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STATE OF WASHINGTON

2007 NOV -5 P 12: 26 No. 79834-6

BY RONALD R. CARPENTER

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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JAYSON LOREN EDWARD BUSH

Appellant,

vs.

STATE OF WASHINGTON

Respondent.

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**APPELLANT'S AMENDED ANSWER AND REPLY BRIEF IN  
SUPPORT THEREOF**

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## I. INTRODUCTION

Mr. Jayson Bush was granted a Conditional Commutation by former Governor Gary Locke on May 25, 2004. Governor Locke authorized a twenty-four (24) month term of “community custody”. *See PRP of Bush, Exhibit “D” p. 2.*

On April 11, 2006, Mr. Bush was charged with one count of Assault of a Child in the Third Degree. He entered a Stipulation and Order of Continuance (SOC) on January 31, 2007 whereby the matter would be dismissed with prejudice provided certain conditions were satisfied.

Governor Christine Gregoire revoked Mr. Bush’s Conditional Commutation on May 30, 2006 without providing sufficient notice or opportunity to be heard on this matter. As of this date, no official document or order has been issued by the Governor’s office, other than the Governor’s letter dated May 4, 2006.

A Personal Restraint Petition has since been filed on behalf of Mr. Bush.

## II. ISSUE I

EVEN IF THE GOVERNOR IS ENTITLED TO REVOKE AN INDIVIDUAL'S PARDON, THE PARDON NEVERTHELESS CREATES A LIBERTY INTEREST AND DUE PROCESS RIGHTS ATTACH.

## III. ARGUMENT

**a) Mr. Bush is entitled to a Hearing prior to the Governor issuing her decision to revoke his conditional commutation.**

Mr. Bush's situation is analogous to parole for the purpose of determining which Due Process Rights Mr. Bush is entitled. In *Morrissey*, the court held that the Fourteenth (14th) Amendment requires that the State afford parolees due process before revoking parole.

The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crimes... The parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions. We see therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts the "grievous loss" on the parolee and often on others.

*Morrissey v. Brewer*, 408 US 471, 482; 92 S. Ct. 2593; 33 L. Ed. 2d 484 (1972).

Mr. Bush also relied on the implicit promise that his original sentence would not be reinstated unless he breached one of the expressed conditions. Because Mr. Bush's situation is analogous to parole, he too is

entitled to Due Process prior to revocation of his Conditional  
Commutation.

In determining what process is due, the Court recognized that the state has an "overwhelming" interest in returning a parolee to prison without the burdens of a trial-like hearing for violating parole conditions. What is needed is an informal hearing structured to assure that a parole violation finding will be based on **verified facts** and that the exercise of discretion will be informed by **accurate knowledge of the parolee's behavior**. Due process requires a preliminary probable cause hearing and a revocation hearing.

The minimum due process requirements include:

- (a) written notice of the claimed violations of parole;
- (b) disclosure to the parolee of evidence against him;
- (c) opportunity to be heard in person and to present and to present witnesses and documentary evidence;
- (d) the right to confront and cross-examine adverse witnesses...;
- (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and;
- (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

*In the Matter of Personal Restraint of Samuel F. McNeal*, 99 Wn. App. 617, 627-8, 994 P. 2d 890 (2000)(emphasis added).

This writer sent numerous requests to the Governor and her general counsel Mr. Richard Mitchell requesting an opportunity to be heard and present facts on behalf of Mr. Bush. Governor Gregoire was also asked to consider the legal affirmative defense to the charge of Assault of a Child in the Third Degree enshrined in RCW 9A.16.100, a defense which this writer was prepared to fully explore at trial. A mitigation packet was also delivered to the Governor, but there was no response indicating she reviewed those materials. These materials and requests were supplied prior to the May 30, 2006 deadline – an issue which is not disputed by the Governor’s attorney.

Governor Gregoire has yet to provide a written statement advising which standard of proof was utilized in her decision to revoke the Conditional Commutation. The only correspondence Mr. Bush received informing him of the revocation was the May 4, 2006 letter where the Governor threatened to revoke the Conditional Commutation. Mr. Bush was not “officially” notified of the revocation until General Counsel Mr. Richard E. Mitchell informed the Honorable Judge Jerome Leveque on January 8, 2007 that the Commutation had actually been revoked the year prior after the Governor “in her own mind” found that Mr. Bush had

committed the offense. Judge Leveque had ordered Mr. Mitchell to appear at this Hearing after the Governor's Office failed to respond to any of this writer's numerous inquiries regarding the status of Mr. Bush's Conditional Commutation.

"The hearing required by due process...must be accorded before the effective decision." *Morrissey v. Brewer*, 408 US at 476, citing *Armstrong v. Manzo*, 380 U.S. 545 (1965). "This discretionary aspect of the revocation decision need not be reached unless there is first an appropriate determination that the individual has in fact breached the conditions of parole. The parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law." *Id.* at 483-4; citing *People ex. rel. Menehino v. Warden*, 27 N.Y. 2d 376, 379 (1971).

Respondent cites *Spencer v. Kees* for the proposition that the Governor has unfettered authority to 'determine whether the conditions of a pardon have been broken'. However, *Spencer*, a **1907 matter**, dealt with an individual who was granted a conditional pardon based on his health and the belief that he would soon be deceased. *Spencer v. Kees*, 47 Wash. 276, 277, 91 P. 963 (1907). Mr. Spencer was pardoned on the condition that "he be placed immediately under the care and surveillance

of Dr. Yancy C. Blalock...and...that the relatives...provide for and support him so long as he shall live...". *Id.*

However, unlike Mr. Bush, Mr. Spencer's pardon did not include the same stringent community custody requirements as Mr. Bush's Conditional Commutation. Mr. Spencer's remaining time was simply pardoned provided he receive medical care from a particular physician and receive support from his family. By Governor Locke ordering such stringent community custody requirements, including the requirement of "commit" no new law violation, he created a liberty interest in the matter.

**b) Mr. Bush's is entitled to a meaningful opportunity to exercise his Due Process Rights in a timely manner.**

Governor Gregoire rushed her decision to revoke Mr. Bush's Conditional Commutation without affording him any of his constitutional rights. This writer believes this decision was made based on a belief that the Governor's jurisdiction over Mr. Bush's matter was soon to expire.

Mr. Bush's Conditional Commutation was signed May 25, 2004, authorizing community custody for a term 'not to exceed twenty-four (24) months. *See PRP of Bush, Exhibit "D" p. 2.* Mr. Bush was released from prison on June 1, 2004. Supervision was to expire May 31, 2006. Mr. Bush was arrested on April 8, 2006 and charged with Assault of a Child in

the First Degree. Governor Gregoire immediately placed a detainer on him and he has remained incarcerated since his April 2006 arrest.

On May 4, 2006, Governor Gregoire advised: "Effective May 30, 2006, your conditional commutation is revoked subject only to a showing by you that charges against you have been dismissed prior to the effective date of this revocation." *See PRP of Bush, Exhibit "B"*.

Mr. Bush was allotted twenty-six (26) days to have the charges against him dismissed. This deadline is based on the amount of time remaining on his community supervision term. Governor Gregoire unjustly rushed the issue believing her jurisdiction over Mr. Bush's matter would expire at the end of the twenty-four (24) month period (May 31, 2006), despite the detainer she had ordered. The original trial date on the underlying charge was set for June 12, 2006. It was technically impossible for Mr. Bush to have these charges dismissed or acquitted before the Governor's deadline.

Ironically, these charges are expected to be dismissed in twenty-four (24) months. Prior to jury selection, Mr. Bush entered into a twenty-four (24) month Stipulation and Order of Continuance (SOC) on two counts of Assault in the Fourth Degree. This SOC is not synonymous with a plea of guilty. The SOC reads: "THE PARTIES AGREE THAT THE COURT IS AUTHORIZING A CONTINUANCE OF THIS MATTER

TO ALLOW ENTRY OF AN **ORDER OF DISMISSAL** REGARDING THE FOLLOWING OFFENSE(S): FOURTH ASSAULT D.V. – TWO COUNTS.” *See PRP of Bush, Exhibit “A” p. 1.*

These charges will be dismissed at the end of the twenty-four (24) month period provide Mr. Bush abides by certain terms and conditions. This disposition satisfies the requirements imposed by Governor Gregoire. There was no possible way this could have been accomplished within the time constraints initially imposed by the Governor.

Governor Gregoire provided Mr. Bush with an opportunity to avoid revocation. It reasonably follows that in the interest of justice and fairness that the opportunity be a viable one. Twenty-six (26) days was an unattainable deadline. There was no feasible way for Mr. Bush to have charges dismissed within that timeframe. The authority to dismiss a case is ordinarily accomplished with a Motion by the State or by an Order of the Superior Court under very limited circumstances. This opportunity is evidence that the Governor also believed that Mr. Bush was entitled to at least minimal Due Process prior to revocation. However, she failed to follow proper procedure.

- c) **Guidance outlining the legal standard of proof for the term “commits” must be provided before any hearing can be conducted.**

Even if Mr. Bush was granted a hearing, it would be impossible to proceed without any guidance regarding the standard of proof that must be overcome to prove a violation has occurred. Without such guidance, Mr. Bush, and all other similarly situated individuals, is at a great disadvantage. They are unable to know, before a violation has occurred, how to model their behavior to avoid revocation or other sanctions.

The Conditional Commutation omits any explanation as to the requisite burden of proof necessary to revoke the Conditional Commutation. A reasonable person could interpret the Conditional Commutation to require proof beyond a reasonable doubt before revocation could occur. This would equate to a jury conviction. An individual can be arrested anytime law enforcement believes probable cause exists. That does not necessarily mean the individual has committed the offense. This is the precise function of a trial. The crime for which Mr. Bush was charged has an affirmative defense of proper parental discipline. This defense may have been explored at trial.

At the very least, the term “commits” should require proof by a preponderance of the evidence. However, without any guidance regarding the applicable standard of proof, this writer would have to be a magician to assist Mr. Bush in avoiding revocation. Mr. Mitchell advised during the January 8, 2007 Hearing that the Governor had “in her own mind”

concluded that Mr. Bush committed this offense. This is a far cry from any established legal standard that this writer is aware of.

#### **IV. CONCLUSION**

Even if the Governor is the proper party to determine whether revocation is appropriate, Mr. Bush is still entitled to a hearing. Mr. Bush's Conditional Commutation is analogous to parole. Like parolees, Mr. Bush was also expected to report to his community corrections officer, to pay a monthly supervision fee, and to comply with other recommendations and instructions of community placement. Just like other parolees, Mr. Bush also relied on the implicit promise that his original sentence would not be reinstated unless he breached one of the expressed conditions.

The Court has already recognized that parolees are entitled to, at least, minimal Due Process. As such, Mr. Bush is entitled to a hearing and written notice as to the alleged violations. He is entitled to an opportunity to be heard at that hearing and to present evidence on his behalf. He is also entitled to a written statement as to the evidence relied upon and the reasons for the revocation. Mr. Bush was denied each of these rights.

Mr. Bush has a right to a meaningful opportunity to exercise his Due Process Rights. Governor Gregoire allotted only twenty-six (26) days

for Mr. Bush to have these charges dismissed. This was an impossibility from the very beginning. Neither this writer nor the prosecuting attorney had, at that early date, the opportunity to interview the alleged victim, or review the discovery. In addition, Governor Gregoire was out of the country at the time, making herself unavailable for any guidance or to review any of the materials delivered by this writer. Ironically, pursuant with the SOC, these charges are scheduled to be dismissed with prejudice at the end of twenty-four (24) months and Mr. Bush will not have been convicted of either a felony or a gross misdemeanor, thereby satisfying the Governor's requests.

Even if Mr. Bush were granted a hearing, it would be impossible to adequately represent him without any guidance as to the legal standard of proof that would be utilized at the hearing. The Pardon implies that "commits" equates to "convict", and would therefore require proof beyond a reasonable doubt. In any case the Governor determining "in her own mind" that Mr. Bush committed this offense, falls short of any conceivable standard of proof that this writer is aware of.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of NOVEMBER,  
2007.

**FILED AS ATTACHMENT  
TO E-MAIL**

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 5<sup>TH</sup> of NOVEMBER, 2007, I served all parties, or their counsel of record, a true and correct copy of this document was delivered to the following person at the following address:

MARY C. McLACHLAN  
Assistant Attorney General  
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1116 W. Riverside  
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LISA R. GURKOWSKI  
Trageser Law Office Paralegal

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To whom it may concern:

Attached, please find a copy of the following documents:

- (1) Appellant's Amended Answer and Reply Brief in Support Thereof;
- (2) Cover Page; and
- (3) Table of Contents.

Thank you for your attention to this matter.

Sincerely,

Marla L. Polin  
Attorney At Law

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