

No. 79834-6

SUPREME COURT OF THE STATE OF WASHINGTON

JAYSON LOREN EDWARD BUSH

Appellant,

vs.

STATE OF WASHINGTON

Respondent.

APPELLANT'S ANSWER AND REPLY BRIEF IN SUPPORT

THEREOF

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ISSUE I	1
	MR. BUSH'S 1997 SENTENCE OF IMPRISONMENT WAS CONVERTED TO A TERM OF TWENTY-FOUR (24) MONTHS OF COMMUNITY CUSTODY , THEREFORE ANY ALLEGED VIOLATIONS OF THE PARDON OR THE 1997 JUDGMENT AND SENTENCE MUST BE PROSECUTED BY THE DEPARTMENT OF CORRECTIONS UNDER RCW §9.94A.737	1
III.	ARGUMENT	1
IV.	CONCLUSION	3
V.	ISSUE II	3
	EVEN IF THE GOVERNOR IS ENTITLED TO REVOKE AN INDIVIDUAL'S PARDON, NOTWITHSTANDING THE FACT THAT THE INDIVIDUAL'S SENTENCE HAS BEEN COMMUTED TO A TERM OF COMMUNITY CUSTODY, THE PARDON NEVERTHELESS CREATES A LIBERTY INTEREST AND DUE PROCESS RIGHTS ATTACH	3
VI.	ARGUMENT	4
	a. Mr. Bush is entitled to a Hearing prior to the Governor issuing her decision to revoke his conditional commutation	4
	b. Mr. Bush's is entitled to a meaningful opportunity to exercise his Due Process Rights in a timely manner	7
	c. Due process mandates that a legal standard of proof regarding the term "commit" be required	8
VII.	CONCLUSION	9
VIII.	ISSUE III	11
	BECAUSE THE CONDITIONAL COMMUTATION CONVERTED THE REMAINING PORTION OF MR. BUSH'S IMPRISONMENT TO A TERM OF COMMUNITY CUSTODY, THE ONLY AVAILABLE PENALTY TO BE IMPOSED IS A TERM NOT TO EXCEED THE REMAINING TERM OF COMMUNITY CUSTODY	11
IX.	ARGUMENT	11

TABLE OF AUTHORITIES

Cases

<i>Morrissey v. Brewer</i> , 408 US 471, 482; 92 S. Ct. 2593; 33 L. Ed. 2d 484 (1972)	4, 5, 6
<i>In the Matter of Personal Restraint of Samuel F. McNeal</i> , 92 Wn. App. 617, 627-8, 994 P. 2d (2000 (emphasis added))	5
<i>Armstrong v. Manzo</i> , 380 U.S. 545 (1965)	6
<i>People ex. Rel. Menehino v. Warden</i> , 27 N.Y. 2d 376, 379 (1971)	6
<i>Spencer v. Kees</i> , 47 Wash. 276, 277, 91 P. 963 (1907)	6

Statutes

RCW§9.94A.16.100	5
RCW§9.94A.030(5)	11
RCW§9.94A.634	2
RCW§9.94A.634(3)(c)	10
RCW§9.94A.737	1, 2, 3, 6, 11
RCW§9.94A.737(1)	2
RCW§9.94A.737(3)	3
RCW§9.94A.737(4)(d)	3

I. INTRODUCTION

Mr. Jayson Bush was granted a Conditional Commutation by former Governor Gary Locke on May 25, 2004. Governor Locke commuted the remaining portion of Mr. Bush's sentence to 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 generated 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

MR. BUSH'S 1997 SENTENCE OF IMPRISONMENT WAS CONVERTED TO A TERM OF TWENTY-FOUR (24) MONTHS OF **COMMUNITY CUSTODY**, THEREFORE ANY ALLEGED VIOLATIONS OF THE PARDON OR THE 1997 JUDGMENT AND SENTENCE MUST BE PROSECUTED BY THE DEPARTMENT OF CORRECTIONS UNDER RCW §9.94A.737.

III. ARGUMENT

Mr. Bush was released on the Conditional Commutation on June 1, 2004. His twenty-four (24) month term of community custody was set to expire on May 31, 2006.

“NOW, THEREFORE, I, Gary Locke, by virtue of the power vested in me as Governor of the state of Washington, grant to Jayson Loren Edward Bush this Conditional Commutation, commute the remainder of the sentence imposed to a term of community custody not to exceed the normal term imposed by the sentencing court (twenty-four months)...” *See PRP of Bush, Exhibit “D” p. 2.*

The ‘normal term’ is based on the nature of the underlying 1997 convictions (Assault in the First Degree). Furthermore, Mr. Bush was subject to certain restrictions and conditions during this twenty-four (24) month period, including: meeting with a community corrections officer; pay a monthly supervision fee; remain in a particular geographic location; submit to random urinalysis and breathalyzer testing; and not associate with any drug users or dealers. *See PRP of Bush, Exhibit “D” p. 2.*

Prosecution of community custody violations are guided by RCW §9.94A.737. RCW §9.94A.737(1) reads: “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...” The remainder of the statute outlines the procedural rights of the offender. Findings of alleged violations must be found by a preponderance of evidence. *See RCW §9.94A.634.*

Because Governor Locke commuted the remainder of Mr. Bush’s 1997 sentence to twenty-four (24) months of community custody, a violation of any of the conditions or requirements must be handled through the Department of Corrections. If the Department were to determine Mr. Bush had violated one of these terms, he could be incarcerated for a term not to exceed the remaining portion of the community custody term.

RCW §9.94A.737(3) reads: “If an offender is accused of violating any condition or requirement of community custody, he...is **entitled** to a hearing before the department prior to the imposition of sanctions...”

RCW §9.94A.737(4)(d) reads: “The offender shall have the right to (i) Be present at the hearing, (ii) have the assistance of a person qualified to assist the offender in the hearing..(iii) testify or remain silent; (iv) call witnesses and present documentary evidence; and (v) question witnesses who appear and testify.”

Clearly a liberty interest exists and Mr. Bush is entitled to a hearing before any sanctions are imposed. Furthermore, the statute outlines the procedures that are to be followed at this hearing and the rights an individual is entitled to at that hearing.

IV. CONCLUSION

By converting the remaining portion of Mr. Bush’s term of imprisonment to a term of community custody, Governor Locke created a liberty interest and therefore Due Process Rights attach to any potential revocation proceeding. Allegations of a violation of a term of community custody are to handled pursuant with the provisions of RCW §9.94A.737. This statutes entitles Mr. Bush, not only to a hearing prior to revocation, but also to be present during that hearing, to have assistance during that hearing, to testify, to call witnesses and to present evidence on his behalf. Mr. Bush requested each of these rights, and was denied without even the courtesy of a response by the Governor’s office.

V. ISSUE II

EVEN IF THE GOVERNOR IS ENTITLED TO REVOKE AN INDIVIDUAL’S PARDON, NOTWITHSTANDING THE FACT THAT THE INDIVIDUAL’S SENTENCE HAS BEEN COMMUTED TO A TERM OF COMMUNITY CUSTODY, THE PARDON

NEVERTHELESS CREATES A LIBERTY INTEREST AND DUE PROCESS RIGHTS ATTACH.

VI. ARGUMENT

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

Mr. Bush's term of community custody 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 relied on the 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 may have explored at trial. A mitigation packet was 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 afforded 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 commuting the remainder of his sentence to community custody. Mr. Spencer's remaining time was simply pardoned provided he abide by certain conditions. By Governor Locke commuting Mr. Bush's remaining period of imprisonment to community custody, he created a liberty interest in the matter. In addition, since Mr. Bush's release was converted to a term of community custody, he, by statute, is entitled to a hearing. See RCW §9.94A.737

b) Mr. Bush 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 due process 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, commuting the remainder of his 1997 sentence to 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 custody 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. Once the detainer was placed on Mr. Bush the time for a hearing was tolled. Thus, the resolution of the alleged violation did not need to be rushed. 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 provided Mr. Bush abides by certain terms and conditions. This disposition satisfies the requirements imposed by Governor Gregoire with the exception that the dismissal will not occur until the end of the twenty-four (24) month period.

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 by way of Motion by the State or by an Order of the Court under very limited circumstances. This opportunity is evidence that the Governor believed that Mr. Bush was entitled to at least minimal Due Process prior to revocation. However, the Governor failed to follow any procedure and the rules arbitrarily created in no way amount to due process.

c) Due process mandates that a legal standard of proof regarding the term "commit" be required.

Even if Mr. Bush is not entitled to a hearing, nevertheless due process dictates that some standard of proof be required as to the term "commit". Without such a standard, it is impossible to defend oneself regarding revocation and in addition, Mr. Bush, and all other similarly situated

individuals, are at a great disadvantage. Specifically, those individuals 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 may even equate the term "commit" to a conviction in a criminal Court. 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.

Even if the proof beyond a reasonable doubt is not required, the term "commits" should require, at a minimum, 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.

VII. CONCLUSION

Even if the Governor, not the Department of Corrections, 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 and to contend that it equates to due process is a myth. 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 original pardon.

Even if a hearing is not required, due process mandates a legal standard of proof be applied to the term "commit" without it, it would be impossible to adequately represent him without any guidance as to the legal standard of proof that would be utilized. The Pardon implies that "commits" equates to "convict", and would therefore require proof beyond a reasonable doubt, at a minimum, the standard of preponderance of evidence should be applied.

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.

VIII. ISSUE III

BECAUSE THE CONDITIONAL COMMUTATION CONVERTED THE REMAINING PORTION OF MR. BUSH'S IMPRISONMENT TO A TERM OF COMMUNITY CUSTODY, THE ONLY AVAILABLE PENALTY TO BE IMPOSED IS A TERM NOT TO EXCEED THE REMAINING TERM OF COMMUNITY CUSTODY.

IX. ARGUMENT

RCW §9.94A.030(5) defines community custody as "that portion of an offender's sentence of confinement in lieu of earned release time... served in the community subject to controls placed on the offender's movement and activities by the department."

RCW §9.94A.737 provides that if an offender violates any condition of community custody, the department may transfer the offender to a restrictive confinement to serve the remaining time of community custody.

Assuming Mr. Bush was found to have violated a term of his release, at most, he may only be sanctioned to the remaining term of his community custody. Thus, his release date should be June 1, 2006. Thus, re-imposing sixteen (16) years is unlawful because it violates the terms of the pardon.

X. CONCLUSION

Governor Locke converted the remaining portion of Mr. Bush's 1997 sentence to a twenty-four (24) month term of community custody. Therefore, the only penalty that can be imposed for a violation is the remaining term of community custody. Mr. Bush has now served thirteen

months in the Spokane County Jail. This far exceeds any imprisonment he could have received for a violation of community custody.

Because Mr. Bush is being unlawfully detained by Governor Gregoire, this writer respectfully requests that the Court grant review on the issues presented on behalf of Mr. Bush as outlined in his Personal Restraint Petition.

RESPECTFULLY SUBMITTED this 24th day of MAY, 2007.



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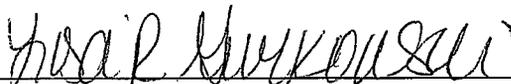


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 24th of May, 2007, I served all parties, or their counsel of record, a true and correct copy of this document, which was delivered to the following person at the following address:

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