

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

FERNANDO IRIZARRY,

Appellant.

RECEIVED  
COURT OF APPEALS  
DIVISION TWO  
JAN 11 2011  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. THE LACK OF MANDATORY NOTICE, INSUFFICIENT EVIDENCE, AND ABSENCE OF RECORD THAT THE COURT APPLIED THE CORRECT BURDEN OF PROOF BEFORE PUNISHING IRIZARRY FOR COMMUNITY CUSTODY VIOLATIONS ARE SQUARELY PRESENTED IN THE RECORD BEFORE THE COURT

- a. The State inexplicably ignores the recent

Supreme Court decision in *Blackburn*. In *In re Personal Restraint of Blackburn*, 168 Wn.2d 881, 884, 232 P.3d 1091 (2010), the Supreme Court expounded upon the precise due process requirements of prosecuting and imposing a jail sanction for a community custody violation. Irizarry repeatedly cited Blackburn throughout his Opening Brief but the State simply ignores this case in its Response Brief. Yet Blackburn is not only critical for its explanation of the mandatory due process requirements of a community custody violation hearing, it is also controlling by disposing of the State's counterarguments, thereby showing the inadequacy of the notice and allegations against Irizarry.

The Blackburn Court explained that the "minimum requirements of due process" for revoking a person's community custody require (1) that "written notice of the claimed violations"

must precede a hearing; (2) “advance disclosure of the State's evidence”; (3) an “opportunity to be heard in person and to present witnesses and documentary evidence”; (4) “the right to confront and cross-examine adverse witnesses”; (5) a neutral and detached adjudicator,; and (6) “a written statement by the fact finder of the evidence relied on and the reasons for the final decision.” Blackburn, 168 Wn.2d at 884 (quoting Morrissey v. Brewer, 408 U.S. 471, 488-89, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)).

In Blackburn, the Supreme Court addressed the type of notice required. The written notice must “inform the offender of the specific violations alleged and the facts that the State will rely on to prove those violations.” 168 Wn.2d at 884 (citing State v. Dahl, 139 Wn.2d 678, 685, 990 P.2d 396 (1999)). Constitutionally adequate notice requires the State to let the accused person “know DOC's legal theory in order to prepare an adequate defense.” Id.

When accusing someone of accused of failing to obey the law, the accused person must be informed of the “particular definition of the crime that he or she allegedly committed,” in order to defend against the allegation. Id. at 886. This includes the

statutory and nonstatutory essential elements of the law allegedly violated. Id. at 866. Irizarry did not receive such notice.

b. Irizarry received inadequate notice, the State did not prove he committed the *charged* violations, and the court did not restrict itself to the charged violations when imposing punishment. Irizarry repeatedly advised the court and the prosecutor that he had not received written notice of the alleged violations. Irizarry did not receive any written notice. His repeated objections to the State's failure to provide him with written notice preclude the State's effort to cast the claim as waived, as the State asserts in its brief. See 8/14/09RP 2, 4; 10/9/09RP 5, 7; 11/4/09RP 5. The State ignored Irizarry's complaints about the lack of notice rather than provide him with the notice he seeks. Even though it makes no sense for the State to have ignored his complaints about notice, that is the path the State elected.

Furthermore, Irizarry's personal restraint petition is consolidated with his direct appeal. In his personal restraint petition he again explained that he never received written notice. PRP, at 3 ("I never received notice of the allegations, hearing and rights, waiver form."); at 3-5 (describing repeated continuances

without providing notice or timely discovery). The record demonstrates he did not receive written notice.

The State may be implicitly arguing that notice to Irizarry's attorney should suffice. This argument fails because any notice to Irizarry's attorney was inadequate, as explained in Appellant's Opening Brief and further addressed below.

The only "notice" document in the record is a snippet that plainly fails the express requirements set forth in Blackburn. Notice is constitutionally inadequate when it does not "state which law he failed to obey." 168 Wn.2d at 887 (emphasis in original). Merely asserting a threat to another is constitutionally insufficient. Id.

Just as in Blackburn, the State's imprecise allegations about a threat to another not only let the State change its legal theory at any time, but it also could lead the court to find a violation on a theory of culpability different from what the State intended or the court allowed. This problem is especially acute with a harassment allegation because one subsection of the harassment statute has been declared unconstitutional and the court should not rely on it. Blackburn, 168 Wn.2d at 886 (citing

State v. Williams, 144 Wn.2d 197, 210-11, 26 P.3d 890 (2001);  
RCW 9A.46.020(1)(a)(iv)).

The written notice that Irizarry's attorney may have received did not specify what threat was at issue, the elements of the offense, or that the claim rested on a constitutionally valid section of the harassment statute, all of which run afoul of the mandates expressed in Blackburn, 168 Wn.2d at 886.

The lack of clear written notice undermines the reliability and adequacy of the remaining charges, as explained in Appellant's Opening Brief, pages 12-18. Irizarry was accused of failing to register his address but convicted of failing to comply with address requirements. CP 21. The actual address requirements of Irizarry's sentence were never explained or alleged. It violates due process to judge him guilty of an violating a requirement that was not alleged with mandatory clarity and specificity. Blackburn, 168 Wn.2d at 887.

Additionally, the petition alleged the failure to "register" occurred before May 31, 2009, but the testimony at the hearing indicated Irizarry stayed in the Black Crow home in dates during June and July. 1/22/09RP 5, 8; CP 21. The date of the allegation did not square with the violation the court found, or the proven

evidence, and Irizarry's temporary visits to the home do not establish that he resided there as required for failing to register. The proof of this claim was insufficient.

The remaining violations were similarly imprecisely alleged and not directly connected to an actual community custody condition that was imposed. The State did not introduce evidence that Irizarry was forbidden from having any contact with minors or from traveling outside of Pierce County, even though it bears the of burden of proof.

Additionally, the court did not enter any mandatory written findings. Its oral findings never even imply the court understood or applied the correct the burden of proof. The oral findings do not set out the material facts supporting each allegation.

Blackburn dictates that the trial court engage in precise fact-finding and the State restrict itself to specifically alleged violations before the court may sanction a person to a significant term of incarceration. The State's response to the constitutional claims raised is woefully inadequate where it does not even address the Supreme Court decision and analysis in Blackburn. The State cannot escape the inadequacies in the case at bar by

ignoring pertinent case law and minimizing the apparent errors in this case.

c. The State did not follow its own procedural rules in prosecuting Irizarry for community custody violations. Irizarry repeated explained that he did not receive notice of the allegations against him. As the State concedes in its Response Brief, WAC 137-104-050(6) requires that before any violation hearing, the hearing officer “shall verify” that “the offender was properly served with the notice of allegations, . . . given a copy of the report of alleged violations, and provided with all supporting documentary evidence.” Response Brief at 3 n.2. Irizarry did not receive this mandatory notice and the court never resolved Irizarry’s objections. The court directed the attorneys to address the question of whether jurisdiction had expired but never settled Irizarry’s complaint about the lack of written notice. The absence of proper notice, in addition to its inadequacy, undermines the fundamental fairness of the proceedings against Irizarry and is contrary to the minimum due process requirements of a violation hearing.

2. IRIZARRY IS STILL ON COMMUNITY CUSTODY AND HIS APPEAL IS NOT MOOT; THE STATE IMPLICITLY CONCEDES IT IS NOT MOOT; THUS, THE MOOTNESS ARGUMENT SHOULD BE DISREGARDED

The State asserts the issues in the case are moot and sets forth some general legal explanation of the doctrine of mootness. Yet as Irizarry explained in his Opening Brief, he remains on community custody presently, and the sanctions he served would extend the duration of community custody. The State agrees that Irizarry's term of community custody has not expired. Response Brief at 19. Framing the issue presented under the rubric of mootness is simply incorrect.

The State presents this mootness analysis in the context of a misguided and largely inapplicable discussion of Irizarry's ability to raise claims in a personal restraint petition. Irizarry's community custody continues and therefore, this Court should disregard the discussion of mootness for purpose of resolving the challenge to the community custody sanctions imposed and challenged.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief and Personal Restraint Petition, Mr. Irizarry respectfully requests this Court strike the community custody violations for inadequate notice and insufficient proof, and remand his case so that he may receive proper credit for the time he served.

DATED this 21st day of March 2011.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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                   RESPONDENT, )  
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                   v. )  
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 FERNANDO IRIZARRY, )  
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                   APPELLANT. )

NO. 40370-6-II



**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21<sup>ST</sup> DAY OF MARCH, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| <input checked="" type="checkbox"/> FERNANDO IRIZARRY<br>1501 FRESHWATER BAY RD<br>PORT ANGELES, WA 98363  | <input checked="" type="checkbox"/> U.S. MAIL<br><input type="checkbox"/> HAND DELIVERY<br><input type="checkbox"/> _____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 21<sup>ST</sup> DAY OF MARCH, 2011.

X  \_\_\_\_\_

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