

NO. 62983-2-I

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

In re the Personal Restraint Petition of:

ANTHONY BAKARI LOUIS BOVAN,

Petitioner.

**SUPPLEMENTAL RESPONSE OF THE DEPARTMENT OF
CORRECTIONS**

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I. IDENTITY OF RESPONDENT

The Respondent is the Department of Corrections (the Department or DOC), represented by ROBERT M. MCKENNA, Attorney General, and ALEX A. KOSTIN, Assistant Attorney General.

II. ISSUES

1. Should this Court address Mr. Bovan's claim despite the petition's mootness?

2. Are *Phelan I* (*In re Phelan*, 97 Wn.2d 590 (1982)) and *Phelan II* (*State v. Phelan*, 100 Wn.2d 508 (1983)) inapplicable to Mr. Bovan because the time he spent in jail on community custody violations is not time spent on the underlying charges of robberies, but additional punishment made a part of the sentence as a contingency for future community custody violations?

3. Does the language of former RCW 9.94A.205 and RCW 9.94A.737(1)¹ preclude credit for post-confinement community custody jail sanction time?

4. Will crediting serial violators with community custody jail sanction time for community custody violations remove an effective

¹Currently codified as RCW 9.94A.633(2)(a).

behavior modification tool from the Department and undermine the purpose of former RCW 9.94A.737(1) and (2)²?

III. ARGUMENT

A. THIS COURT SHOULD ADDRESS THE ISSUE ON THE MERITS DESPITE THE PETITION'S MOOTNESS

Mr. Bovan was released from confinement on July 25, 2009. Exhibit 1, Declaration of Kathy Jerez, Attachment A, OMNI Screen, Transferred to Field ERD column, indicating that on July 25, 2009, he was released from confinement. Bovan's release from confinement makes this petition moot. The Department agrees with Mr. Bovan this Court should review the claim on the merits because it is of continuing and substantial public interest. *In re Erickson*, 146 Wn. App. 576, 582 (2008).

B. PHELAN I AND II ARE INAPPLICABLE TO BOVAN BECAUSE JAIL SANCTION TIME WAS A PART OF HIS SENTENCE AS A CONTINGENCY FOR FUTURE COMMUNITY CUSTODY VIOLATIONS

Mr. Bovan cannot show the Department's not awarding him with the credits for all the time he spent in jail³ for violations of his community custody violates the Constitution of the United States, or Constitution or

² Currently codified as RCW 9.94A.714(1)

³ Per declaration of Mrs. Wendy Stigall, a business analyst and records manager for the Department, the Department credited Mr. Bovan, upon reincarceration with 369 days as successful community custody days and the time between August 6 (date of arrest) and August 28, 2008 (date of transfer to the Department) (the days in detention awaiting disposition of his last violation that resulted in his reincarceration). Exhibit 2, Declaration of Wendy Stigall.

laws of Washington. RAP 16.4(c)(6). No Washington or United States Supreme Court case has held he is entitled to receive credits for the time he spent in jail for violations of community custody in a non-DOSA and non-SSOSA case.

No Washington or United States Supreme Court cases have held the Department-imposed sanctions during community custody are to be credited upon revocation in a non-DOSA/SSOSA case. Mr. Bovan's reliance on *In re Phelan (Phelan I)*, 97 Wn.2d 590(1982) and *State v Phelan (Phelan II)*, 100 Wn.2d 508 (1983), *superseded by statute per Matter of Mota*, 114 Wn.2d 465 (1990), is misplaced. Bovan interprets these cases to hold the post-prison confinement sanctions are a part of his principal underlying charge and therefore should be credited back when he is returned to prison.

Phelan I and *II* did not hold that. In fact, they never addressed the issue of whether post-prison sentence Department-imposed sanctions are to be considered a part of the principal underlying charge.

Careful reading of *Phelan I* shows it stands for the well-recognized principle the time served on the underlying charge must be credited to an offender. *Phelan I* was a pre-SRA suspended sentence case. The court gave Phelan a maximum sentence, but suspended it on conditions. After Phelan's several violations, the court revoked his probation and reinstated

the original sentence. *Phelan I*, 97 Wn.2d at 592-593. The underlying theme in *Phelan I* analysis was the well-recognized principle that “the constitutional guarantee against multiple punishments for the same offense absolutely requires that punishments already exacted must be fully credited in imposing sentence upon a new conviction for the same offense.” *Id.* at 595 (citing to *North Carolina v. Pearce*, 395 U.S. 711, 718-19 (1969), *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794 (1989)). *Pearce* did not address the sanction time for post-prison confinement behavior. Thus *Phelan’s* rationale is inapplicable in Mr. Bovan’s case.

Phelan I looked at four different time periods to determine whether they should be credited against the sentence upon the revocation of probation, 1. time between arrest and guilty plea, 2. time between the guilty plea and sentencing, 3. time imposed by the court as a condition of probation after sentencing, and 4. time in jail awaiting revocation hearing. *Phelan I*, 97 Wn.2d at 592. Thus, for the first, second, and third time categories *Phelan* was required to be given credit under Washington and United States Supreme Court precedent. *Id.* at 594-97.

Under the same principle, for the fourth category, *Phelan* held “petitioner is entitled to credit only if the jail time served was exclusively on the principal underlying charge of second-degree rape.” *Id.* at 597

(emphasis added). *Phelan II* held the jail time credits in *Phelan I* are to be credited against the discretionary minimum terms set by the Parole board. *Phelan II*, 100 Wn.2d at 510. Apparently based on the language of *Phelan I*, *above*, Mr. Bovan concludes it requires the Department to give credits for the Department - administered violation sanction time because he was serving them on the underlying conviction. Supplemental Brief, at 10. He is incorrect for several reasons.

First, *Phelan I* never addressed the issue of credits for the *post-prison confinement* sanction violation jail time. It is incorrect to stretch its holding to apply in Bovan's case.

Second, the principle *Phelan I* enunciated in 1982 in regard to credits for jail time served on the underlying criminal charge is now a well-recognized codified principle of Washington law. *See* RCW 9.94A.505(6) (Sentencing court must give an offender "credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.")

Third, and most importantly, Mr. Bovan is incorrect when he equates time served on the underlying charges with the time served post-prison confinement on the Department-administered violation sanctions. Mr. Bovan fails to recognize his sentence is composed of several elements. One is the jail time served exclusively on the underlying

charges, i.e. four counts of second degree robberies. Per Washington statutory and case law, *above*, the time served exclusively on the robberies charge is to be credited to Mr. Bovan. The sentence also includes the court-ordered prison confinement time. And, the sentence includes contingency for future sanctions based on violations of the community custody conditions. *See* Department's Response, Exhibit 2, Attachment A, Judgment and Sentence, sections 4.5 and 4.6. The time Mr. Bovan served for the community custody sanctions was not "exclusively on the principal underlying charge" of second-degree robberies, but for violations of the community custody conditions.

Here, the Department credited Mr. Bovan with all the days in jail while he was awaiting disposition of his final violation resulting in his reincarceration, but not 34 days on previous community custody violations. Exhibit 2, Declaration of Wendy Stigall, at 4-5. The 34 days community custody sanction time Mr. Bovan served prior to termination of his early release was sanction time pursuant to the Department's policies. *See* Exhibit 3, DOC Policy Directive 320.155, Violation Process/Violations of Conditions. The sanction time was a consequence of his violations. It is not part of his prison confinement term. Rather, it is part of his overall sentence via the statutory regime for early release to a community custody term

To effectively supervise offenders serving community custody under RCW 9.94A.728(2), the Department needs flexibility to impose lesser sanctions than complete termination. Hence, every sentence for a crime that falls under the categories in RCW 9.94A.728(2)⁴ contains a contingency the offender will not release early without serving a community custody term, and that during the community custody term, the offender can be sanctioned for violations. That contingency is part of the original sentence. As noted below, the original sentence is more than the months of prison imposed in the judgment and sentence. It is the months of prison imposed, plus the statutory contingency under former RCW 9.94A.205, which authorized the Department to make policies for sanctions. *See* section C, below. The statutory contingency is that if the offender commits additional acts that violate his conditions, he can receive additional jail time for those acts -- time on top of the prison confinement term imposed at sentencing.

To construe the statute as Mr. Bovan advocates would allow him, upon termination of early release, to reap the benefits of his prior bad behavior and receive credit for his prior sanctions. This would reduce his post-return confinement. He would lock-in his prison early release credits

⁴ Those categories are: "A person convicted of a sex offense, a violent offense, any crime against persons under RCW 9.94A.411(2), or a felony offense under chapter 69.50 or 69.52 RCW . . ." RCW 9.94A.728(2)(b). Second degree robbery is a violent offense. RCW 9.94A.030.

(given for good behavior) by committing acts of bad behavior on community custody and serving sanction time. Such an absurd result is not allowed by the statute.

Also, offenders would more likely not have any confinement time to return to under former RCW 9.94A.737(1) and -(2) if they received credit for sanction time toward their post-return confinement. Exhibit 2, at ¶¶ 3, 9. Mr. Bovan's interpretation is untenable.

Mr. Bovan has not demonstrated an entitlement to the relief he seeks in this petition—credit toward his post-return period for the days he spent on jail sanction time.

C. THE DEPARTMENT PROPERLY DID NOT CREDIT BOVAN WITH TIME SPENT IN CONFINEMENT FOR COMMUNITY CUSTODY VIOLATIONS, BECAUSE WASHINGTON STATUTES AND CASE LAW DO NOT PERMIT SUCH CREDITS

The statute under which Mr. Bovan seeks to receive jail credits is former RCW 9.94A.737(1) that states, in part, that the violator of community custody, upon transfer to confinement serves up to the remaining portion of the sentence, minus “credit for any period actually spent in community custody or in detention awaiting disposition of an alleged violation.”

The question before this Court is whether 9.94A.737(1) language means that upon transfer to confinement after the third violation under

former RCW 9.94A.737(2)⁵ , Mr. Bovan should receive credit for the successful community custody days and the time spent in confinement awaiting disposition of his third violation, or whether he gets credited with all jail time for all previous community custody violations.

The statutory regime allows the DOC to create a policy to impose sanctions for violations during community custody. *See* Laws 1988, ch. 153, § 4 (codified as former RCW 9.94A.205,⁶ the prior version of former RCW 9.94A.737(1)) (requiring DOC to develop hearing procedures and sanctions). Former RCW 9.94A.737 stated in part:

(1) If an offender violates any condition or requirement of community custody, the department may transfer the 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 disposition of an alleged violation* and subject to the limitations of subsection (3) of this section.

⁵ Currently codified as RCW 9.94A.714(1)

⁶ The statute stated:

If an inmate violates any condition or requirement of community custody, the department may transfer the inmate to a more restrictive confinement status to serve the remaining portion of the sentence, *less credit for any period actually spent in community custody or in detention awaiting disposition of an alleged violation*. If an inmate is accused of violating any condition or requirement of community custody, he or she is entitled to a hearing before the department prior to the imposition of sanctions. The hearing shall be considered as inmate disciplinary proceedings and shall not be subject to chapter 34.05 RCW. *The department shall develop hearing procedures and sanctions.*

Laws 1988, ch. 153, § 4 (codified as former RCW 9.94A.205) (emphasis added).

(2) 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.

(3) . . . (c) For an offender sentenced to a term of community custody under RCW 9.94A.505(2)(b), 9.94A.650, or 9.94A.715, or under RCW 9.94A.545, for a crime committed on or after July 1, 2000, who violates any condition of community custody after having completed his or her maximum term of total confinement, including time served on community custody in lieu of earned release, the department may impose a sanction of up to sixty days in total confinement for each violation.⁷

The Department correctly determined Mr. Bovan would be credited with successful community custody time and time awaiting disposition of his latest violation, but not the time spend on previous community custody violations. The statute's language did not authorize such credits. When this Court reviews the language of the statute, it cannot add words to it when the Legislature chose not to include them.

⁷ Subsection (3) of the statute governs offenders who have reached their maximum prison expiration date. Mr. Bovan is not subject to subsection (3). Rather, Mr. Bovan's sanction confinement time falls under the DOC's authority to develop hearing procedures and sanctions pursuant to former RCW 9.94A.205. Exhibit 2, at ¶¶ 5-7. That statute required the DOC to develop such policies and a sanction grid for offenders released to community custody in lieu of early release.

See State v. Delgado, 148 Wn.2d 723, 727 (2003). The Legislature did not include the language the serial violator upon return to confinement is to be credited with all the jail time he spent on sanctions for community custody violations. Had the Legislature intended to include such language, the statutory interpretation presumption is it would have included it.

Mr. Bovan did not receive a DOSA or SSOSA sentence, and the applicable statute did not entitle him to credit for confinement time attributable to previous community custody violations. Unlike the SSOSA or DOSA statute (per this Court's interpretation in *In re Albritton*, 143 Wn. App. 584 (2008)), the Legislature did not include in RCW 9.94A.737(1) the language mandating crediting all jail sanction time upon reincarceration.

In the SSOSA statute, RCW 9.94A.670(11), the Legislature included this specific language that reads in part as follows, "all confinement time served during the period of community custody shall be credited to the offender if the suspended sentence is revoked." Former RCW 9.94A.737(1) does not include such language.

Further, Mr. Bovan's reliance on this Court's decision of *In re Albritton* is misplaced. In *Albritton*, this Court interpreting the former RCW 9.94A.660(5) DOSA statute emphasized the statutory language that upon DOSA revocation, offender is subject to "*all rules relating to earned*

release time.” This Court concluded the language meant that upon revocation, DOSA sentence “becomes a sentence like any other” and Albritton then, per the statutory language was subject to “all rules relating to earned release time”, including credits for all community custody jail sanction time. *Id.* at 595 (relying on *In re Reifschneider*, 130 Wn. App. 498 (2005), another DOSA case).

Unlike Mssrs. Albritton and Reifschneider, Mr. Bovan did not receive a DOSA or SSOSA sentence. This Court recognized that DOSA is the “alternate form” of the standard range sentence. *Albritton*, 143 Wn. App. At 591. The statute in Mr. Bovan’s case did not state, as in Mr. Albritton’s DOSA sentence, that upon Bovan’s return to confinement he was subject to “all rules relating to earned release time”, or as in SSOSA statute, that all confinement time was to be credited upon revocation. RCW 9.94A.737(1) does not authorize credit for prior sanction time. And, as explained above, *Albritton* did not involve the policy implications that exist in Mr. Bovan’s case. Crediting community custody offenders with the jail sanction time will result in little or no confinement time left after the Department terminates their community custody. This is not what the Legislature could have intended.

If the Legislature meant to state, as it did in the SSOSA statute, that the serial violators of community custody upon return to confinement

after their third community violation are to be given credit for all Department-imposed sanctions, it would have included language to that effect. This Court should not interpret former RCW 9.94A.737(1) as authorizing credit for jail sanction time when the Legislature chose not to include such language in it.

D. CREDITING ALL JAIL SANCTION TIME UPON REINCARCERATION REMOVES A POWERFUL BEHAVIOR MANAGEMENT TOOL FROM THE DEPARTMENT AND UNDERMINES THE PURPOSE OF THE STATUTE

Mr. Bovan's interpretation of the statute undermines its purpose and removes a powerful behavior management tool from the Department when it deals with the community custody offenders.

The Final Bill Report indicates that the programs established in ESSB 6157 (codified as RCW 9.94A.737(2)) resulted from a report of the Washington State Institute of Public Policy, and the recommendations of the Joint Task Force on Offender Programs, Sentencing, and Supervision. Exhibit 4, Final Bill Report, at 1. These programs are intended to have a positive effect on recidivism, while producing significant cost savings. *Id.* One of the programs required the return of an offender to state prison after an offender is found to have committed a third community custody violation. *Id.* at 3.

The Final Bill Report shows one of the underlying goals of RCW 9.94A.737(2) was the reduction of recidivism. RCW 9.94A.737(2) gave the Department powerful and effective behavior tool in managing recidivist community custody offenders.

First, it acts as a deterrent mechanism. A community custody offender who values the relative freedom community custody provides vs. total confinement would restrain himself or herself from committing multiple community custody violations. Community custody offenders are by now surely aware that committing multiple violations would result not only in jail confinement for violations, but in the end, in the return to confinement to serve the rest of the sentence there.

Second, it acts as a punishment mechanism for those who will not abide by the community custody rules regardless of the consequences. It is equally clear there always be offenders like Mr. Bovan who simply will not comply with the community custody rules. Therefore, the Department must have a “hammer” mechanism to punish offenders like him who repeatedly violate community custody conditions. Interpreting the statute the way Mr. Bovan urges will effectively remove the “hammer” from the Department.

Interpreting the statute to credit all jail sanction time will also undermine the statute’s value as a behavior modification tool in two ways.

First, it will remove offenders' incentive to comply with the community custody rules. The worst offenders of community custody rules will know the time they spent in jail on their multiple violations prior to return to confinement will be credited against their confinement time. They will have no incentive to comply with the community custody requirements because they will be credited with both successful community custody time (i.e. time on the street while complying with community custody rules, or good conduct time on community custody) and all the jail sanction time (i.e. jail time served as a consequence of violating community custody rules, or bad conduct time).

Second, it will remove the statute's role as a punishment mechanism. Now, the offender is likely prevented from violating community custody rules because of the threat of the eventual reincarceration and loss of the relative freedom if he or she commits multiple violations. If the offender gets all his jail time back, as explained in section B, there will often be little or no time confinement left to serve. Therefore, the threat of reincarceration will no longer be there to stop the worst offenders from repeatedly violating community custody rules.

IV. CONCLUSION

Based on the above, the Department respectfully asks this Court to hold the language of former RCW 9.94A.737(1) did not entitle Mr. Bovan,

a recidivist community custody offender, to be credited with all the jail time he spent post-prison sentence on the Department-administered sanctions.

RESPECTFULLY SUBMITTED this 2 day of October, 2009.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document on all parties or their counsel of record as follows:

- US Mail Postage Prepaid
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- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by _____

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

EXECUTED this 2nd day of October, 2009 at Olympia, WA.



KATHY JERENZ
Legal Assistant

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STATE OF WASHINGTON
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EXHIBIT 1

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

In re the Personal Restraint Petition of:

ANTHONY BAKARI LOUIS BOVAN,

Petitioner.

DECLARATION OF
KATHY JERENZ

I, KATHY JERENZ, make the following declaration:

1. I am a legal secretary with the Corrections Division of the Attorney General's Office in Olympia, Washington. I have knowledge of the facts stated herein and am competent to testify.

2. I am familiar with the Offender Management Network Information (OMNI) used by the Department of Corrections (DOC). I am authorized by the DOC to retrieve information from OMNI. Among other things, information regarding an offender's location, custody, birth date, sentence, infractions and grievances are entered and tracked on OMNI. Attached to this declaration as Attachment A is a copy of an OMNI Screen

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regarding inmate Anthony Bakari Louis Bovan, DOC #791896.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

EXECUTED this 2nd day of October, 2009, at Olympia, Washington.


KATHY JERENZ

ATTACHMENT A

EXHIBIT 2

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

In re the Personal Restraint Petition of:

ANTHONY BAKARI LOUIS BOVAN,

Petitioner.

DECLARATION OF
WENDY STIGALL

I, WENDY STIGALL, make the following declaration:

1. I am a business analyst and also a long-time records manager for the Department of Corrections (DOC) at the Washington Corrections Center in Shelton, Washington. I have knowledge of the facts stated herein and am competent to testify.

2. The DOC uses the term “CCP return,” or “community custody prison return,” to mean a non-DOSA post-OAA offender (a CCP) released from prison early to community custody whose prison term has not expired and whose violations during community custody resulted in the DOC returning him or her to total confinement for up to the remainder of the prison term under RCW 9.94A.737(1) or –(2).

3. I have worked on the OMNI project on sentence modifications, which includes analyzing the sentence structures of CCI terminations and CCP returns. That involves reviewing the credits and numbers of previous sanctions for offenders. I would estimate that if the

DOC were to credit CCP offenders' sentences with credit for time spent on sanctions that have already been completed from prior violations, almost all such offenders would not have any time left in their prison terms to return back to confinement on.

4. When DOC began conducting violation hearings, generally, it did so under the pre-OAA regime. At that time (prior to 2000), there were two types of supervision: community custody and postrelease supervision. The DOC held violation hearings for offenders during community custody, while the court was in charge of hearings during postrelease supervision. Postrelease supervision was any supervision period that existed after expiration of the prison sentence maximum expiration date. Community custody, in contrast, was any period of time that the offender was released from prison on early release time ("good time") and prior to the expiration of the prison term maximum expiration date. If an offender was released early for good behavior, he was released to community custody "in lieu" of earned early release (i.e., in lieu of general release without supervision). Prior to the OAA, the entire period of supervision was called community placement. This period was comprised of a period of community custody or a period of postrelease supervision or both.

5. When the DOC began holding violation hearings prior to passage of the OAA, the pre-OAA version of RCW 9.94A.737 was former RCW 9.94A.205. It did not include any provision similar to RCW 9.94A.737(2). It provided for essentially the same provision that is now codified in RCW 9.94A.737(1). And the provision referring to 60-day jail sanctions for every violation (was codified as RCW 9.94A.737(3)), applied only to sex offenders.

6. Additionally, the statute required the DOC to develop hearing procedures and sanctions. Former RCW 9.94A.205(3). Accordingly, the DOC developed a sanction grid that included discrete confinement terms as intermediate sanctions for pre-OAA offenders. This allowed the hearing officers the option of imposing shorter confinement times as sanctions for violations that were less serious than violations that warranted a loss of early release. This practice has continued to the present day.

7. With passage of the OAA, the DOC received authority to hold hearings for violations occurring at any time during the entire period of supervision. The terms “community placement” and “postrelease supervision” were eliminated and instead everything became “community custody.” If an offender’s prison sentence maximum expiration date had expired, but he or she remained under the DOC’s supervision, the DOC

was authorized to impose only up to 60 days of total confinement for each violation, regardless of whether the offender was a sex offender. This remains the case today, codified in RCW 9.94A.737(3), which became RCW 9.94A.633(1), effective August 1, 2009.

8. When the DOC sanctions a CCI offender to a loss of early release after a violation hearing, the DOC credits the offender's remaining confinement term with "any period actually spent in community custody or in detention awaiting disposition of an alleged violation," as required in the statute (was codified as RCW 9.94A.737(1)). From the beginning of the Sentencing Reform Act, the DOC has read this provision to refer to successful community custody time and also that period before the last hearing that is analogous to presentence time. It requires the DOC to set the start date of the return to confinement as the time when the offender was first arrested before the hearing that results in the order for a termination of early release. The DOC has never interpreted this language to mean that the offender's confinement term would be credited with time spent in confinement on previous sanctions that had already been completed under that cause.

9. In the case of Anthony Bovan, DOC No. 791896, the DOC, upon reincarceration credited him with 369 days of successful community custody time and the time between August 6, 2008 and August 26, 2008,

the dates between his arrest and transfer to the DOC's custody because the DOC determined August 6, 2008 was the starting date for Bovan's CCP Termination. Prior to that, he spent 34 days in jail on violations. It is unusual compared to most CCI terminations that he served only 34 days of sanction time prior to his early release termination. Most offenders in his situation have served substantial sanction time by the time the DOC terminates their early release.

I declare under the penalty of perjury of the laws of Washington State that the foregoing is true and correct to the best of my knowledge.

EXECUTED this 30th day of September 2009, at Shelton, Washington.


WENDY STIGALL

EXHIBIT 3

 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p> <p>POLICY DIRECTIVE</p> <p><input type="checkbox"/> Offender Manual <input type="checkbox"/> Spanish</p>	<p>PRE-RELEASE/ WORK RELEASE/FIELD</p>	<p>NUMBER DOC 320.155</p>
	<p>SIGNATURE _____ DATE _____</p> <p>Signature on File</p>	<p>EFFECTIVE DATE 7/29/02</p>
	<p>JOSEPH D. LEHMAN, SECRETARY</p>	<p>PAGE NUMBER 1 of 9</p>
<p>TITLE VIOLATION PROCESS/VIOLATIONS OF CONDITIONS</p>		

SUPERSESSION:

DOC 320.155 signed 7/31/00

REFERENCES:

DOC 100.100 is hereby incorporated into this Policy Directive; RCW 9.94A; DOC 280.510 Public Disclosure of Records; DOC 320.140 Jail Bed Resources for Offenders; DOC 320.165 Community Custody Violator Sanction to Work Release; DOC 390.570 Supervising Special Sex Offender Sentencing Alternative (SSOSA) Offenders; DOC 460.130 Hearings for Community Custody, Work Release and Pre-Release; DOC 670.655 Special Drug Offender Sentencing Alternative

POLICY:

- I. Community Corrections Officers (CCO) are responsible for taking action on known offender violations based on risk.
- II. The Department authorizes the use of Stipulated Agreements for all types and classifications of offenders as an alternative to a formal Department Hearing.
- III. A Hearing Officer from the Office of Correctional Operations (OCO) Hearing Unit must make a probable cause determination within 3 working days of initial detention when an offender is arrested without warrant and detained for violation of conditions.

DIRECTIVE:

- I. Offender Violations – General
 - A. Supervisors will ensure that CCOs take appropriate action when they learn an offender has violated conditions of supervision, probation, or parole.
 - B. Allegations involving violent, assaultive, or threatening behavior that poses a serious risk to the community, or behavior that is denied by the offender shall be addressed in a formal Hearing. CCOs shall consider a range of appropriate responses to other offender violation behavior as alternatives to a formal Department Hearing process.
 1. Appropriate, alternative responses shall be considered based on the offender's risk, the seriousness of the violation, and the offender's violation history. CCOs will use the Offender Behavior Response Guide (attached) when determining the appropriate response.

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- a. The response to violations shall occur within 30 calendar days from the date that the CCO becomes aware of the violation. Supervisors may authorize an additional 30 days to respond to violations of Risk Management (RM-D) offenders.
- b. The response to violations shall be documented on the Offender Based Tracking System (OBTS) DT37, and may include, but is not limited to:
 - 1) No action taken, with reason why:
 - 2) Verbal or written reprimand/warning; or
 - 3) Stipulated agreement.
- C. All violations will be acted upon within documented time frames per this Policy Directive, prior to the termination date of supervision, probation, or parole. The CCO/designee will enter allegations on the appropriate OBTS DP18, DP19, DP21, DI46, and/or DI89 screen(s), and findings of guilt and custody classification will be entered into OBTS by the Corrections Records Specialist/designee as appropriate.
- D. CCOs will submit DOC 09-228 Report of Alleged Violations when a community custody offender escapes or absconds and is placed on inactive status.

II. Stipulated Agreement

- A. If the behavior constitutes a violation of a supervision condition, the offender admits to committing the alleged behavior, and it is determined that a Stipulated Agreement is appropriate, DOC 09-226 DOC Jurisdiction Only Notice of Violation/Stipulated Agreement, DOC 09-051 Notice of Violation/Stipulated Agreement, or local version shall be written and signed during a face-to-face meeting with the offender.
 1. The Agreement will:
 - a. List all alleged violation behaviors;
 - b. List the specific actions/measures that the offender shall take to address or repair the harm done by the violation behavior;
 - c. Include specific time frame requirements; and
 - d. Be approved by the Supervisor.
 2. The appropriate Stipulated Agreement will be written and applied with regard for the offender's crime of conviction, the violation(s) committed, the offender's risk of re-offending, and the safety of the community.
 3. The CCO/designee shall enter the Stipulated Agreement violations in OBTS DP18 and shall document the facts and circumstances of the Stipulated Agreement in OBTS DT37.
- B. Failure to comply with the terms of a Stipulated Agreement constitutes a violation of conditions of supervision and is considered a violation of a Department requirement/condition. If the violation behavior, which is a violation of a targeted

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risk condition has previously been addressed in a Stipulated Agreement, the Hearing Officer may count the Stipulated Agreement as a violation process score when evaluating the appropriate sanction at a subsequent Hearing.

- C. Stipulated Agreements will not be used to impose confinement or to release from confinement.
- D. Where the sentencing Court continues to have violation/sanction jurisdiction. The original Stipulated Agreement shall be submitted to the Court and Prosecuting Attorney within 3 working days of signing. A copy shall be forwarded to the Regional Records Unit for entry of the sanction/response information.
 - 1. A Stipulated Agreement submitted to the Court will not take effect immediately. The Court has 15 calendar days from receipt of the Stipulated Agreement to schedule a Hearing or modify Department sanctions.
- E. Where the Department retains violation/sanction jurisdiction the CCO shall forward the original Stipulated Agreement to the Regional Records Unit for entry of the sanction/response information.
 - 1. In all other cases, a copy of the Stipulated Agreement will be forwarded to the Regional Records Unit for entry of the sanctions/response information.
 - 2. The Stipulated Agreement will take effect immediately upon supervisory approval.
- F. If the CCO determines that the violation merits partial or total confinement s/he should first consider the appropriateness of home detention with electronic monitoring. The offender's medical/mental health criteria should be considered. The CCO may contact the Department's Health Services Utilization Review Manager in Olympia at (360) 455-6309 to assist in developing a response/sanction recommendation.
 - 1. If no viable alternatives remain, the CCO shall consider the most appropriate venue and duration of incarceration.

III. Hearing Process Time Frames

- A. Time frames that begin when the violation becomes known to the CCO:
 - 1. Non-Detained Cases
 - a. CCOs will serve offenders DOC 09-230 Work Release Notice of Allegations, Hearing, Rights, and Waiver; DOC 09-231 Community Custody Notice of Allegations, Hearing, Rights, and Waiver; or DOC 09-232 Pre-Release Notice of Allegations, Hearing, Rights, and Waiver within 30 calendar days.

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- 1) Except for Work Release and Pre-Release cases, CCOs will provide the necessary Discovery information to the offender not less than 7 working days before the Hearing.
2. Arrested Pursuant to Warrant/Suspended Cases
 - a. CCOs will serve the following documents, as appropriate, within 3 working days of the detention/suspension and distribute the documents to the detaining authority or Hearing Officer:
 - 1) DOC 09-230 Work Release Notice of Allegations, Hearing, Rights, and Waiver;
 - 2) DOC 09-231 Community Custody Notice of Allegations, Hearing, Rights, and Waiver; or
 - 3) DOC 09-232 Pre-Release Notice of Allegations, Hearing, Rights, and Waiver; and
 - 4) DOC 09-325 Order for Arrest and Detention; DOC 09-076A Compact – Interstate Order to Detain; and/or
 - 5) DOC 09-125 Order of Parole Suspension, Arrest, and Detention,
 - b. Except for Work Release and Pre-Release cases, the CCO will provide the necessary Discovery information to the offender within 3 working days of service of DOC 09-231 Community Custody Notice of Allegations, Hearing, Rights, and Waiver.
 3. Arrested/Detained Without Warrant Cases
 - a. The CCO shall request probable cause determination through the Probable Cause/Warrants Unit no later than the next working day following the arrest without warrant and detention of an offender by fax, phone, or electronically. The following information will be provided:
 - 1) Offender name;
 - 2) DOC number;
 - 3) Offender date of birth (DOB);
 - 4) Crime of conviction;
 - 5) County and cause numbers of jurisdiction;
 - 6) Arrest date;
 - 7) CCO name and phone number;
 - 8) Condition(s) alleged to have been violated;
 - 9) A description of evidence that supports the position that there is probable cause to believe a violation has occurred; and
 - 10) Supervision end date.
 - b. The Hearing Unit must make a probable cause decision within 3 working days of arrest and immediately enter the decision on OBTS DT37.

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- c. The appropriate Notice of Allegations, Hearing, Rights, and Waiver must be served on the offender within 3 working days of probable cause entry in OBTS DT37.
- d. Except for Work Release and Pre-Release cases, the CCO, or other authorized Department employee, will provide the necessary Discovery information to the offender within 3 working days of service of DOC 09-231 Community Custody Notice of Allegations, Hearing, Rights, and Waiver.

IV. Probable Cause

- A. An OCO Hearing Unit Hearing Officer must make a determination whether there is probable cause to believe a violation has occurred in all cases where the offender is detained, pre-hearing without a warrant.
- B. If the Hearing Unit Administrator/designee determines that there is no probable cause to believe a violation has occurred, s/he will immediately notify the CCO and order that the offender be released from detention. The CCO will promptly issue the necessary release from detention paperwork to the detaining facility:
 - 1. DOC 09-014 Cancellation of Order for Arrest and Detention and Order for Release or Transfer;
 - 2. DOC 09-014A Cancellation of Detainer for Interstate Compact cases; and/or
 - 3. Only the ISRB may cancel DOC 09-125 Order of Parole Suspension, Arrest, and Detention.

V. Distribution of Hearing Documents

- A. Hearing documents will be distributed to the appropriate detaining authority as specified in the Distribution of the Hearing Documents. (attached)

VI. Scheduling Hearings

- A. If the Court retains jurisdiction of the offender, the Court will schedule the Hearing per local practice.
 - 1. If the offender is detained, the sentencing Court will be notified by the next business day.
 - 2. CCOs must be subpoenaed to testify at Court Hearings when:
 - a. Traveling and testifying will take longer than the normal workday;
 - b. Testifying at the trial of an offender being prosecuted for a new offense; or
 - c. Testifying out of state.

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- B. If the offender is under the jurisdiction of the Indeterminate Sentence Review Board (ISRB), all parole Hearings will be scheduled by the ISRB.
 - 1. If the offender is detained, the ISRB will schedule Hearings within 2 weeks of service of the document.

- C. CCOs will be responsible for scheduling community custody Hearings for offenders under the Department's jurisdiction.
 - 1. CCOs will telephone the Hearing Unit Regional Records staff to request a Hearing and will provide the following information:
 - a. Offender name and DOC number;
 - b. Location;
 - c. Number of allegations;
 - d. Estimated length of the Hearing, and
 - e. Number of witnesses.
 - 2. The Hearing Unit Regional Records staff will notify the requesting CCO of the Hearing time and place no later than the next working day.
 - a. In-custody Hearings must be held within 5 working days from the date of service of DOC 09-230 Work Release Notice of Allegations, Hearing, Rights, and Waiver; DOC 09-231 Community Custody Notice of Allegations, Hearing, Rights, and Waiver; or DOC 09-232 Pre-Release Notice of Allegations, Hearing, Rights, and Waiver.
 - b. Out-of-custody Hearings must be held within 15 calendar days of service of the violations alleged.

VII. Preparation for Hearings

- A. To prepare for a Hearing, the CCO shall:
 - 1. For community custody Hearings, complete DOC 09-228 Report of Alleged Violations and DOC 09-126 Supplemental Report of Alleged Violations, if required, prior to the scheduled Hearing and deliver to the offender and the Hearing Officer as part of Discovery.
 - 2. Consult with his/her Supervisor when recommending response options outside the Offender Behavior Response Guide (attached) option ranges.
 - 3. Obtain Supervisor approval when recommending any response that will result in incarceration or suspended confinement time.
 - 4. Obtain certified interpretive services for offenders with language or communication barriers, if necessary, when serving Hearing documents and for the Hearing.

VIII. Pre/Post Hearing Confinement

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- A. If pre-hearing or post-hearing confinement is required, the CCO shall attempt to arrange placement in a local correctional facility/county jail under the guidelines established in DOC 320.140 Jail Bed Resources for Offenders and as stipulated in any existing local jail agreement made based on DOC 320.140 Jail Bed Resources for Offenders. Placement may be precluded by medical/mental health needs disclosed by the offender or observed by Risk Management Team members, volunteers, or the CCO.
- B. Whenever possible, the violator will be confined in the Region where s/he is to be sanctioned. Field offices and facilities are encouraged to work together to develop local agreements in their Region to facilitate placement.
- C. The case will remain active on the supervising CCOs caseload.

IX. Special Sex Offender Sentencing Alternative (SSOSA)

- A. SSOSA offenders who commit their crimes on or after June 6, 1996 and on or before July 1, 2000 on Community Custody (SCC) status are under the jurisdiction of the sentencing Court and Violations should be referred to the Court for disposition using DOC 09-228 Report of Alleged Violations.
- B. SSOSA offenders on Community Custody past their Maximum Release Date (CCM) are under the jurisdiction of the Department and may be sanctioned to the county jail for up to 60 days per violation. Violations will be handled through the Department's Hearing process.
- C. County shuttle process shall be used to transport an offender confined in the local county jail from the county of confinement to the county of jurisdiction. The CCO will ensure the Headquarters Warrant Desk is notified to arrange transport.
 - 1. CCOs will make arrangements with the local county jail, if applicable, prior to holding the offender for transport to the county of jurisdiction.
- D. CCOs or other designated staff shall coordinate with local jails to hold offenders sanctioned to jail as a result of a CCM/SCC Violation Hearing. CCM cases may not be placed in a Department facility.

X. Drug Offender Sentencing Alternative (DOSA)**

- A. For offenders who committed their crimes before July 25, 1999, while on community custody status, violations disposed of via DOC 09-226 DOC Jurisdiction Only Notice of Violation/Stipulated Agreement, DOC 09-051 Notice of Violations/Stipulated Agreement, or local version Stipulated Agreement and/or a Hearing conducted by a Department Hearing Officer are subject to a Court review.
 - 1. CCOs will complete DOC 09-228 Report of Alleged Violations, using DOC 20-259 DOSA – Notice of Violation as the first page, recommending for or against further Court action based on the Hearing Officer's decision.

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- a. A copy of DOC 09-228 Report of Alleged Violations will be distributed to the Chemical Dependency Treatment Unit in the West Central Region.
 - b. Court action will be requested within 30 days for a report recommending a Hearing and within 15 days if the Court decides to take further action on a Stipulated Agreement.
- B. The following applies to offenders who committed their crimes on or after July 25, 1999:
- 1. If the offender violates any of the sentence conditions, the Department will hold a violation Hearing unless waived by the offender.
 - 2. An offender who violates any conditions of supervision as defined by the Department shall be sanctioned.
 - 3. If the Hearing Officer finds that conditions have been willfully violated, the offender may be reclassified to serve the remaining balance of the original sentence. If the offender is reclassified s/he shall be subject to all rules relating to earned release time.

XI. Hearings

- A. Hearings shall be conducted per DOC 460.130 Hearings for Community Custody, Work Release and Pre-Release.

DEFINITIONS:

Words/terms appearing in this Policy Directive may also be defined in the Glossary section of the Policy Directive Manual.

ATTACHMENTS:

Offender Behavior Response Guide
 Distribution of Hearing Documents

DOC FORMS (See Appendix):

- DOC 09-014 Cancellation of Order for Arrest and Detention and Order for Release or Transfer
- DOC 09-014A Cancellation of Detainer
- DOC 09-051 Notice of Violations/Stipulated Agreement
- DOC 09-076A Compact – Interstate Order to Detain
- DOC 09-082 Compact – Notice of Violation
- DOC 09-112 Compact – Supplemental Notice of Violation
- DOC 09-114 Board – Notice of Violation
- DOC 09-118 Board – Supplemental Notice of Violation
- DOC 09-122 Court – Notice of Violation
- DOC 09-125 Order of Parole Suspension, Arrest, and Detention
- DOC 09-126 Supplemental Report of Alleged Violations
- DOC 09-226 DOC Jurisdiction Only Notice of Violation/Stipulated Agreement

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- DOC 09-228 Report of Alleged Violations
- DOC 09-230 Work Release Notice of Allegations, Hearing, Rights, and Waiver
- DOC 09-231 Community Custody Notice of Allegations, Hearing, Rights, and Waiver
- DOC 09-232 Pre-Release Notice of Allegations, Hearing, Rights, and Waiver
- DOC 09-233 Hearing and Decision Summary
- DOC 09-238 Confinement Order
- DOC 09-239 Secretary's Warrant
- DOC 09-325 Order for Arrest and Detention
- DOC 20-259 DOSA – Notice of Violation



EXHIBIT 4

FINAL BILL REPORT

ESSB 6157

C 483 L 07

Synopsis as Enacted

Brief Description: Changing provisions affecting offenders who are leaving confinement.

Sponsors: Senate Committee on Ways & Means (originally sponsored by Senator Prentice).

Senate Committee on Ways & Means

Background: According to the Department of Corrections (DOC), approximately 8,500 offenders return to the community from Washington prisons each year after completing their sentences and over 25,900 offenders are currently on active supervision in the community. Research from the Washington State Institute of Public Policy (WSIPP) shows that approximately 54 percent of these offenders will commit a new felony within 13 years. Further, the Washington Caseload Forecast Council estimates that under existing policies, Washington's incarceration rate will increase 23 percent by the year 2019.

In 2005, the Legislature directed the WSIPP to report, by October 2006, whether evidence-based and cost-beneficial policy options exist to alleviate the need to build more prisons. WSIPP concluded that several programs directed to adult offenders can have a positive impact on recidivism and produce significant cost savings for the State of Washington (see Steve Aos, Marna Miller, and Elizabeth Drake (2006). Evidence-Based Public Policy Options to Reduce Future Prison Constructions, Criminal Justice Costs, and Crime Rates. Olympia: Washington State Institute for Public Policy).

The 2006 Legislature created the Joint Task Force on Offenders Programs, Sentencing, and Supervision (SSB 6308). The legislation required the Task Force to review offender programs, sentencing, and supervision of offenders upon reentry into the community with the stated goals of increasing public safety, maximizing rehabilitation of offenders, and lowering recidivism. The Task Force made many recommendations, several of which are incorporated.

Summary: PART I - Community Transition Coordination Networks: Each county or group of counties are required to conduct an inventory of the services available in the county or region to assist offenders in reentering the community and present its assessment to the policy advisory committee no later than January 1, 2008.

A community transition coordination network program (CTCN) is created within the Department of Community, Trade and Economic Development (CTED). The CTCN program is a pilot project to be conducted in up to four counties for a period of four years and is limited to offenders under county or city misdemeanor probation.

CTED must invite counties or groups of counties to apply for grant funds to facilitate partnerships between supervision and service providers. Among other components, it is anticipated that a county or group of counties wishing to implement a network will collaborate

with DOC, address methods to identify offenders' needs, and connect offenders with needed resources and services that support successful transition to the community.

Counties receiving grant funds must work with WSIPP to establish data tracking mechanisms and conduct an evaluation at the completion of the pilot program. CTED must convene a policy advisory group to receive status reports on the implementation of the networks and review annual evaluations. The grant program expires June 30, 2013.

The purview of Local Law and Justice Councils is expanded to include issues related to mechanisms for communication of information about offenders and partnerships between the department and local community policing and supervision programs.

PART II - Individual Reentry Plan: DOC is required to develop an individual reentry plan for every offender committed to the jurisdiction of the department.

An individual reentry plan is the result of a comprehensive assessment of an offender initiated at the time the offender is committed to the jurisdiction of the department. The plan should address both the risks and needs of the offender and describe actions needed to prepare an individual for release, define terms and conditions of release, and address the supervision and services needed in the community.

In determining the county of discharge for an offender on community supervision, community custody, or community placement, the offender must be returned to his or her county of origin unless it is determined that returning the offender to that county would be inappropriate. County of origin is defined as the county of the offender's first felony conviction in Washington. If the department returns the offender to a location other than the county of origin, the department must notify the Local Law and Justice Council in writing.

PART III - Partial Confinement and Supervision: WSIPP is required to conduct an analysis of reentry and work release programs to identify evidence-based practices for the State of Washington. The institute should identify optimal services or combination of services to be provided to offenders reentering the community through work release programs. DOC is, in turn, required to review its policies to transform its work release facilities into effective residential reentry centers.

DOC must continue to establish Community Justice Centers (CJC) throughout the state. In addition to the six existing facilities, three more facilities must be added by December 1, 2011. DOC must notify the county and/or city prior to locating a new CJC in the community. DOC must make efforts to enter into memoranda of understanding or agreements with the local community policing and supervision programs to address efficiencies in sharing space or resources, mechanisms of communication, and partnerships between police and corrections' officers in conducting supervision.

DOC must prepare a list of counties in which work release facilities, CJsCs, and other community-based correctional facilities are anticipated to be located within the next three years and transmit the list to the Office of Financial Management (OFM) and the counties on the list. In preparing the list, the county must make substantial efforts to provide for the equitable distribution of facilities among counties. Equitable distribution is defined.

In order to qualify for 50 percent earned release an offender must participate in programming and must not have committed a new felony while under supervision. If DOC denies transfer to community custody in lieu of earned early release, DOC may transfer an offender to partial confinement in lieu of earned early release for up to three months.

If an offender has not completed his or her maximum term of total confinement and is found to have committed a violation of his or her community custody at a third violation hearing, DOC must return the offender to total confinement in a state correctional facility to serve up to the remaining portion of his or her sentence. DOC may choose not to return the offender to confinement if it determines that returning the offender would interfere with the offender's rehabilitation and reintegration into the community.

~~An offender who is arrested while on community custody for a new felony offense must be held in total confinement until a DOC hearing on the violation or until being formally charged by the prosecutor, whichever is earlier.~~

A legislative Task Force is created to review current law and policy related to community custody and community supervision. The Task Force must convene by August 1, 2007 and report to the Governor and the Legislature by November 1, 2007.

DOC must conduct an updated community corrections workload study and report the results of the study to the Governor and the Legislature on or before November 1, 2007.

PART IV - Education: DOC is to fund basic academic skills through obtaining a high school diploma or its equivalent; achievement of vocational skills necessary for purposes of work programs and for an inmate to qualify for work upon release; and additional work and education programs necessary for compliance with an offender's individual reentry plan (except post-secondary education).

Other appropriate vocational, work or education programming that does not meet the above requirements must be paid by the inmate according to a sliding scale formula.

A third party may pay all or a portion of the costs and tuition for any programming. Payments for this purpose must not be subject to any of the deductions as provided in Chapter 72.09 RCW.

A postsecondary education degree program is created. An inmate must pay for the program by paying for the program themselves or receive funding from a third party.

DOC and the State Board for Community and Technical Colleges must investigate and review methods to optimize educational and vocational programming opportunities for offenders. DOC and the State Board must report to the Governor and the Legislature no later than July 1, 2008.

WSIPP must conduct a comprehensive analysis and evaluation of evidence-based correctional education programs and the extent to which Washington's programs are in accord with these practices. The Institute must report to the Governor and the Legislature no later than November 1, 2007.

PART V - Employment Barriers: The Department of Licensing (DOL) and DOC must enter into an agreement to assist offenders in obtaining drivers' licenses. The DOL is also required