

No. 40297-1-II  
Cowlitz Co. Cause No. 09-1-00790-7

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

**STATE OF WASHINGTON,**

Appellant

v.

**BLAKE ANDREW BARKER,**

Respondent.

---

**REPLY BRIEF**

---

10 OCT 22 PM 1:50  
STATE OF WASHINGTON  
BY SB  
DEPUTY

COURT OF APPEALS  
DIVISION II

SUSAN I. BAUR  
Prosecuting Attorney  
DAVID PHELAN/WSBA #36637  
Deputy Prosecuting Attorney  
Attorney for Appellant

Office and P. O. Address:  
Hall of Justice  
312 S. W. First Avenue  
Kelso, WA 98626  
Telephone: 360-577-3080

**TABLE OF CONTENTS**

**I. ANSWER TO COUNTERSTATEMENT OF ISSUE..... 1**  
**II. ARGUMENT..... 1**  
**III. CONCLUSION ..... 3**

## TABLE OF AUTHORITIES

### Cases

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

..... 1, 2

*Sherman v. U.S. Parole Com'n*, 502 F.3d 869, 880 (9<sup>th</sup> Cir. 2007).... 1, 2, 3

### Statutes

18 U.S.C. Section 4213..... 3

RCW 9.94A.737..... 2

## **I. ANSWER TO COUNTERSTATEMENT OF ISSUE**

This issue was not raised at the trial court level and should not be addressed at this time without a properly designated cross-appeal of the trial court's ruling.

There is an insufficient record to evaluate the respondent's claims. Respondent addresses, generally, the requirements laid out by *Morrissey v. Brewer*, but since the issue of the State's compliance with those requirements was not raised at the trial court level, there is no record that examines any failure to comply with those requirements. 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) .

Finally, insofar as the record exists, the State fully complied with the requirements of *Morrissey* and the alleged due process violation should not be considered an independent ground to affirm the trial court's decision.

## **II. ARGUMENT**

It appears that the respondent concedes the appellant's initial argument regarding the error made by the trial court in light of *Sherman v. U.S. Parole Com'n*, 502 F.3d 869, 880 (9<sup>th</sup> Cir. 2007).

Turning to the alternative basis to affirm alleged by the respondent, the argument is based on a fundamental misunderstanding of the requirements of *Morrissey*. The Department of Corrections is required by statute to provide the full panoply of protections outlined in *Morrissey*, including: (1) written notice of the violation, the evidence presented, and

the basis for any sanction (2) a hearing, (3) an interpreter or other assistant, (4) the right to testify or remain silent, (5) call witnesses and present evidence, (6) questions witnesses that appear and testify, (7) the right to appeal, (8) and that hearings officers report through a separate chain of command than community corrections officers. RCW 9.94A.737. These requirements almost exactly mirror the minimal due process protections required by *Morrissey*, 408 U.S. at 489. There is nothing in the record to suggest that the Department failed to adhere to any of those requirements.

There is no record upon which to evaluate the Department of Corrections compliance with such procedural safeguards since this issue was not raised at the trial court. Moreover evidence of a failure to comply with any of the *Morrissey* requirements would be irrelevant in this case, since the only question that relates to the current criminal prosecution is whether the warrant that Barker was arrested on was valid. The warrant was valid.

There is no suggestion in any case cited by the respondent that a parole violator arrest warrant must contain notice of the allegations that provide the basis of that warrant. Nor is there any such requirement, contrary to the Respondent's citation of *Morrissey* and *Sherman*. What is required under *Morrissey* is written notice of the allegations at a preliminary hearing. *Id.* at 489. That requirement is provided for under RCW 9.94A.737.

The brief discussion in *Sherman* that relates to the need for notice within the warrant discusses it only in the context of the requirements of 18 U.S.C. Section 4213. *Sherman* does **not** hold that such a requirement is required under the 14<sup>th</sup> Amendment. Nor does *Morrissey*. The only “requirement” is statutory and that does not effect the warrant at issue in this case. Nor is there a reason to impose such a requirement, since written notice is already addressed in RCW 9.94A.737.

The issue is simply whether or not a valid warrant was issued. The wanted person request form alleges a failure to appear and such an allegation is all that is required, under the 4<sup>th</sup> or 14<sup>th</sup> amendment, for a valid warrant to issue. A “mere allegation” is sufficient to comply with the 4<sup>th</sup> and 14<sup>th</sup> amendments. *Sherman*, 502 F.3d at 881.

### **III. CONCLUSION**

The due process issue is improperly raised before the court and should not be evaluated. The due process issue was not raised at the trial court level and as such, there is no record upon which to evaluate the State’s compliance with the requirements of *Morrissey*.

Insofar as an examination of such compliance is possible, it is clear that at the least, the Department of Corrections complies by statute with the requirements of *Morrissey*. The requirement that notice be contained within the body of the warrant is a requirement of the federal statute at issue in *Sherman*, not a constitutional requirement. The “notice” requirement discussed in *Morrissey* relates only to notice AFTER arrest,

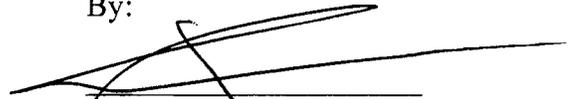
i.e. at a preliminary hearing. There is no requirement that the warrant itself provide notice of the specific violations.

Accordingly, the State requests that this court reverse the trial court and remand the case.

Respectfully submitted this 20<sup>th</sup> day of October, 2010.

SUSAN I. BAUR  
Prosecuting Attorney

By:



DAVID L. PHELAN/WSBA # 36637  
Deputy Prosecuting Attorney  
Representing Appellant

## APPENDIX

**§ 4213. Summons to appear or warrant for retaking of parolee**

(a) If any parolee is alleged to have violated his parole, the Commission may--

(1) summon such parolee to appear at a hearing conducted pursuant to section 4214; or

(2) issue a warrant and retake the parolee as provided in this section.

(b) Any summons or warrant issued under this section shall be issued by the Commission as soon as practicable after discovery of the alleged violation, except when delay is deemed necessary. Imprisonment in an institution shall not be deemed grounds for delay of such issuance, except that, in the case of any parolee charged with a criminal offense, issuance of a summons or warrant may be suspended pending disposition of the charge.

(c) Any summons or warrant issued pursuant to this section shall provide the parolee with written notice of--

(1) the conditions of parole he is alleged to have violated as provided under section 4209;

(2) his rights under this chapter; and

(3) the possible action which may be taken by the Commission.

(d) Any officer of any Federal penal or correctional institution, or any Federal officer authorized to serve criminal process within the United States, to whom a warrant issued under this section is delivered, shall execute such warrant by taking such parolee and returning him to the custody of the regional commissioner, or to the custody of the Attorney General, if the Commission shall so direct.

### **9.94A.737. Community custody--Violations--Hearing--Sanctions**

(1) If an offender is accused of violating any condition or requirement of community custody, he or she is entitled to a hearing before the department prior to the imposition of sanctions. The hearing shall be considered as offender disciplinary proceedings and shall not be subject to chapter 34.05 RCW. The department shall develop hearing procedures and a structure of graduated sanctions.

(2) The hearing procedures required under subsection (1) of this section shall be developed by rule and include the following:

(a) Hearing officers shall report through a chain of command separate from that of community corrections officers;

(b) The department shall provide the offender with written notice of the violation, the evidence relied upon, and the reasons the particular sanction was imposed. The notice shall include a statement of the rights specified in this subsection, and the offender's right to file a personal restraint petition under court rules after the final decision of the department;

(c) The hearing shall be held unless waived by the offender, and shall be electronically recorded. For offenders not in total confinement, the hearing shall be held within fifteen working days, but not less than twenty-four hours, after notice of the violation. For offenders in total confinement, the hearing shall be held within five working days, but not less than twenty-four hours, after notice of the violation;

(d) 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, appointed by the hearing officer if the offender has a language or communications barrier; (iii) testify or remain silent; (iv) call witnesses and present documentary evidence; and (v) question witnesses who appear and testify; and

(e) The sanction shall take effect if affirmed by the hearing officer. Within seven days after the hearing officer's decision, the offender may appeal the decision to a panel of three reviewing officers designated by the secretary or by the secretary's designee. The sanction shall be reversed or modified if a majority of the panel finds that the sanction was not reasonably related to any of the following: (i) The crime of conviction; (ii) the violation committed; (iii) the offender's risk of reoffending; or (iv) the safety of the community.

(3) For purposes of this section, no finding of a violation of conditions may be based on unconfirmed or unconfirmable allegations.

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, )  
)  
Appellant, )  
v. ) NO. 40297-1-II  
)  
BLAKE ANDREW BARKER, ) AFFIDAVIT OF SERVICE  
)  
Respondent. )

DAVID L. PHELAN, being first duly sworn, on oath deposes and says: That on October 20<sup>th</sup>, 2010, I served the following by mail:

David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

AND

Catherine E. Glinski  
Attorney at Law  
P.O. Box 761  
Manchester, WA 98353

10 OCT 22 PM 1:50  
STATE OF WASHINGTON  
BY [Signature]  
DEFENDANT  
COURT CLERK  
DIVISION II

with a copy of the following documents:

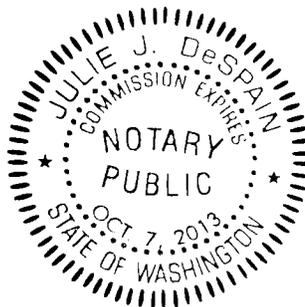
- 1. Reply Brief
- 2. Affidavit of Service

[Signature]  
\_\_\_\_\_

SUBSCRIBED AND SWORN to before me this 20th day of October, 2010.

[Signature]  
\_\_\_\_\_  
Notary Public in and for the State  
of Washington residing in Cowlitz  
Co. My commission expires: 10-7-13

AFFIDAVIT OF SERVICE



RECEIVED  
OCT 22 2010

CLERK OF COURT OF APPEALS DIV I  
STATE OF WASHINGTON

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,	)	
	)	
Appellant,	)	
v.	)	NO. 40297-1-II
	)	
BLAKE ANDREW BARKER,	)	AFFIDAVIT OF SERVICE
	)	
Respondent.	)	

DAVID L. PHELAN, being first duly sworn, on oath deposes and says: That on October 20<sup>th</sup>, 2010, I served the following by mail:

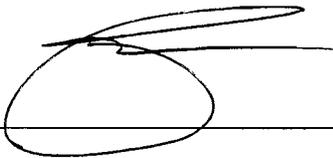
David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

AND

Catherine E. Glinski  
Attorney at Law  
P.O. Box 761  
Manchester, WA 98353

with a copy of the following documents:

1. Reply Brief
2. Affidavit of Service




---

SUBSCRIBED AND SWORN to before me this 20th day of October, 2010.




---

Notary Public in and for the State  
of Washington residing in Cowlitz  
Co. My commission expires: 10-7-13

AFFIDAVIT OF SERVICE

