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

In the Matter of the Personal Restraint of:	)	No. 29900-7-III
CHAD R. JENSEN,	)	
	)	UNPUBLISHED OPINION
Petitioner.	)	
	)	

Siddoway, J. — Chad Jensen seeks relief from personal restraint after the Department of Corrections revised his risk assessment—a component in calculating his maximum entitlement to earned release—and, based on the new assessment, extended his release date by almost two years. Moreover, his risk assessment was revised while he was serving the last of four sentences comprising one continuous commitment, and the department reduced the earned release for which he was eligible not only for the sentence he was then serving, but also for the three sentences for which the department had certified his earned release time and release dates, and from which he had been transferred.

Mr. Jensen contends that application of the reduced earned release rate constitutes double jeopardy and that reduction of his earned release rate without notice and a hearing

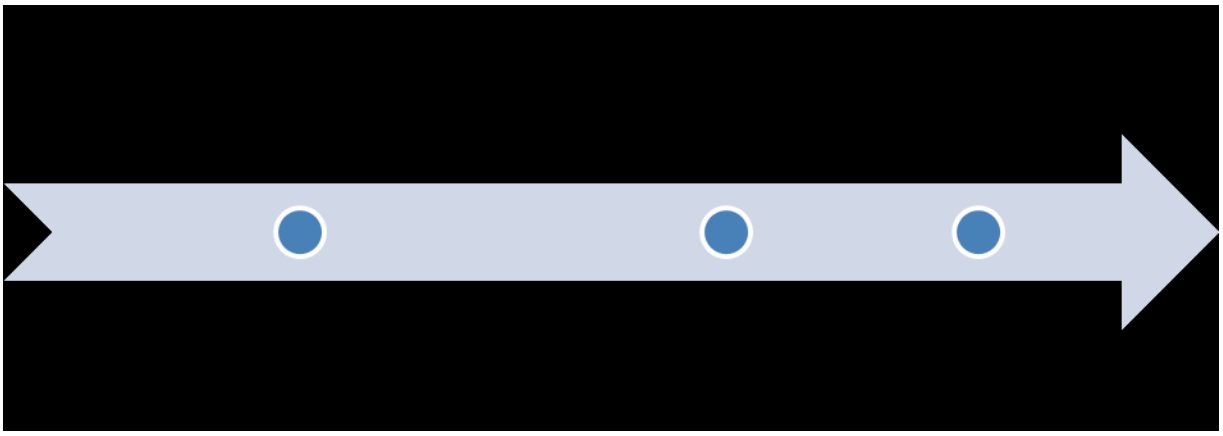
violated due process. He also contends that applying 2009 legislative changes to his preexisting sentence violates the ex post facto clause. We grant the petition as to Mr. Jensen's three completed sentences and deny it as to his uncompleted fourth sentence.

FACTS AND PROCEDURAL BACKGROUND

Chad Jensen was convicted in December 2004 in Chelan County of first degree possession of stolen property and attempt to elude a pursuing police vehicle, and was sentenced to 25 months and 15 days in prison. Also in December 2004, he was convicted in Douglas County of first degree possession of stolen property and second degree possession of stolen property, and again was sentenced to 25 months and 15 days in prison. The Chelan and Douglas sentences were served concurrently. He was convicted in October 2005 in Pierce County of 3 counts of first degree possession of stolen property, and was sentenced to 57 months in prison. Finally, in November 2007, he was convicted in Okanogan County of 12 counts of second degree trafficking in stolen property, and was sentenced to 60 months in prison. The sentences on the Pierce and Okanogan causes have been served consecutively to each other and to the concurrent Chelan and Douglas sentences. Absent earned release time, his full sentences would collectively result in his incarceration through November 2016, as illustrated

[1] Our calculation of the interim completion dates does not comport with the department's records submitted with its response, for reasons we cannot determine. The final release dates as originally imposed and as thereafter adjusted for earned release time are consistent, however.

below:[1]



A Washington prisoner's term of incarceration may be reduced by earned release time: a combination of good conduct time, related to good behavior; and earned time, related to program participation. Former RCW 9.94A.728(1) (2003 & 2004);[2] RCW

[1] Our calculation of the interim completion dates does not comport with the department's records submitted with its response, for reasons we cannot determine. The final release dates as originally imposed and as thereafter adjusted for earned release time are consistent, however.

[2] Former RCW 9.94A.728 (2003) applies to the department's actions before July 1, 2005,

9.94A.729(1)(a); WAC 137-28-160. Inmates are assessed for their risk of reoffense and, based on that assessment, may earn up to a 50 percent reduction in their sentences. Former RCW 9.94A.728(1)(b).

While serving the Chelan and Douglas sentences, Mr. Jensen was assessed for his risk of reoffense under the "Risk Management Identification" (RMI) system then in use by the department. The RMI tool assigned an offender to one of four community supervision levels: RMA, RMB, RMC, and RMD, in descending order of seriousness. Mr. Jensen was assessed at the level RMC, qualifying him for 50 percent earned release time. *See In re Pers. Restraint of Wheeler*, 140 Wn. App. 670, 672, 166 P.3d 871 (2007) (only offenders who were assessed as RMC or RMD were qualified to earn early release at 50 percent).

When Mr. Jensen reached his earned release dates on the Chelan and Douglas sentences and was released to the Pierce cause in November 2005, the department certified the earned release time he had accumulated for the Chelan and Douglas sentences. The department also certified his earned release time when he was released to

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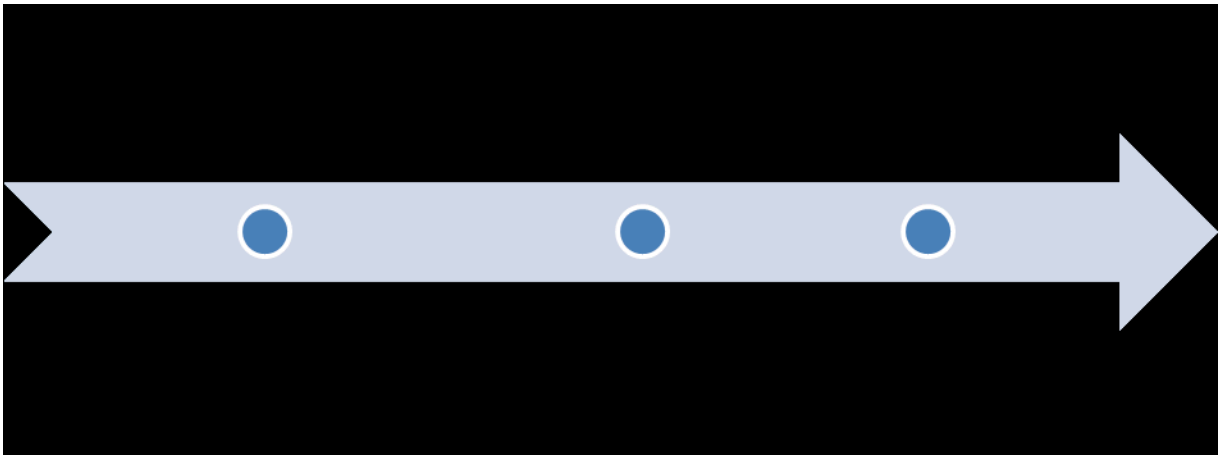
and former RCW 9.94A.728 (2004) applies after that date. The applicable texts of the two versions are the same for the purposes of this case. All citations refer to both versions. *See In re Pers. Restraint of Pullman*, 167 Wn.2d 205, 209 n.2, 218 P.3d 913 (2009). RCW 9.94A.728 was amended several times during the 2009 legislative session without reference to each other. The last amendment, Laws of 2009, chapter 455, section 3, moved most of the earned release and risk assessment provisions from former RCW 9.94A.728 to a new statute: RCW 9.94A.729.

begin serving the sentence on the Okanogan cause in March 2008; the RMI tool was still being used, he was still assessed at level RMC, and he was certified as having earned 50 percent earned release time on the Pierce cause. Based on the completion and transfer dates, certified earned release time and assuming he earned the maximum 50 percent earned release time on the Okanogan cause, Mr. Jensen would have been eligible for release on November 24, 2010, as illustrated below:



In 2009, the Washington legislature enacted RCW 9.94A.729, which required risk

assessment using a specific risk assessment tool, "the risk assessment tool recommended by the Washington state institute for public policy." RCW 9.94A.729(4). The new assessment tool relies on static criteria such as criminal history, age, and gender and is considered to have better predictive accuracy than the former RMI tool. Because the legislature concluded that the new act was "necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing institutions," RCW 9.94A.729 took effect immediately, on May 11, 2009. Laws of 2009, ch. 455, § 7.

In July 2009, the department reassessed Mr. Jensen's risk to reoffend using the static risk assessment tool and determined that he was HNV (high non-violent) under the classifications provided by the new tool. Under this new classification, he was eligible for, at most, 33 percent earned release time rather than the 50 percent maximum to which he had been entitled under his RMC assessment. RCW 9.94A.729(3)(c)(i), (d). Mr. Jensen was notified of the change in his risk assessment and of his loss of 50 percent eligibility in January 2010. The department's notice identified the reason for the change as "New scoring method changed Risk Level from RMC to High Non-Violent" rather than indicating that the original scoring was inaccurate. Resp. of Dep't of Corr. (DOC) (Ex. 4). Mr. Jensen's appeal of the change to the superintendent was denied.

Initially, department officials believed that the change in risk level would not

affect Mr. Jensen's 50 percent earned release time on the Chelan, Douglas, and Pierce sentences but only on the final, Okanogan, sentence that he was then serving. They assured him of this in letters in February and April 2010.[3] Following further internal communication with the Attorney General's Office, however, the department changed its position and in June 2010 its records manager informed Mr. Jensen that his eligibility for earned release time would be capped at 33 percent on the Chelan, Douglas, and Pierce causes as well, and his release dates from those causes would be adjusted accordingly. The Attorney General's Office reasoned that the new risk assessment tool must be applied to all sentences served consecutively without a break in the chain of custody in order to comply with the legislatively-dictated one-third maximum for earned release time for higher-risk offenders formerly provided by RCW 9.94A.728(1)(c) and recodified in 2009 at RCW 9.94A.729(3)(d).

Mr. Jensen's current release date with earned release time capped at 33 percent for all four sentences and the interim release dates adjusted accordingly is September 11, 2012.

Mr. Jensen filed his petition for relief from personal restraint with this court,

[3] As explained by Carrie Fleming, the Statewide Correctional Records Manager, Mr. Jensen would keep the 50 percent earned release time on the Chelan, Douglas, and Pierce sentences that "had already been served when your Risk Level Code changed from RMC to High Non Violent." Resp. of DOC (Ex. 6).

which appointed him counsel and referred the matter to this panel. RAP 16.11(b), (c).

ANALYSIS

Mr. Jensen challenges a department decision from which he has had no previous or alternative avenue for judicial review and therefore must demonstrate that he is under unlawful restraint. RAP 16.4. He is under restraint by virtue of his incarceration. *In re Pers. Restraint of Pullman*, 167 Wn.2d 205, 211, 218 P.3d 913 (2009). The restraint is unlawful if the department's challenged action is unconstitutional or violates state law. *In re Pers. Restraint of Liptrap*, 127 Wn. App. 463, 469, 111 P.3d 1227 (2005). A showing that a decision by a government agency failed to comply with the agency's own rules or regulations is sufficient to show the unlawfulness of the restraint. *In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 149, 866 P.2d 8 (1994).

Washington law and regulations, like those of many states, provide that an offender can accumulate earned release credits that reduce the duration of a prison sentence. The legislature has directed the department to "adopt, by rule, a system that clearly links an inmate's behavior and participation in available education and work programs with the receipt or denial of earned early release days and other privileges." RCW 72.09.130(1). The system "shall be fair, measurable, and understandable to offenders, staff, and the public." RCW 72.09.130(2). The earned release statute at the time of Mr. Jensen's offenses, former RCW 9.94A.728(1), required the department to

develop procedures by which an offender may reduce his or her sentence for good behavior and good performance. It explicitly conditioned eligibility for, and maximum entitlement to, earned release on performance of a risk assessment by the department. Former RCW 9.94A.728(1)(b)(iii). Its provision for performance of "a" risk assessment did not limit the department to a single risk assessment. *In re Pers. Restraint of Adams*, 132 Wn. App. 640, 648, 134 P.3d 1176 (2006), *overruled on other grounds by Pullman*, 167 Wn.2d at 216. Moreover, legislation increasing the maximum percentage of earned release time to 50 percent provided that "the changes to the maximum percentages of earned release time . . . do not create any expectation that the percentage of earned release time cannot be revised[.] The legislature retains full control over the right to revise the percentages of earned release time available to offenders at any time." RCW 9.94A.7281.

The policies adopted by the department and published in its Offender Manual make it clear that earned release time will be lost in the event of infractions. They make it clear that infractions can also result in a reassessment of an offender's risk classification. *Pullman*, 167 Wn.2d at 215. In a case involving uncertified earned release time, the Supreme Court observed that "[t]he policies of reassessment and reclassification make it clear that 'an offender's risk level is always subject to change.'" *Id.* (quoting record).

But the department's policies also provide for a process of "certification" or "validation" of earned release time. The department concedes that under its policies in effect while Mr. Jensen was serving the Chelan, Douglas, and Pierce sentences, early release time was certified when an offender transferred from one consecutive cause to the next consecutive cause. Second Suppl. Resp. of DOC at 2. The 2000 version of the department's Offender Manual explicitly provided that "[earned release time] will be certified by the facility Superintendent/Supervisor or designee at the end of the longest concurrent sentence, at the end of consecutive sentences under one cause, or at the transfer from one cause to a consecutive cause." Former DOC Policy 350.100(V)(A)(3) at 5 (revised Dec. 20, 2000).[4] The 2006 version provided more generally for certification. Former DOC Policy 350.100(VII)(C) at 7 (revised Aug. 28, 2006).[5] It is undisputed that prior to 2010, Mr. Jensen's earned release time, capped at 50 percent based on his assessment at risk classification of RMC, was certified by the department at the time of his transfer from the Chelan, Douglas, and Pierce causes.

The significance of certification under the department's Offender Manuals in effect during Mr. Jensen's incarceration and prior to the most recent revision in October 2011 included that only "uncertified or unvalidated" good conduct time would be lost if

[4] Second Suppl. Resp. of DOC (Ex. 17).

[5] *Id.* (Ex. 18).

found guilty of a serious infraction. Former DOC 350.100(I)(A)(3) at 2 (2000); former DOC 350.100(I)(H) at 3 (2006); former DOC Policy 350.100(I)(E) at 3 (revised Sept. 24, 2008).[6] All three versions of the manual provided that

> [a]n offender who has transferred from one sentence within a cause number to the next sentence, or from one cause number to the next cause number, cannot lose [earned release time] associated with the previous sentence or cause.

Former DOC 350.100(I)(H) at 3 (2000); former DOC 350.100(I)(M) at 4 (2006); former DOC 350.100(I)(I) at 3 (2008). While the legal effect of a certification is not addressed by statute, it was characterized in the context of a county jail's certification of good time to the department in *In re Personal Restraint of Williams*, 121 Wn.2d 655, 664, 853 P.2d 444 (1993) as the presumptively correct identification of earned release time by a correctional institution having jurisdiction over an offender. *Williams* held that a certification (in that context) had legal force unless based upon an apparent or manifest error of law.

With this framework for entitlement to earned release time in mind, we turn to Mr. Jensen's claims of unlawful restraint.

Noncertified Earned Release Time

We first address Mr. Jensen's challenge to the department's reduction of the

[6] Pet'r's Reply Br. (Ex. H).

earned release time accumulated toward the Okanogan sentence he is presently serving. He argues that the department's reduction of that earned release time to the maximum one-third supported by his revised assessment constitutes double jeopardy and was effected without required due process.[7]

The double jeopardy clause of the Fifth Amendment to the United States Constitution protects against (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.[8] *Warnick v. Booher*, 425 F.3d 842, 847 (10th Cir. 2005); *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). The "multiple punishment" prohibition at issue in this case protects against (1) punishment greater than

[7] The department asserts in a surreply (not requested by the court) that Mr. Jensen's due process argument is precluded under RAP 10.3(c) because it was raised for the first time in his reply brief. It also addresses argument from Mr. Jensen based on DOC Policy 350.100. The reply brief should be limited to those issues discussed in the response brief. RAP 10.3(c); *see State v. Hudson*, 124 Wn.2d 107, 120, 874 P.2d 160 (1994). While Mr. Jensen did not specifically argue due process violations in his personal restraint petition, the department's response argued that it properly applied statutory law and department policy in its assessment and calculation of earned release credits. Mr. Jensen's reply that the department did not follow its own policies or minimum due process in changing his risk assessment and earned release credits is properly addressed in a broad sense to the department's response brief.

[8] Mr. Jensen confines his argument to the double jeopardy clause of the Fifth Amendment, which applies to the states under the due process clause of the Fourteenth Amendment. *State v. Hardesty*, 129 Wn.2d 303, 309 n.2, 915 P.2d 1080 (1996). The state double jeopardy clause, Washington Constitution article I, section 9, is interpreted in the same manner as the federal provision. *Id.*

the legislature intended and (2) sentence adjustments that upset an offender's legitimate expectation of finality in his or her sentence. *Warnick*, 425 F.3d at 847 (quoting *Jones v. Thomas*, 491 U.S. 376, 381, 109 S. Ct. 2522, 105 L. Ed. 2d 322 (1989); *United States v. DiFrancesco*, 449 U.S. 117, 136, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980)). Mr. Jensen relies on the second form of jeopardy and his claimed legitimate expectation of the finality of his earned release dates.

An offender has no constitutional or inherent right to be conditionally released before the expiration of a valid sentence. *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 7, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979). *Pullman* and earlier cases establish that in light of former RCW 9.94A.728's provision requiring the department to develop procedures that "may" reduce an offender's sentence and the department's policies of reassessment, reclassification, and reduction for infraction, Mr. Jensen had no constitutional or statutory expectation that his risk classification and his potential release date could not change during the time he served the sentence on a particular cause. *See Pullman*, 167 Wn.2d at 216. Because he had no legitimate expectation of finality in the earned release that would be credited toward the Okanogan sentence, application of the new assessment tool and the 33 percent earned release percentage to this current sentence does not constitute a violation of the double jeopardy clause. *Warnick*, 425 F.3d at 847.

Mr. Jensen also contends that the department denied him due process by changing his risk assessment and eligibility for 50 percent earned release credits without notice and a hearing. He cites *Wheeler*, 140 Wn. App. at 675, in which the inmate was initially assessed as low risk to reoffend, making him eligible for 50 percent earned early release, and was later reassessed to a higher risk classification, thereby losing his eligibility for enhanced earned release. Citing *Adams*, 132 Wn. App. at 653, *Wheeler* held that minimum due process requires written notice and an opportunity to challenge a department reassessment of an offender's risk category. *Wheeler*, 140 Wn. App. at 674. *Adams* was overruled in *Pullman*, however, which held that the department's broad discretion to recalculate an inmate's earned release date on the basis of a risk classification that is subject to change cannot create a protected liberty interest. *Pullman*, 167 Wn.2d at 216. All an inmate can justifiably expect is that the department will follow its own policies in reassessing risk classifications. *Id*. at 218. Department policy allowed the inmate in *Pullman* to appear before the risk management team and to appeal the reclassification to the superintendent. Because the inmate was afforded those limited rights in *Pullman*, his challenge was denied. *Id*. at 219.

As in *Pullman*, department policy in effect at the time of Mr. Jensen's reassessment allowed him to appeal reassessment and other classification actions to the superintendent. DOC Policy 320.400(V).[9] He exercised his right to appeal and the

appeal was denied. He was entitled to no further procedural protection against a change in his risk classification. *Pullman*, 167 Wn.2d at 218.

Certified Earned Release Time

The more difficult issue is presented by the department's reduction of the earned release time it had earlier certified in transferring Mr. Jensen from time served in the Chelan, Douglas, and Pierce causes. He contends that application of the new risk assessment and lower rate of earned release credits to those causes upset his legitimate expectation of finality in his certified early release dates and violated the double jeopardy clause. The department responds that, as with the release date for Mr. Jensen's Okanogan sentence, he had no legitimate expectation of finality in the transfer dates from time served for earlier causes. It also argues that it was compelled to apply the reduced percentage to the sentences already served in order to comply with the one-third statutory maximum for his earned release eligibility, and that it was therefore not increasing Mr. Jensen's sentence but merely correcting an error.

We address the department's second argument first. The department admits that when it began reassessing inmates using the new tool required by RCW 9.94A.729(4), it grandfathered earlier causes included in a single commitment and applied the new rate solely to the cause that the inmate was then serving. But it then concluded that honoring

[9] Available at http://www.doc.wa.gov/policies/default.aspx.

the early release dates certified for causes treated as having been completed could require it to release an inmate earlier than allowed for sentences that it claims it is required to treat in the aggregate. To illustrate, if Mr. Jensen's sentences on the four causes amounted to a total period of incarceration of 5,109 days, then—based on his "high non-violent" classification in 2010 and assuming that the limitation on his earned release time to one-third provided by RCW 9.94A.729(3)(d) applies to the aggregate of the sentences for the four causes—the maximum earned release time he could receive for all four sentences would be 1,703 days. Yet if his time served for the first three causes accounted for 3,284 of the total 5,109 days, then he would already have been afforded 1,642 days of earned release time before transferring to the Okanogan cause. Continuing to credit him 33 percent earned time would quickly take him over the presumed 1,703 day limit. The solution and correction, according to the department, was to reduce his earlier certified earned release time and change his transfer dates from the prior three causes to later dates.

The premise for this required adjustment is the department's view that it is required to impose the statutory maximum as determined in 2010 on the four sentences in the aggregate. It bases this on the language in RCW 9.94A.729(3)(d) that "[i]n no other case shall the *aggregate earned release time* exceed one-third of the total sentence." (Emphasis added.) It argues that use of the word "aggregate" indicates that the legislature

intended consecutive sentences to be treated as one aggregate sentence term. We disagree with the meaning the department attaches to the statute's references to "aggregate earned release time."

When interpreting the words of a statute, we seek to determine the legislature's intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). If the plain language is clear and unambiguous, the legislative intent is clear. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). The meaning of a statutory provision is also harmonized with the other provisions in the statute and the statutory scheme as a whole. *Jacobs*, 154 Wn.2d at 600. The earned release statute here defines earned release as a combination of good conduct time credits and earned time credits. RCW 9.94A.729(1)(a); *see also* WAC 137-28-160 (definition of "earned release time" is "the combined earned time and good conduct time credit an offender is eligible to earn"). It also recognizes that an offender may be entitled to credit for early release credit earned during presentence detention in a county jail. RCW 9.94A.729(1)(b). This combination, or "aggregate," may not exceed one-third of the total sentence in most cases (with exceptions for certain offenders who are eligible for only 15 percent aggregate earned release time and for those offenders eligible for 50 percent aggregate earned release time). RCW 9.94A.729(3)(a), (c), (d). The plain meaning of "aggregate" as used in RCW 9.94A.729 is the combined good conduct time and earned time, not combined consecutive sentences. *See In re Pers.*

Restraint of Fogle, 128 Wn.2d 56, 59-60, 904 P.2d 722 (1995) (describing the computation of earned release and the maximum allowed of the aggregate credits).

As further support for its argument that sentences unbroken by a release from custody must be treated in the aggregate, the department points out that the United States Supreme Court views the unit of custody for habeas claims as one aggregate period of incarceration rather than as separate units, citing *Garlotte v. Fordice*, 515 U.S. 39, 45-46, 115 S. Ct. 1948, 132 L. Ed. 2d 36 (1995). Thus, a habeas petitioner can challenge a completed sentence if he or she is still in custody. But the Supreme Court's decision in *Garlotte*, like its earlier decision in *Peyton v. Rowe*, 391 U.S. 54, 88 S. Ct. 1549, 20 L. Ed. 2d 426 (1968), was based principally on the plain meaning of "in custody" in the federal habeas statute, which authorizes federal district courts to entertain petitions for relief from state-court judgments when the petitioner is "'in custody in violation of the Constitution or laws or treaties of the United States.'" *Garlotte*, 515 U.S. at 43-44 (quoting 28 U.S.C. § 2254(a)). The Court observed that "'[i]n common understanding "custody" comprehends respondents' status for the entire duration of their imprisonment.'" *Id.* at 44 (quoting *Peyton*, 391 U.S. at 64). The decisions, particularly in *Peyton*, were also based on practical concerns about timely assertion and resolution of habeas petitions. Neither the statutory nor the practical rationales for the decisions in *Garlotte* or *Peyton* has any application to the earned release issue presented in this case.

Alternatively, the department argues that Mr. Jensen did not have the legitimate expectation of finality in the early release and transfer dates certified for the Chelan, Douglas, and Pierce causes required to support a double jeopardy challenge, relying on *Hardesty*, 129 Wn.2d at 315. But *Hardesty* does not support its position. *Hardesty* held that a defendant has no legitimate expectation of finality in a sentence that was obtained by fraud. *Id*. But even where a sentence was the product of an error, the defendant could have a reasonable expectation of finality in the sentence for double jeopardy purposes. *Id*. at 314.[10] Even a bona fide correction of an error in an offender's good time credits may have double jeopardy implications if the correction comes at a time that violates the inmate's legitimate expectation of finality. *Warnick*, 425 F.3d at 846.

Warnick presented an inmate similar to Mr. Jensen's in that the inmate argued that what he contended was a subtraction of earned good time credits took place after they were recorded on his "rebill date"—the date on which his first sentence ended and two other, concurrent sentences began. *See id.* at 844. Having determined that this might present a double jeopardy violation, the Tenth Circuit remanded to the district court for consideration of the double jeopardy issue, directing the district court to determine whether Oklahoma law, including its constitution, statutes, regulations, and state law, or

[10] In the case of the offender in *Hardesty*, the Supreme Court concluded that the State failed to prove the erroneous sentence was obtained by fraud. *Hardesty*, 129 Wn.2d at 318-19.

some other event (like an acquittal) gave the inmate a legitimate expectation of finality. *Id*. at 848. On remand, Oklahoma's procedures were determined to provide that when an inmate completes one sentence and transfers to the next, the earned credits are merely recorded on a "consolidated record card." *Warnick v. Booher*, 2006 OK Cr 41, ¶ 20, 144 P.3d 897. Because the consecutive sentences are considered one actual sentence with multiple parts, the inmate's sentence is not actually discharged until all parts of it are completely served through the combination of accumulated credits and actual days in prison. *Id.* at ¶ 21. Thus, under Oklahoma law, the ongoing accumulation and reduction of good time credits throughout the period of incarceration created no expectation of finality in the sentence short of the aggregate term set forth in the judgment and sentences. *Id.* at ¶ 13.

Washington law and procedure are distinguishable. Washington statutes and case law do not provide that multiple consecutive sentences are treated as a single, aggregate term of imprisonment. Before recent amendments to DOC Policy 350.100 and WAC 137-30-030(1)(e) (filed in 2011, which states that an offender who has transferred from one cause to another may lose earned release time in the previous cause), the department had no policy treating consecutive sentences in the aggregate. Instead, and as detailed above, policy provided that each sentence in a consecutive series was separate, that earned release credits would be certified at the end of each term of incarceration, and that those

credits could not be lost after the offender transferred to the next consecutive sentence or cause. An offender is justified in expecting that the department will follow its own policies regarding risk classification reassessment. *Pullman*, 167 Wn.2d at 218.

The department argues that its former DOC Policies 350.100 prohibited only the loss of earned release credits due to infraction sanctions, not corrections of "mistakes." But the plain language of its policy is not so limited. It assures that an inmate "cannot lose" earned release credits after he or she has transferred from one cause to the next cause. *See, e.g.*, former DOC 350.100(I)(M) (2006). Reassessment of an offender's risk classification with a newly adopted assessment tool does not constitute a correction of a mistake. The former classification was accurate under the assessment system then in place.

The department also asserts that it did not actually take away Mr. Jensen's credits, but merely changed their value with the new risk assessment. Had its policies provided for accumulation of gross credits subject to adjustment for risk of reoffense at the conclusion of Mr. Jensen's commitment, the department's position would be reasonable. But that was not its method or policy. It applied the risk assessment classification and resulting 50 or 33 percent cap at the time it certified earned release credits and transferred Mr. Jensen to the next cause. Absent any provision for posttransfer revaluation of previously-certified earned release time, the department's revaluation was unforeseeable

and equivalent to a loss.[11] The policy in effect at the time Mr. Jensen's earned release credits were certified assured him that the credits could not be lost once he transferred to the next cause. He had a legitimate expectation of the finality of those credits and the length of incarceration for each of those prior consecutive sentences.

The department's retroactive adjustment of the release dates for Mr. Jensen's completed terms of incarceration due to a changed risk classification violated the multiple punishments prohibition of the double jeopardy clause. Mr. Jensen is also entitled to relief based on his showing that the department failed to comply with its own rules, which itself proves unlawful restraint under RAP 16.4. *Cashaw*, 123 Wn.2d at 147-48.

We need not reach Mr. Jensen's additional argument that the department's action constituted an ex post facto violation. *See State v. Speaks*, 119 Wn.2d 204, 207, 829 P.2d 1096 (1992) (if it is not necessary to reach a constitutional question, the court should decline to do so). We deny the portion of his petition seeking relief from the Okanogan sentence and grant relief from the Chelan, Douglas, and Pierce sentences. We remand to the department for recalculation of Mr. Jensen's release date in accordance with the opinion.

A majority of the panel has determined that this opinion will not be printed in the

[11] The department can, and with its 2011 revision of its Offender Manual, has rewritten its policy on these matters, from which it may argue different "legitimate expectations" in the future.

Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Siddoway, J.

WE CONCUR:

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Korsmo, C.J.

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Kulik, J.