COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of the Personal Restraint of:	)	**36073-3-III**
RONALD D. MCGLOTHLIN,	)	**ORDER DISMISSING PERSONAL RESTRAINT PETITION**
Petitioner.	)	

Ronald D. McGlothlin is serving a 306-month sentence imposed in his 1997 Yakima County convictions on a guilty plea of three counts of first degree rape. He seeks relief from personal restraint in the form of the Department of Corrections (DOC) calculation of his earned early release credits. Because he has had no prior opportunity for judicial review of this issue, he does not need to make the usual threshold showing of actual prejudice due to a constitutional error, or of a complete miscarriage of justice due to a nonconstitutional error. *In re Pers. Restraint of Gentry*, 170 Wn.2d 711, 714-15, 245 P.3d 766 (2010). Instead, he need only show unlawful restraint under RAP 16.4, by demonstrating either a constitutional violation or a violation of state law. *Id.* at 715; *In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 148, 866 P.2d 8 (1994); *In re Pers. Restraint*

of Liptrap, 127 Wn. App. 463, 469, 111 P.3d 1227 (2005). Mr. McGlothlin contends he is restrained due to a constitutional violation.

Under former RCW 9.94A.120(4) (1994) (amending Initiative 593, the "three strikes law," adopted November 1993), Mr. McGlothlin was required to serve a five-year mandatory minimum term of confinement before he became eligible to earn early release credits. In *State v. Cloud*, 95 Wn. App. 606, 617-18, 976 P.2d 649 (1999), Division One held that a portion of Initiative 593 (The Persistent Offender Accountability Act) violated the single subject rule in Article II, section 19 of the Washington Constitution. Specifically, the section that made certain non-persistent offenders ineligible for early release from prison was held unconstitutional because it did not relate to the Act's title, which refers solely to persistent offenders. *Id.* *Cloud* noted, however, that in 1997 the Legislature reenacted RCW 9.94A.120 under a more expansive title (enacted July 27, 1997). The reenacted statute also denied earned early release credit during the mandatory portion of the enumerated crimes, such as first degree rape. *See* former RCW 9.94A.120(4) (1997) (recodified as RCW 9.94A.540).

Pursuant to former RCW 9.94A.120(4) (1994), the DOC initially found that Mr. McGlothlin was not entitled to earned early release time for the first five years of his sentence. In a prior personal restraint petition, he challenged the calculation of his earned early release date under *Cloud*. *See In re Pers. Restraint of McGlothlin*, no 21221-1-III

(Wa. Ct. App. 2002). This court held that the *Cloud* holding applied to offenders whose crimes were committed after November 2, 1993 (the date Initiative 593 was approved) and before July 27, 1997 (when the statute was reenacted). *Id.* at 1-2. Mr. McGlothlin's crimes were committed during this window. The DOC conceded that it had erroneously applied former RCW 9.94A.120(4) to Mr. McGlothlin's sentence and credited him with early release time earned during the first five years of his sentence. Accordingly, Mr. McGlothlin's amended earned early release date was March 23, 2019. The petition was dismissed as moot. *Id.* at 2.

During a 2018 system-wide classification review, the DOC realized that it had calculated Mr. McGlothlin's earned early release date incorrectly. The department discovered that the 1997 reenactment of the Act had an emergency clause relating back to July 1, 1997 for certain provisions. *See* Laws of 1997, ch. 338, § 75 ("This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect July 1, 1997," except for certain sections not relevant here). Mr. McGlothlin's crimes were committed after July 1, 1997; consequently, the DOC credited him solely with the early release credits earned after his mandatory five-year term of confinement, completed on June 26, 2018. The new earned early release date was thus June 16, 2021.

Mr. McGlothlin challenges the change in his earned early release date. He contends the rescission of earned early release granted pursuant to his first personal restraint petition is an illegal ex post facto sentence change.

The ex post facto provisions of the United States and Washington Constitutions prohibit the enactment of laws that retroactively increase the punishment associated with a crime after its commission. *In re Pers. Restraint of Dyer*, 164 Wn.2d 274, 292, 189 P.3d 759 (2008); *State v. Pillatos*, 159 Wn.2d 459, 474-75, 150 P.3d 1130 (2007). "The ex post facto clause is rooted in the individual's right to fair notice, not a right to less punishment." *Dyer*, 164 Wn.2d at 292. When, as here, a statute has been declared unconstitutional, it does not cease to "exist" for purposes of the ex post facto clauses. *Pillatos*, 159 Wn.2d at 476. Application of a new statute that corrects the illegal portions of a former statute in effect at the time of the crime's commission is not an ex post facto violation. *Id.* The old, unconstitutional, statute "still exists, and still gives notice that certain conduct is illegal and carries certain consequences." *Id.*

At the time Mr. McGlothlin committed his crimes, former RCW 9.94A.120(4) (1994) provided that he was not entitled to earned early release credit for the five years of his mandatory sentence. The decision in *Cloud*, which declared the statute unconstitutional because Initiative 593 violated the single subject rule, did not void the statute for ex post facto purposes. Mr. McGlothlin had notice at the time he committed

his crimes in mid-July 1997 that his rape convictions were subject to a mandatory minimum sentence of five years, and that he was disqualified from earning early release credit during that mandatory period. Former RCW 9.94A.120(4) (1994). The constitutional infirmities of the statute were corrected by amendment later in July 1997, and the relevant section of the amendment was expressly applied retroactively to all crimes committed after July 1, 1997. From the time he committed his crimes, Mr. McGlothlin had notice under former RCW 9.94A.120(4) that his conduct carried the consequence of a mandatory minimum sentence with no earned early release credits. Thus, he shows no ex post facto clause violation.

Furthermore, this court is not bound by the DOC's erroneous concession of error related to the 2002 personal restraint petition. *See State v. Haack*, 88 Wn. App. 423, 438, 958 P.2d 1001 (1998) (citing *State v. Knighten*, 109 Wn.2d 896, 901-02, 748 P.2d 1118 (1988)). Neither is this court bound by its erroneous holding in the prior personal restraint petition. *See State v. Clark*, 143 Wn.2d 731, 745, 24 P.3d 1006 (1999) (the law of the case doctrine does not prevent appellate reconsideration of an identical issue if the prior appellate decision was clearly erroneous). The emergency clause of the amendment adopted in Laws of 1997, chapter 338, section 75 was in effect at the time of the 2002 personal restraint and should have determined the result of that petition. Under former RCW 9.94A.120(4) (1997), the DOC correctly changed Mr. McGlothlin's earned early

release date by subtracting early release credits that were erroneously applied to the mandatory minimum sentence. Consequently, Mr. McGlothlin fails to show that he unlawfully restrained.

The petition is therefore dismissed as frivolous. RAP 16.11(b).

REBECCA L. PENNELL
ACTING CHIEF JUDGE

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals
of the
State of Washington
Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

February 25, 2019

Timothy Norman Lang
Mandy Lynn Rose
Office of the Attorney General
1125 Washington St SE
Olympia, WA 98501-2283

Ronald D McGlothlin
#772722
Airway Heights Correction Center
PO Box 2049
Airway Heights, WA 99001-1839

CASE # 360733
Personal Restraint Petition of Ronald D McGlothlin
YAKIMA COUNTY SUPERIOR COURT No. 971011758

Dear Counsel and Mr. McGlothlin:

Enclosed is a copy of the Order Dismissing Personal Restraint Petition filed by this Court today in the above-referenced case.

In accordance with RAP 16.14(c) and RAP 13.5 A, review of this Order may be obtained only by filing a Motion for Discretionary Review in the Washington State Supreme Court within 30 days after the filing of this Order. A copy must be filed with the Court of Appeals.

The address for the Washington State Supreme Court is Temple of Justice, P. O. Box 40929, Olympia, WA 98504-0929.

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:bls
Enclosure