining a number of factors such as the completion of the sentence, the passage of time, the pendency of appeal or review, or the defendant's misconduct. Id. at 311. *See also State v. Traicoff*, 93 Wn.App. 248, 256, 967 P.2d 1277 (1998) (no reasonable expectation of finality in portion of sentence –community placement– Traicoff had not yet begun to serve); State v. H.J., 111 Wn.App. 298, 304-05, 44 P.3d 874 (2002) (no expectation in finality where juvenile had served only one month of 24 month period of supervision).

Here, the superior court granted Harris' writ of habeas corpus on April 7, 2008. The City did not seek a stay of the order. The next day, the municipal court held a hearing to implement the order. Appendix 1. The City was represented by the same Assistant City Attorney who responded to the writ. The municipal court complied with the superior court's order. The judge gave Harris credit for 140 days of electronic home detention against his 90 day sentence, and struck the jail report date. At this point, Harris had

completed his sentence.<sup>6</sup> Then the City appealed the superior court's order granting the writ.

Generally, double jeopardy is not implicated where the government files a timely appeal from an allegedly lenient sentence. State v. Freitag, 127 Wash.2d 141, 145, 896 P.2d 1254 (1995). In *Freitag*, "[t]he State immediately appealed the trial court's erroneous sentence putting Freitag on notice that her sentence was not final." Id. But in the case at bar, the City's subsequent appeal does not prevent Harris' legitimate expectation in the finality of his sentence for three reasons.

First and foremost, Harris completed his sentence. On April 7, 2008, the municipal court credited him with the time he served on electronic home monitoring. Harris' obligation to the court was satisfied. His 90-day jail term was completed. He legitimately expected his sentence was final.

Second, the City took no action to prevent the superior court's order from being implemented by the municipal court. The City did not seek a stay

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<sup>4</sup>The parties also agreed to dismiss Harris' appeal from the sentence as moot because Harris obtained the relief sought by his successful writ in superior court which was executed by the municipal court. Appendix 2.

of the order pending a subsequent appeal. Rather, the City stood by as the sentencing judge executed the superior court's judgment and credited Harris with sufficient time to satisfy his entire jail sentence. At that point, Harris had no expectation that the City would seek to undo what had been completed. While the City has a statutory right to appeal the superior court's judgment as a final order pursuant to RAP 2.2(a)(1), the City filed the appeal only after the superior court judgment had been executed. The City's appeal from the writ – absent any effort to prevent the implementation of the superior court's order and in light of the acquiescence to the execution of that judgment– comes too late to divest Harris of his legitimate expectation of finality in his completed sentence.

Third, *Freitag* and similar cases are inapplicable because the sentencing scheme and related court rules expressly authorized the prosecution to appeal a sentence. *Id.* See also RCW 9.94A.585(2); RAP 2.2(b)(6); State v. Pascal, 108 Wn.2d 125, 137, 736 P.2d 1065 (1987). In contrast, the prosecution has no right to appeal sentences imposed by courts of limited jurisdiction.

The government may not appeal in a criminal case unless specifically authorized by court rule or statute. State v. AMR, 147 Wn.2d 91, 95, 51 P.3d 790 (2002)<sup>7</sup>; State v. Smith, 117 Wn.2d 263, 270, 814 P.2d 652 (1991).

Prudential concerns, and the humanity of the law require legislators to speak in a clear voice when giving the government the right to appeal a criminal case.

(Citations omitted.) AMR, 147 Wn.2d at 95. The government's ability to appeal, when granted, is strictly construed. State v. Rock, 9 Wn.App. 826, 829, 515 P.2d 830 (1973), rev. denied, 83 Wn.2d 1007 (1974). There is no statute, court rule or case that grants "in a clear voice" the government the right to appeal sentences imposed by courts of limited jurisdiction. Unlike RAP 2.2, RALJ 2.2 does not authorize the government to appeal a criminal sentence. While the RALJ generally allow an "aggrieved party" to appeal a "final decision," the same rule then specifically restricts the government's right to appeal in criminal cases. RALJ 2.1(a); RALJ 2.2(a) and (c). RALJ

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<sup>7</sup>The United States has an "important tradition disfavoring criminal appeals by the sovereign." Arizona v. Manypenny, 451 U.S. 2332, 244, 101 S.Ct. 1657, 68 L.Ed.2d 58 (1981), cited in State v. AMR, 147 Wn.2d 91, 51 P.3d 790, 792 (filed August 8, 2002). The Washington Constitution grants criminal defendants the right to appeal, but gives no corresponding right to the State. State v. Miller, 82 Wash. 477, 478, 144 P. 693 (1914); State v. Johnson, 24 Wash. 75, 76, 63 P. 1124 (1901).

2.2(c) permits the prosecution to appeal in criminal cases "only" in the types of decisions listed. RALJ 2.2 (c)(1)-(4). The list is exclusive and does not authorize government appeal any sentences.

The facts of this case support Harris' expectation of finality in the sentence. Harris completed his sentence, the City acquiesced in the implementation of the superior court's order granting the writ and did not seek a stay and the City has no right to appeal a sentence all support. The City's subsequent appeal of the executed order granting the writ does not operate to divest Harris of the finality of his sentence.

2. **Harris was not required to submit to illegal incarceration in order to challenge his unlawful sentence by writ of habeas corpus. The judgement and sentence imposing a 90-day jail term and denying credit for time served on pre-trial electronic home monitoring was a *restraint* subject to challenge by writ of habeas corpus.**

Every person *restrained* of his liberty under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of the restraint, and shall be delivered therefrom when illegal. (Emphasis added) RCW 7.36.010.<sup>8</sup>

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<sup>8</sup>The right to challenge an unlawful restraint by writ of habeas corpus in superior court is guaranteed by the Washington Constitution, const. art. 4, sec. 6, and by statute RCW 7.36. The habeas writ guarantees, among other things, the right to challenge a restraint imposed

“Restraint” is not limited to physical incarceration or conditions of release. Future or potential adverse consequences are also actionable restraints under the law. This is the modern scope of habeas relief as delineated in *Born v. Thompson*, 154 Wn.2d 749, 763-767, 117 P.3d 1098 (2005). Applying *Born* here, Harris was illegally restrained by the municipal court’s judgment and sentence imposing a 90-day jail term and denying credit for 140 days served. Because he had already served his entire sentence, he would have been illegally detained the moment he set foot in the jailhouse. Harris was entitled to challenge his sentence by writ of habeas corpus.

The City erroneously asserts that Harris was not restrained by the municipal court’s judgment and sentence imposing a 90-day jail term and ordering him to report to jail. The City acknowledges the rule in *Born* and *Butler v. Kato*, 137 Wn.App. 515, 154 P.3d 259 (2007) -- that a person need not be in-custody to petition for habeas relief-- and then incongruously asserts that “actual or physical restraint” is required. Brief of Appellants at

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in violation of the state and federal constitutions. *In re Runyan*, 121 Wn.2d 432, 441-43, 853 P.2d 424 (1993) (legislature expanded relief in 1947); *Smith v. Whatcom County District Court*, 147 Wn.2d 98, 113, 52 P.3d 485 (2002), citing RCW 7.36.140.

5. The City ignores the modern scope of habeas relief and relies instead on ancient cases which are superceded by *Born*.

The *Born* court defined *restraint* as used in the habeas statute. Born petitioned for a writ of habeas corpus to challenge the district court's finding that he committed a "violent act," the predicate for misdemeanor competency restoration. Born, 154 Wn.2d at 751. Born was held in the county jail at the time the writ was heard and denied by the superior court; he was then transferred to Western State Hospital. Born appealed, but he was released from custody and the prosecution against him was dismissed by the time his appeal was heard. Born, 154 Wn.2d at 753, note 5. On appeal, Born argued that he was still restrained for purposes of habeas relief because the "violent act" finding could be used to commit him for restoration the next time he is charged with a misdemeanor and found incompetent. The fact that he was no longer incarcerated did not preclude habeas relief, he argued, and the potential consequences were sufficient restraint under RCW 7.36.010. Born, 154 Wn.2d at 763-64.

The Washington Supreme Court agreed. *Born* held that "restraint"

has evolved to cover more than immediate physical or other deprivation liberty. *Born* traced the evolution of the term “restraint” from *Monohan v. Burdman*, 84 Wn.2d 922, 925, 530 P.2d 334 (1975) to *In re PRP of Mines*, 146 Wn.2d 279, 45 P.3d 535 (2002), concluding with the pronouncement in *In re PRP of Powell*, 92 Wn.2d 882, 602 P.2d 711 (1979), “release from confinement is no longer the sole function of the writ of habeas corpus.” *Born*, 154 Wn.2d at 766, quoting *Powell*, 92 Wn.2d at 887.<sup>9</sup>

*Born* adopted the rationale from *Monohan*. *Born*, 154 Wn.2d at 763.

*Monohan* held that habeas relief was available where the petitioner’s tentative parole release date was canceled without due process. The court first determined “parole status constitutes is a form of custody within the reach of habeas corpus relief.” *Monohan*, 84 Wn.2d at 925.<sup>10</sup> The court then observed the cancellation of the release date may have the “collateral

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<sup>9</sup>The City wrongly asserts that *Powell* is inapposite here because it involved a personal restraint petition. Brief of Appellants at 5. *Born* relies upon and quotes this statement from *Powell* in delineating the scope of the “restraint” sufficient for habeas relief. *Id.*

<sup>10</sup> This is so because a parolee, unlike the ordinary citizen, is subject to supervision by his parole office, limited in his mode, manner, and place of living and travel, restricted as to his associates and type of employment, and subject to re-incarceration in the event of a breach of any condition of his parole. Thus, he is not a free man in the commonly accepted sense. *Id.*

consequence” of effecting future decisions of the parole office or sentencing judge. Such potential consequences are sufficient “to retrieve his [habeas] petition from the ‘limbo of mootness.’” Monohan, 84 Wn.2d at 924, *quoted in Born*, 154 Wn.2d at 765.

*Born* took two lessons from *Monohan*. First, the predicate “restraint” for habeas relief addresses the problem of mootness. Second, mootness is defeated when the habeas petitioner is subject to the authority of the court which retains jurisdiction to incarcerate the petitioner. These precepts have been carried over into the “restraint” necessary to maintain a personal restraint petition. Born, 154 Wn.2d at 763-65.

Moreover, *Born* dismissed the same arguments the City advances here. There the State also argued habeas relief was not available because *Born* was not presently detained or restrained and the writ cannot be used to address a future event. Born, 154 Wn.2d at 765-66.<sup>11</sup> The court rejected the

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<sup>11</sup>In support of its argument, the State cited to cases similar to those relied upon by the City here, like *Proll v. Morris*, 85 Wn.2d 274, 534 P.2d 569 (1975) which held “[t]he question on an application for a writ of habeas corpus is the legality of detention, and the remedy where detention is held illegal is release” and that the “writ will not issue where it can have no effect on the petitioner’s custodial status.” Born, 154 Wn.2d at 765-66, quoting *Proll*, at 277.

state's theory and authorities. "These statements do not state the present function of the writ of habeas corpus. As noted, 'release from confinement is no longer the sole function of the writ of habeas corpus.' Powell, 92 Wash.2d at 887, 602 P.2d 711." Born, 154 Wn.2d at 766. The court distinguished the federal cases cited, noting the federal habeas statute requires the petitioner to be "in custody" and Washington's statute requires only "restraint." Born, 154 Wn.2d at 765. The court concluded that Born was "sufficiently under a present restraint to seek habeas relief" because a future court could commit him for restoration based on the "violent act" finding he challenged in his petition. Id.

*Born* controls here. If the *potential* adverse consequence of competency restoration commitment was a sufficient restraint to support a habeas writ, then a jail term imposed by a final judgment and sentence that will certainly be served is also an actionable restraint. Because he had served the statutory maximum sentence on electronic home monitoring, Harris would be illegally detained the moment he was booked into jail and started to serve the illegal sentence. Harris was subject to the court's

judgment and sentence and order to report to the jail. Thus, he was “sufficiently under present restraint to seek habeas relief.” Born, 154 Wn.2d 766. See also Butler v. Kato, 137 Wn.App. 515, 520-21, 154 P.3d 259 (2007) (habeas writ brought to challenge conditions of pretrial release).

The City summarily dismisses the controlling cases, *Born* and *Powell*, and relies instead upon a number of ancient cases. The most recent of which was decided decades before *Monohan* and *Born* delineated the modern scope of habeas relief.<sup>12</sup> The “actual and physical restraint” limitation on habeas relief in *Ex parte Powell*, 191 Wash. 152, 153 70 P.2d 778 (1937) is now longer the law.<sup>13</sup> The City’s reliance on *State v. Eichman*, 69 Wn.2d 327, 335-366, 418 P.2d 418 (1966) is also misplaced. *Eichman*, who was being held on a valid superior court judgment, sought to challenge

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<sup>12</sup>The scope of statutory habeas relief has “changed over time in Washington.” In re Petition of Runyan, 121 Wash.2d 432, 443, 853 P.2d 424 (1993). In 1947, the Legislature expanded the scope of inquiry in habeas cases to allow scrutiny into the facts and process behind the judgment where the petitioner alleged a constitutional violation. RCW 7.36.130(1); see also Palmer v. Cranor, 45 Wash.2d 278, 273 P.2d 985 (1954).

<sup>13</sup>It should also be noted that the petitioners in *Ex parte Powell* were challenging their guilty pleas entered before a justice of the peace. At the time the writ was filed, petitioners had appealed to the superior court, were awaiting a trial *de novo* in the superior court, and had been released on bail.

his justice court conviction for violation of his right to counsel. The court declined to hear the writ because Eichman had been released on the justice court matter and did not face any further incarceration on that matter. Eichman, 69 Wn.2d at 336.<sup>14</sup> In contrast, when Harris filed his writ he faced certain incarceration under the challenged sentence.

The City's main contention is that Harris may not challenge the 90-day sentence imposed on this case until he had served the unchallenged 30-days sentence imposed on the probation case. Brief of Appellants at 7. The cases the City relies upon here were discredited and rejected in *Palmer v. Cranor*, 45 Wn.2d 278, 273 P.2d 985 (1954). There the warden raised the same objection raised by the City here: the habeas petitioner could not "attack a subsequent judgment and sentence until the expiration of the first judgment and sentence." Id. at 283. The court observed, "[t]he logic of respondent's

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<sup>14</sup>Also, no objective evaluation of the merits could be made because the justice court was not a court of record. The court opined that Eichman's remedy was to appeal. Id. Since then, the Washington courts have held that habeas relief may not be conditioned upon the exhaustion of any other remedy, including an appeal. Toliver v. Olsen, 109 Wn.2d 607, 610, 746 P.2d 809 (1987); Weiss v. Thompson, 120 Wn.App. 402, 407, 85 P.3d 944 (2004) ("that the court erred in denying Weiss's application for habeas corpus relief because such relief is not conditioned on appeal his criminal conviction.")

argument is unassailable if the *sole* purpose of a writ of *habeas corpus* is to seek release from confinement. No matter what the rule is elsewhere, the fact remains that we have on numerous occasions denied release of a petitioner under the writ [but granted other relief].” Palmer, 45 Wn.2d at 284 (emphasis in original). The court rejected the warden’s position. “The rule for which respondent contends, based upon the *ober dictum* of the *Grant*<sup>15</sup> case, *supra*, cannot be controlling under the facts of this case and our existing statutes. It should not be so applied as to destroy constitutional safeguards.” Palmer, 45 Wn.2d at 285. “To hold that a court of competent jurisdiction cannot examine this question [whether his plea was coerced] until the expiration of his first sentence, would [] vitiate the statutes . . . .” Id. *Accord Nahl v. Delmore*, 49 Wn.2d 318, 321, 301 P.2d 161 (1956).

Harris was “restrained of his liberty under any pretense whatever” by the municipal court’s sentence and was entitled to “prosecute a writ of habeas corpus to inquire into the cause of the restraint and [] be delivered therefrom

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<sup>15</sup>Grant v. Smith, 24 Wash. 839, 167 P.2d 123 (1946). *Palmer* further distinguished *Grant* and *In re Miller*, 129 Wash, 538, 225 Pac. 429 (1924) because those cases were decided before the 1947 amendments to the habeas statute. Id.

where illegal.” RCW 7.36.010. The superior court correctly relieved him of the illegal restraint and should be affirmed.

**3. Equal protection, double jeopardy and due process require that Harris receive credit for the 140 days he served on pre-trial electronic home detention against the 90-day statutory maximum sentence.**

In his habeas petition, Harris claimed the municipal court denied him equal protection of the law by refusing to credit electronic home detention against his 90-day statutory maximum sentence. CP 5-7. The superior court properly granted the writ of habeas corpus, finding that Harris was entitled to the same credit for pre-trial electronic home detention as provided to most felons. CP 38-39. This court can affirm the superior court on this basis and any other reason supported by the law and the record. State v. Bobic, 140 Wn.2d 250, 258, 996 P.3d 610 (2000); State v. Michielli, 132 Wn.2d 229, 242-43, 937 P.2d 587 (1997).

Credit for time spent on detention prior to trial, conviction and sentencing against statutory maximum jail terms is guaranteed by due process and equal protection of the law and the prohibition against multiple

punishments. Reanier v. Smith, 83 Wn.2d 342, 346, 517 P.2d 949, 953 (1974). Double jeopardy guarantees the offender will not serve more time in confinement than is provided by law. Reanier, 83 Wn.2d at 347 note 4.

"Pre-trial detention is nothing less than punishment. An unconvicted accused who is not allowed or cannot raise bail is deprived of his liberty." Reanier, 83 Wn.2d at 349. This analysis applies not only to indigent persons who cannot post bail. "Whether the pretrial confinement be occasioned by the inability to post bail or the individual's inability to 'otherwise procur(e) his release from confinement prior to trial', *Reanier* requires that credit for time served be granted against the individual's maximum sentence." In re petition of Phelan, 97 Wash.2d 590, 594, 647 P.2d 1026 (1982) (Phelan I) Washington courts adopted the double jeopardy analysis from the *North Carolina v. Pearce*. "[T]he constitutional guarantee against multiple punishments for the same offense absolutely requires that *punishment already exacted* must be fully 'credited' in imposing sentence upon a new conviction for the same offense." (Emphasis added.) State v. Phelan, 100 Wash.2d 508, 671 P.2d 1212 (1983) (Phelan II), citing North Carolina v. Pearce, 395

U.S. 711, 718-19, 89 S.Ct. 2072, 2077, 23 L.Ed.2d 656 (1969). Prior detention must be credited to any sentence imposed. Id. This is particularly true when the statutory maximum punishment has been imposed and served.

The constitutional violation is flagrantly apparent in a case involving the imposition of a maximum sentence after reconviction.... Though not so dramatically evident, the same principle obviously holds true whenever punishment already endured is not fully subtracted from any new sentence imposed.

Pearce, 395 U.S. at 718, *quoted in Phelan*, 100 Wn.2d at 515. “This language mandates credit not only against maximum and mandatory minimum terms but against discretionary minimum terms as well.” Phelan, 100 Wn.2d at 515, *citing also State v. Shannon*, 60 Wash.2d 883, 890-91, 376 P.2d 646 (1962). *Phelan II* rejected the argument—proffered here by the City—that pre-trial conditions of release or detention cannot be classified as punishment.

It was multiple punishment, not multiple rehabilitation, which concerned the court in *Pearce*. Similarly, *while presentence incarceration may not technically be considered punishment*, we doubt that a convicted defendant makes any distinction. Accord, Schornhorst, *Presentence Confinement and the Constitution: The Burial of Dead Time*, 23 *Hastings L.J.* 1041, 1067-69 (1972).

(Emphasis added.) Phelan, 100 Wn.2d at 515. In Washington, it is established that an offender must get credit against a sentence for all time spent in jail, but no credit is guaranteed for merely being subject to the usual probation conditions. State v. Hultman, 92 Wash.2d 736, 600 P.2d 1291 (1979); In re Phelan, 97 Wash.2d 590, 647 P.2d 1026 (1982) (Phelan I). *See also* State v. Vasquez, 75 Wn.App. 896, 881 P.2d 1058 (1994) (no constitutional arguments made in unsuccessful attempt to obtain credit against jail sentence where defendant was released to his home, ordered to be there when not at work and subject only to occasional visits from the police).

Under any definition, electronic home detention qualifies as detention and punishment. Our statutes require that persons charged and convicted of felonies get credit for time served on pretrial and post-conviction electronic home detention. RCW 9.94A.505(6); RCW 9.94A.030(11), (30). Furthermore, credit for time served on pretrial and post-conviction electronic surveillance is given to certain defendants convicted of DUI. SMC 11.56.025; RCW 46.61.5055. Harris was sentenced to the statutory maximum of 90 days for a DWLS 3<sup>rd</sup> degree charge. He was required to post

\$5,000 bail in addition to the electronic detention to secure his release from total confinement. He completed 140 days of pretrial electronic home detention and was initially not given any credit for time served. Under the original sentence, not only did Mr. Harris not get credit for any time served on electronic home detention, but he also served 50 days more than necessary. This is "dead time" might not be credited towards any jail sentence.

Clearly, if a defendant convicted of a DUI can be given time served for electronic home surveillance, then a defendant who is charged with a simple misdemeanor should be afforded the same right. Where the applicable law does not require a term of imprisonment in jail, a person serving a DUI sentence is eligible to receive credit for electronic home detention. City of Bremerton v. Bradshaw, 121 Wn.App. 410, 88 P.3d 438 (2004).

Equal protection requires Harris be given credit for time served for pre-trial electronic home detention on his sentence. State v. Anderson, 132 Wn.2d 203, 213, 937 P.2d 581 (1997). Where the law permits credit for pretrial electronic surveillance, then equal protection requires that credit be

given for post-trial home detention. The Supreme Court of Washington held in *Anderson* that, "the equal protection clause requires defendants under post-trial electronic home monitoring to likewise receive credit for time served." Anderson, 132 Wn.2d at 213, 937 P.2d 581.

While the status of each group may be different in terms of their presumption of innocence, the condition of each group-being subject to electronic home detention-is identical. Additionally, the reasons for placing a defendant from either group under electronic detention are indistinguishable. Since the Legislature has chosen to grant jail time credit to those who serve pretrial electronic home detention... equal protection requires the same credit to be granted to those who serve electronic home detention after their conviction and pending their appeal." Id.

Similarly, there is no rational reason to distinguish between confinement on post-conviction electronic home detention for a felony charge and confinement on pre-trial home detention for a simple misdemeanor charge. If the Supreme Court of Washington makes no distinction between defendants who are constitutionally presumed innocent while serving time on electronic home detention prior to trial, and defendants who have been convicted of a crime pending appeal, certainly the equal protection clause

requires no distinction between post-conviction defendants on home surveillance for a felony charge and pretrial defendants on electronic home detention for a misdemeanor charge. All defendants should be given credit for time served on pretrial home monitoring unless prohibited by statute.

The City asserts that misdemeanants and felons are never similarly situated with respect to sentencing. Brief of Appellant at 16. Clearly that is not true with respect to the constitutional protections that ensure credit for jail time against the sentence imposed. They are treated the same under the law as set forth above, and there is no rational basis to permit felons credit for time served on electronic home detention and not those serving a sentence on a simple misdemeanor. *State v. Bowen* illustrates this point.

*Bowen* held that misdemeanants were not entitled to equal protection of SRA standard range sentences imposed for the felony that corresponded to a particular misdemeanor. *State v. Bowen*, 51 Wn.app. 42, 45-47, 751 P.2d 1226 (1988). But presumptive SRA sentences are not guaranteed; the determinative sentencing scheme still requires judges to exercise discretion in choosing the sentence. “While the SRA structures the discretion to

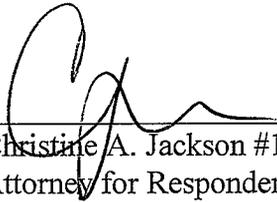
sentence, it does not eliminate it. RCW 9.94A.010. The court has discretion to impose a sentence outside the presumptive range 'if it finds, considering the purpose of [the SRA], that there are substantial and compelling reasons justifying an exceptional sentence'. RCW 9.94A.120(2). Thus, since discretion may still be exercised, the felon is not guaranteed a sentence within the presumptive range." Bowen, 51 Wn.App. at 46. Also, the court noted the significantly stiffer consequences a convicted felon suffers compared with a misdemeanor. Id.

In contrast, neither state law nor the constitution delegates to the judges' discretion to grant or deny a felon credit for time served on pre- or post-trial electronic home monitoring. Also, electronic home detention bears a greater relationship to the rehabilitative goals of misdemeanor sentencing, than it does to the primary goal under the SRA, punishment. Electronic home detention with breathalyzer will assist the court's to rehabilitate the offender by restricting access to high crime areas and deter the use of alcohol that may induce objectionable or criminal behavior.

**E. CONCLUSION**

The City's appeal is moot because relief cannot be granted without violating the prohibition against double jeopardy. Nonetheless, this court should affirm the superior court because it correctly granted the writ. The illegal sentence was subject to challenge by writ of habeas corpus and Harris was entitled to credit 140 days of electronic home detention against his 90-day jail term.

Respectfully submitted this 23<sup>rd</sup> day of January, 2009,



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Christine A. Jackson #17192  
Attorney for Respondent

## APPENDIX 1

MUNICIPAL COURT OF SEATTLE  
DOCKET

r295002

Case Status: OPEN Jurisdiction EndDate: 08/16/2010

CITY OF SEATTLE, Plaintiff

\*\* OPEN \*\*

Vs.

HARRIS, JOSHUA , Defendant

Address: 17815 105TH PL SE #M201  
RENTON, WA 98055  
425 228/1909 (Home)

Case No: 513854  
File Loc: REC  
Def No: 78528  
Incident No: 7429067  
Custody: OUT  
Rltd Grp No:  
Co-Def's:

DOB: 09/15/1962 Age: 46 Sex: M Race: B Lang:

Sentencing Judge: CHARLES, EDSONYA  
Prosecutor:  
Defense Attorney: PERKINS, ABBEY  
Interpreter:

ACA 206 624/8105

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\*\* Charges \*\*

Chrg Doc No: 10559099 Type: BK Viol Date: 10/19/2007 Filing Date: 10/19/2007

Chrg 1: LICENSE, DRIVER, SUSP./REVOKED THIRD DEGREE  
11.56.320(D) Plea: G Find: G Status: SS  
Disposition: SUSPENDED SENTENCE

BAIL BAIL NOT FORFEITABLE SXP  
Start:10/20/2007 Due:10/20/2007 End:  
Amt:5,000 Susp: Curr:  
Rmks:10/20/07 \$5000 BAIL - AND- EHMB. RELEASE TO BI ONLY

BAIL BAIL NOT FORFEITABLE NXB  
Start:10/19/2007 Due:10/19/2007 End:10/20/2007 APPEARED IN COURT  
Amt:500 Susp: Curr:

CRAS CRIMINAL TRAFFIC ASSESSMENT FEE SXP  
Start:03/07/2008 Due:03/18/2008 End:  
Amt:43 Susp: Curr:43 Time Pay: OTA

FINE PAY FINE SXP  
Start:03/07/2008 Due:03/07/2008 End:  
Amt:1,000 Susp:1,000 Curr:

JAIL COMPLY WITH JAIL SENTENCE SXP  
Start:03/07/2008 Due:08/16/2010 End:  
Jail:90 Susp: Unit:Days Cfts:N  
Rmks:3/7/08: JUDGE RECOMMENDS WORK RELEASE, TO RUN  
CONSECUTIVELY TO EACH COUNT AND CASE 409400

Chrg Doc No: 10559100 Type: BK Viol Date: 10/19/2007 Filing Date: 10/19/2007

Chrg 2: OPERATING MOTOR VEHICLE WITHOUT IGNITION INTERLOCK  
11.56.350 Plea: G Find: G Status: SS  
Disposition: SUSPENDED SENTENCE

BAIL BAIL NOT FORFEITABLE NXB  
Start:10/19/2007 Due:10/19/2007 End:10/20/2007 APPEARED IN COURT  
Amt:250 Susp: Curr:

FINE PAY FINE SXP  
Start:03/07/2008 Due:03/18/2008 End:  
Amt:1,000 Susp:800 Curr:200 Time Pay: OTA

JAIL COMPLY WITH JAIL SENTENCE SXP  
Start:03/07/2008 Due:08/16/2010 End:  
Jail:90 Susp:90 Unit:Days Cfts:N  
Rmks:3/7/08: TO RUN CONSECUTIVELY TO EACH COUNT AND CASE  
409400

Chrg 3: OPERATING MOTOR VEHICLE WITHOUT IGNITION INTERLOCK  
11.56.350 Plea: Find: Status: NC  
Disposition: NO COMPLAINT FILED

BAIL BAIL NOT FORFEITABLE CXT  
Start:10/19/2007 Due:11/18/2007 End:10/20/2007 NO COMPLAINT FILED  
Amt:500 Susp: Curr:

Other Case Obligations:

CCFE CRIMINAL CONVICTION FEE SXP  
Start:03/07/2008 Due:03/18/2008 End:  
Amt:43 Susp: Curr:43 Time Pay

CADD REPORT ADDR CHANGE TO COURT IN WRITING W/IN 24HR SXP  
Start:03/07/2008 Due:08/16/2010 End:

EHMB ELECTRONIC HOME MONITORING WITH TEST EQUIPMENT TSD  
Start:10/20/2007 Due:04/17/2008 End:11/05/2007 OBL CORRECTION  
Rmks:10/20/07:EHMP WITH BAC, IN ADDITION TO BAIL  
10/22/07:DEFENDANT ENROLLED

EHMP EHM PRIOR TO ADJUDICATION JMM  
Start:10/22/2007 Due:04/20/2008 End:03/07/2008 OBLIGATION COMPLETED  
Rmks:WITH BAC

NCLV NO CRIMINAL LAW VIOLATIONS SXP  
Start:03/07/2008 Due:08/16/2010 End:

NVOI COMPLY NOT DRIVE W/OUT VALID LIC OR INSURANCE SXP  
Start:03/07/2008 Due:08/16/2010 End:

OTHR OTHER OBLIGATION JMM  
Start:10/20/2007 Due:04/17/2008 End:03/07/2008 OBLIGATION COMPLETED  
Rmks:10/20/07 CONDS OF RELEASE: NCLV, NARO, NDRO, NO  
DRIVING, ABST, DONT & EHMB

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 \*\* Scheduled Hearings \*\*  
 -----

S	Date	Time	Ctrrm	Type	Tape	Judge	Prosecutor	Date	Clk
H	10/20/2007	10:05	KCJ2	ICA		EISENBERG, A	SALA, T	10/19/2007	TMO
H	11/05/2007	9:00	1101	IPTH		CHARLES, E	SANDERS, M	10/20/2007	NXB
H	01/07/2008	9:00	1101	PTH		CHARLES, E	DORN, S	11/05/2007	TSD
H	03/07/2008	9:00	1101	SENT		CHARLES, E	GRANT, J	01/07/2008	TSD
H	03/14/2008	9:00	1101	MOTION		CHARLES, E	GRANT, J	03/13/2008	TSD
H	04/08/2008	9:00	1101	SENT		CHARLES, E	GREENE, R	04/07/2008	TSD
C	04/09/2008	8:45	1101	J-REV				03/14/2008	TSD

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 \*\* Events \*\*  
 -----

Date	Description	Clk
10/19/2007	DEFENDANT BOOKED. BA# 207044915	TMO
10/19/2007	IN-CUSTODY ARRAIGNMENT SCHEDULED FOR 10/20/2007 AT 1005 IN COURTROOM KCJ2	TMO
10/19/2007	CHARGE # 3 115635000 (NO INTERLOCK) PENDING	TMO
10/20/2007	CHARGE # 3 115635000 (NO INTERLOCK) NO COMPLAINT FILED	CXT
10/20/2007	DF: HARRIS, JOSHUA (78528) PRESENT CLK; NDB DL; 12:41 ATTY; J. KVISTAD DEFENSE MOTION FOR RELEASE - DENIED CITY MOTION TO SET BAIL - GRANTED	NXB
10/20/2007	DEF SCREENED-CASE REFERRED TO ACA FOR ASSIGNMENT	NXB
10/20/2007	PROBABLE CAUSE FOUND BY COURT	NXB
10/20/2007	CHARGE # 1 11563200D (SUSP.OL.3RD) NOT GUILTY PLEA ENTERED	NXB
10/20/2007	CHARGE # 2 115635000 (NO INTERLOCK) NOT GUILTY PLEA ENTERED	NXB
10/20/2007	IN CUSTODY PRE-TRIAL HEARING SCHEDULED FOR 11/05/2007 AT 900 IN COURTROOM 1101	NXB
10/24/2007	UPDATE CIT# -SCAN. (CS EVENT)	EXR
10/26/2007	EHM ENROLLMENT REPORT/EHM STARTED 10/22/07	MXB
11/05/2007	DF: HARRIS, JOSHUA (78528) PRESENT DL:9:26 CLK:TD ATTY:K.LONGACRE	TSD
11/05/2007	CONTINUANCE REQUESTED BY DEFENSE-CONSULTATION/DOL RECORDS-GRANTED.	TSD
11/05/2007	SPEEDY TRIAL RULE WAIVER FILED NEW COMM DATE 1/3/08, NEW EXP DATE 4/3/08	TSD

11/05/2007	PRE-TRIAL HEARING SCHEDULED FOR 01/07/2008 AT 900 IN COURTROOM 1101	TSD
11/15/2007	NOTICE OF APPEARANCE FILED BY ACA ATTY ABBEY PERKINS WSBA 36998 FILED 10/25/07.	AXR
01/07/2008	DF: HARRIS, JOSHUA (78528) PRESENT DL:11:19 CLK:TD ATTY:K.LONGAKER GUILTY PLEA ENTERED, STATEMENT OF DEF ON PLEA OF GUILTY ATTACHED HERETO.	TSD
01/07/2008	JURY WAIVER FILED	TSD
01/07/2008	BENCH TRIAL WAIVED	TSD
01/07/2008	DEFENSE MOTION FOR DELAY OF SENTENCING(CITY DOES NOT OBJECT)-GRANTED. DEF TO REMAIN ON EHMP WITH BAC UNTIL SENTENCING DATE	TSD
01/07/2008	PLEA CHANGED TO GUILTY CHARGE# 1 11563200D (SUSP.OL.3RD)	TSD
01/07/2008	CHARGE # 1 11563200D (SUSP.OL.3RD) GUILTY FINDING ENTERED	TSD
01/07/2008	CHARGE # 1 11563200D (SUSP.OL.3RD) FINDING ENTERED	TSD
01/07/2008	PLEA CHANGED TO GUILTY CHARGE# 2 115635000 (NO INTERLOCK)	TSD
01/07/2008	CHARGE # 2 115635000 (NO INTERLOCK) GUILTY FINDING ENTERED	TSD
01/07/2008	CHARGE # 2 115635000 (NO INTERLOCK) FINDING ENTERED	TSD
01/07/2008	SENTENCING SCHEDULED FOR 03/07/2008 AT 900 IN COURTROOM 1101	TSD
03/07/2008	DF: HARRIS, JOSHUA (78528) PRESENT CLERK:JMM, DL:9:59. DA: K. LONGAKER.	JMM
03/07/2008	CHARGE # 1 11563200D (SUSP.OL.3RD) SUSPENDED SENTENCE	JMM
03/07/2008	CHARGE # 2 115635000 (NO INTERLOCK) SUSPENDED SENTENCE	JMM
03/07/2008	JURISDICTION END DATE SET TO 03/06/2010	JMM
03/07/2008	SENTENCE IMPOSED	JMM
03/07/2008	DEFENDANT REFERRED/RELEASED TO TIME PAY OFFICE	JMM
03/07/2008	JUDGE RECOMMENDS WORK RELEASE TO RUN CONSECUTIVELY TO EACH COUNT AND CASE 409400 *COURT DECLINES TO GIVE DEF CFTS FOR EHM PRE AND POST*	JMM
03/07/2008	****BOND TO BE HELD UNTIL DEF REPORTS TO WORK RELEASE** (CS EVENT)	JMM

03/07/2008	DEFENDANT REPORTING TO JAIL- CHECK SCHEDULED FOR 04/09/2008 AT 845 IN COURTROOM 1101 **WORK RELEASE**	JMM
03/07/2008	EHM REPORT CITING TERMINATION; REMOVED FROM EHM: ON 03/07/08 MR. HARRIS COMPLETED HIS EHMP OBLIGATION. HE SERVED 140 DAYS.	TSD
03/07/2008	DATA SENT ELECTRONICALLY TO DOL ON CHARGE # 1	B
03/07/2008	DATA SENT ELECTRONICALLY TO DOL ON CHARGE # 2	B
03/12/2008	MOTION TO ADD ON RECEIVED FROM K. LONGAKER (MOTION TO STAY SENTENCING PENDING APPEAL) -FORWARDED TO JUDGE CHARLES FOR REVIEW MOTION TO ADD ON GRANTED	TSD
03/13/2008	DEFENDANT REPORTING TO JAIL- CHECK HRNG SCHDLD FOR 04/09/2008 AT 845 IN DEPT 1101, CANCELLED!	TSD
03/13/2008	MOTION HEARING SCHEDULED FOR 03/14/2008 AT 900 IN COURTROOM 1101	TSD
03/14/2008	DF: HARRIS, JOSHUA (78528) PRESENT DL:9:35 CLK:TD ATTY:K.LONGAKER DL:9:35 CLK:TD ATTY:K.LONGAKER DEF MOTION TO STAY JAIL SENTENCE PENDING APPEAL- GRANTED (ON CONDITON DEF POSTS \$5,000 APPEAL BOND)	TSD
03/14/2008	*COURT REVOKES AUTHORIZATION OF WORK RELEASE* (DEF IS NOT EMPLOYED)	TSD
03/14/2008	NOTICE OF APPEAL BOND FIXED AT \$5,000 BY JUDGE E. CHARLES *JAIL SENTENCE STAYED-ALL OTHER OBLIGATIONS STILL ACTIVE*	TSD
03/14/2008	ORDER ON CRIMINAL MOTION S/F: MR. HARRIS HAS UNTIL 9/28/08 TO MAKE A DOWN PAYMENT ON HIS FINANCIAL OBLIGATION. THEREAFTER, MR. HARRIS IS TO ARRANGE MONTHLY PAYMENTS WITH RRU.	TSD
03/14/2008	DEFENDANT REPORTING TO JAIL- CHECK SCHEDULED FOR 04/09/2008 AT 845 IN COURTROOM 1101	TSD
03/15/2008	FTA RTND FROM 1435 QUEEN AVE NE RENTON WA, 98056 W/ FORWARD ADDR. ADDR UPDTD. (CS EVENT)	JPN
03/21/2008	NOTICE OF APPEAL FILED ON 03/19/2008, SUPRCT CAUSE# 81037491	SXP
03/25/2008	TRANSCRIPT ISSUED	SXP
04/07/2008	MOTION TO ADD ON FOR RESENTENCING RECEIVED FROM K. LONGAKER - GRANTED	TSD

04/07/2008 DEFENDANT REPORTING TO JAIL- CHECK HRNG SCHDL D FOR TSD  
04/09/2008 AT 845 IN DEPT 1101, CANCELLED!

04/07/2008 SENTENCING SCHEDULED FOR 04/08/2008 AT 900 IN TSD  
COURTROOM 1101

04/08/2008 DF: HARRIS, JOSHUA (78528) PRESENT TSD  
DL:9:21 CLK:TD ATTY:K.LONGAKER  
ORDER ON CRIMINAL MOTION RECEIVED FROM KING COUNTY  
SUPERIOR COURT - PETITION IS GRANTED AND SEATTLE  
MUNICIPAL COURT SHALL CREDIT DEF 90 DAYS ON EHM...

04/08/2008 ...DETENTION AGAINST HIS 90 DAY SENTENCE IN SMC NO. TSD  
513854 FOR DWLS 3.

04/08/2008 DEF WILL RECEIVED CFTS FOR 90 DAYS SPENT ON EHM TOWARDS TSD  
90 DAY JAIL SENTENCE IMPOSED ON 3/7/08. DEF MOTION TO  
RECEIVE 50 DAYS CFTS TO BE APPLIED TOWARD COUNT 2 (DEF  
SERVED 140 DAYS ON EHM) - DENIED AT THIS TIME.

04/08/2008 BOND EXONERATED TSD

04/08/2008 RENTON CITY JAIL COMMITMENT SCHEDULED 4/8/08 BJK

05/01/2008 BOND RETURNED TO SURETY RMS

05/16/2008 NOTICE OF WITHDRAWAL FILED 043008 ACA KIRSTEN K LONGAKE ADS  
R (CS EVENT)

07/17/2008 RENTON CITY JAIL RELEASE 7/17/08 BJK

08/29/2008 REMANDED BY SUPERIOR COURT; SEE ORDER AND COST SHEET. SXP

09/05/2008 REMANDED BY SUPERIOR COURT ON 08/29/2008; CONVICTION SXP  
(JUDGMENT) AFFIRMED; SENTENCE NOT STAYED; NO JUDICIAL  
ACTION REQUIRED, APPEAL DISMISSED AS MOOT PREVIOUS  
ORDER;PER JUDGE RIETSCHEL.

11/29/2008 TIME PAY OFFICE ALLEGES FAILURE TO PAY FINE B

12/01/2008 REVOCATION HRNG (Time Pay) CANCELLED, PAYMENTS CURRENT KLC

12/30/2008 TIME PAY OFFICE ALLEGES FAILURE TO PAY FINE B

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\*\* Accounting Summary \*\*

Post	Bail						
Date :	Amount:	Type:	Paid:	Method:	Status:	DC:	Posted By
10/20/2007	5000.00	BAIL	5000.00	BO	E		ALLCITY BAIL BOND

Chg :	Obl :	Orig Obl :	Obl :	TP :
Sq# :	Type :	Amount :	Bal Due :	Status :
1	CRAS	43.00	43.00	OTA
2	FINE	1000.00	200.00	OTA

CCFE

43.00

43.00

OTA

\*\* Total due on this case:

286.00 \*\*

## APPENDIX 2

RECEIVED

2008 JUL 11 PM 2:36

FILE COPY

KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA

SUPERIOR COURT OF THE STATE OF WASHINGTON  
COUNTY OF KING

City of Seattle,  
Respondent

Plaintiff,

NO. 08-1-03749-1 SEA

vs.

Joshua Harris,  
Appellant

ORDER ON RALJ MOTION

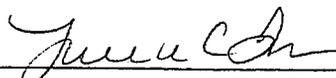
(CLERKS' ACTION REQUIRED)

Defendant.

The above-entitled Court, having heard a motion by respondent to dismiss this appeal as it is moot. Appellant pled guilty to both charges in Seattle Municipal Court and his appeal was from the sentence imposed, specifically the trial court's refusal to credit against the jail period the time he was on EHM prior to sentencing. That issue was resolved in appellant's favor in Harris v. Charles, 08-2-11150-4 SEA and the commitment order has been changed accordingly. Thus, appellant has already received the relief he has requested.

IT IS HEREBY ORDERED that this appeal is dismissed as being moot and the case is remanded to Seattle Municipal Court.

DATED: July 11, 2008

  
JUDGE

Without objection.

Christine Jackson - per e-mail authorization  
Attorney for Appellant

Richard Greene # 13496  
Attorney for Respondent

Order on RALJ Motion (OR)