

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

09 SEP -8 PM 3:54

BY RONALD R. CARPENTER

CLERK *RR*

No. 82329-4

THE SUPREME COURT
OF THE STATE OF WASHINGTON

PERSONAL RESTRAINT PETITION

of

Douglas Blackburn,

Petitioner.

Island County Superior Court Cause No. 04-1-00113-8

DOC Hearing Officer Robert LaLanne

Petitioner's Supplemental Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 339-4870
FAX: (866) 499-7475

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....iii

STATEMENT OF ISSUES 1

STATEMENT OF FACTS AND PRIOR PROCEEDINGS 1

ARGUMENT 5

I. The lack of adequate notice denied Mr. Blackburn his Fourteenth Amendment right to due process. 5

A. The Notice of Allegations did not allege that Mr. Blackburn “willfully” violated the terms of his sentence. .. 5

B. The Notice of Allegations did not allege that Mr. Blackburn failed to “obey all laws” by committing a specific crime..... 6

C. The Notice of Allegations did not outline the essential elements of the crime Mr. Blackburn was accused of committing. 6

D. Mr. Blackburn’s revocation must be reversed because DOC provided constitutionally deficient notice..... 8

II. Mr. Blackburn’s DOSA may not be revoked based on his failure to “obey all laws.” 8

A. The 2004 DOSA statute did not authorize the trial court to require Mr. Blackburn to “obey all laws” as a condition of community custody. 8

B. The requirement that Mr. Blackburn “obey all laws” is

vague and overbroad and cannot support a revocation of his
DOSA. 12

**III. DOC violated Mr. Blackburn’s Fourteenth Amendment
right to due process by revoking his DOSA without
observing the minimal protections required by the
constitution..... 14**

A. Under the circumstances of this case, DOC violated Mr.
Blackburn’s due process right to be represented by counsel at
his revocation hearing. 14

B. Mr. Blackburn was denied his due process right to confront
and cross-examine witnesses against him at his revocation
hearing. 17

C. DOC denied Mr. Blackburn his right to due process by
revoking his DOSA for failure to “obey all laws” without
finding that he violated a particular statute, without finding facts
sufficient to establish a criminal law violation, and without
finding a “willful” violation. 17

**IV. Mr. Blackburn is entitled to relief because he is unlawfully
restrained under RAP 16.4..... 19**

CONCLUSION..... 20

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Gagnon v. Scarpelli</i> , 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973)	5, 14, 15, 17, 20
<i>Morrissey v. Brewer</i> , 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)	.... 5, 17, 20
<i>U.S. v. Chatelain</i> , 360 F.3d 114 (2 nd Cir. 2004)	..... 5
<i>U.S. v. Cina</i> , 699 F.2d 853, 859 (7th Cir.), <i>cert. denied</i> , 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983)	..... 7
<i>U.S. v. Havier</i> , 155 F.3d 1090 (9 th Cir. 1998)	..... 5, 20

WASHINGTON STATE CASES

<i>Adams v. King County</i> , 164 Wn.2d 640, 192 P.3d 891 (2008)	..... 13
<i>Delyria v. State</i> , 165 Wn.2d 559, 199 P.3d 980 (2009)	..... 11
<i>In re Detention of Martin</i> , 163 Wn.2d 501, 182 P.3d 951 (2008)	..... 12
<i>In re Isadore</i> , 151 Wn.2d 294, 88 P.3d 390 (2004)	..... 22
<i>In re Leach</i> , 161 Wn.2d 180, 163 P.3d 782 (2007)	..... 9, 10
<i>In re McNeal</i> , 99 Wn.App. 617, 994 P.2d 890 (2000)	..... 18
<i>In re Orange</i> , 152 Wn.2d 795, 100 P.3d 291 (2004)	..... 21
<i>Spain v. Employment Sec. Dep't</i> , 164 Wn.2d 252, 185 P.3d 1188 (2008)	. 11, 12
<i>State v. Bahl</i> , 164 Wn.2d 739, 193 P.3d 678 (2008)	..... 14, 15, 16, 22, 23
<i>State v. Barclay</i> , 51 Wn.App. 404, 753 P.2d 1015 (1988)	..... 9
<i>State v. Christensen</i> , 153 Wn.2d 186, 102 P.3d 789 (2004)	..... 9
<i>State v. Engel</i> , 166 Wn.2d 572, 210 P.3d 1007 (2009)	..... 9

<i>State v. Gonzales Flores</i> , 164 Wn.2d 1, 186 P.3d 1038 (2008)	14
<i>State v. Jackson</i> , 61 Wn.App. 86, 809 P.2d 221 (1991).....	14
<i>State v. Johnson</i> , 119 Wn.2d 143, 829 P.2d 1078 (1992)	7, 8
<i>State v. Jones</i> , 118 Wn.App. 199, 76 P.3d 258 (2003)	9, 10, 12
<i>State v. Mendoza</i> , 165 Wn.2d 913, 205 P.3d 113 (2009).....	11, 13
<i>State v. Punsalan</i> , 156 Wn.2d 875, 133 P.3d 934 (2006)	10
<i>State v. Raines</i> , 83 Wn.App. 312, 922 P.2d 100 (1996).....	9
<i>State v. Tellez</i> , 141 Wn.App. 479, 170 P.3d 75 (2007)	8
<i>State v. Williams</i> , 144 Wn.2d 197, 26 P.3d 890 (2001)	8, 20

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. XIV	5, 12, 14, 15, 16, 20
------------------------------	-----------------------

WASHINGTON STATE STATUTES

Former RCW 9.94A.120 (2000)	12
Former RCW 9.94A.660 (2004)	6, 9, 10, 11, 12, 14, 21
RCW 26.09.006.....	15
RCW 46.61.570.....	15
RCW 9.94A.660	6, 9, 12, 13
RCW 9.94A.703	13
RCW 9.94A.737.....	6, 19
RCW 9A.46.020	3, 6, 7, 8, 9, 15, 20, 21

OTHER AUTHORITIES

RAP 16.4 19

WAC 137-24-040 18

STATEMENT OF ISSUES

- (1) Whether the petitioner was given sufficient notice of the law he was accused of failing to obey.
- (2) Whether the petitioner's DOSA can be revoked based on a violation that constitutes a crime if the petitioner has not been charged with that crime.
- (3) Whether the petitioner's DOSA revocation proceeding otherwise comported with due process.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In August of 2004, Douglas Blackburn pled guilty to Manufacture of Methamphetamine and Possession of Methamphetamine. He received a prison-based DOSA sentence of 42 months in custody and 42 months of community custody. Judgment and Sentence.¹ He was required to "obey all laws" as a condition of community custody. Judgment and Sentence, p. 6. He was released on community custody in October of 2006.²

While on community custody, Mr. Blackburn completed inpatient drug treatment. DOC Report of Alleged Violation, p. 3. Prior to his release from treatment, he called his mother, Gail Blackburn, arranging to get his truck and keys from her house. His girlfriend also spoke with Gail about the planned visit. Christian Stmt. Gail lived with her disabled sister, and they both received in-home care. Mr. Blackburn's brother and sister-in-law Shelley Blackburn

¹ Unless otherwise noted, documents referenced in this brief are those attached as exhibits to the Response of the Department of Corrections, filed in the Supreme Court on December 26, 2008.

² Prior to revocation, DOC sanctioned Mr. Blackburn for community custody violations. He served a total of 45 days for using a controlled substance, providing a dilute urinalysis sample, and failing to obtain advance approval for a residence change. DOC Report of Alleged Violation, pp. 2-3; OMNI Legal Face Sheet, p. 7.

also lived on Gail's property in their own home. Shelley Blackburn Stmt.

After his release from treatment, Mr. Blackburn and his girlfriend went to Gail's to get his truck and keys. At the house, he spoke with his mother's caregiver, DeAnna Wolf, who told him Gail wasn't home. Wolf Stmt. Ms. Wolf made a phone call, and Shelley came to the house. She told Mr. Blackburn to leave, and threatened to call 911. Shelley Blackburn Stmt. Mr. Blackburn couldn't get his truck started, so he coasted to a neighbor's, got a jumpstart, and left. Christian Stmt. A few minutes later, he called Ms. Wolf to ask when Gail would return. He said he was so aggravated with Shelley that he could kill her. Ms. Wolf called Shelley, and relayed this statement.³ Wolf Stmt.

Mr. Blackburn went to the DOC office. Christian Stmt. While there, Shelley came and wrote a note for the CCO. Shelley Blackburn Stmt. CCO Diekman interviewed Mr. Blackburn, who admitted he made the statement, but explained he didn't mean it and was just venting. The CCO arrested him. Transcript, p. 18.

DOC served Mr. Blackburn with a "Community Custody Notice of Allegations," which alleged a single violation: "Failure to obey all laws; specifically, threatening to kill Shelley Blackburn on or about 5/14/08." Community Custody Notice of Allegation. Mr. Blackburn was later served

³ Later, while going to her second job, Ms. Wolf saw Mr. Blackburn who asked her about the "threat." She declined to talk with him about it. Wolf Stmt.

with an amended notice. Amended Community Custody Notice. Neither notice alleged a willful violation of conditions, or specified the law Mr. Blackburn was alleged to have violated. Both made clear he was not permitted the assistance of counsel: “[N]o other person may represent you in presenting your case. There is no right to an attorney or counsel.” Notice, Amended Notice. A list of the evidence included the Judgment and Sentence, a DOC standard conditions form, chronological reports, a written statement from Shelley, a written statement from Ms. Wolf, and RCW 9A.46.020. Amended Notice. These items were apparently attached to the amended notice. Amended Notice.

At the hearing, CCO Garner read into the record statements from Shelley, Ms. Wolf, and Mr. Blackburn’s girlfriend. Transcript, p. 5-9. When Shelley was called to testify by phone, Mr. Blackburn interjected that a restraining order prevented him from contact (including third party contact) with her.⁴ Transcript, p. 11. He said he would be breaking the law if he communicated with her in any way. The officer reviewed the order, noting: “It does say indirectly or directly um but this is court type stuff so we’re okay.” Transcript, p. 12. Before Shelley testified, the officer told Mr. Blackburn: “I just want to go ahead and say that um you know we’re okay going ahead with this right now, but if your, if your concerned about that you don’t have to say anything to her okay.” Transcript, p. 13.

Shelley testified that Mr. Blackburn had a long history of hating her, and that she took his statement seriously. Transcript, p. 14-16. She claimed that Mr. Blackburn had previously threatened to hurt her. Transcript, p. 16. Mr. Blackburn declined to cross-examine Shelley. Transcript, p. 17. CCO Diekman testified that Shelley seemed scared by what Ms. Wolf said Mr. Blackburn said. Transcript, p. 18-19.

Mr. Blackburn testified that he was just venting his frustration when he made the statement, and that he told Ms. Wolf he was just venting at the time. Transcript, p. 22-23.

In giving his ruling, the hearing officer stated that

“[W]hat really matters though primarily is the perception of the person receiving it. And huh you’ve pretty much uh help me decide on your guilty when you said; well Miss Wolf didn’t even hear the second part because she was so upset.... It is the person on the receiving end that gets to decide how serious it was it is to be taken and she’s took it so seriously and you said well yeah she was so upset that she didn’t hear my second part. I’m finding you guilty of the allegation.”
Transcript, p. 36-37.

The hearing officer revoked Mr. Blackburn’s DOSA. Transcript, p. 37, 40. The decision was memorialized in a handwritten report, and later in a typed report. Community Custody Hearing Report, Hearing and Decision Summary.

Mr. Blackburn appealed, and the Regional Appeals Panel denied his appeal. Regional Appeals Panel Decision. Mr. Blackburn filed a Personal

⁴ The restraining order was apparently issued as a result of this incident. Transcript, p. 15.

Restraint Petition. The Supreme Court accepted the case, appointed counsel, and issued a letter directing counsel to address the issues outlined above, along with any other issues raised in the Petition.

ARGUMENT

I. **THE LACK OF ADEQUATE NOTICE DENIED MR. BLACKBURN HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.**

The Fourteenth Amendment guarantees that no state shall “deprive any person of life, liberty, or property, without due process of law...” U.S. Const. Amend. XIV. The Supreme Court has outlined minimal due process requirements for probation/parole revocation. *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973). This includes the right to adequate written notice of any alleged violations. *Morrissey*, at 489. Where the state alleges that the offender violated conditions by committing a new crime, the state must notify the offender of both the facts alleged and of the law(s) broken. *U.S. v. Havier*, 155 F.3d 1090 (9th Cir. 1998). The notice must be effective, allowing the offender to defend against the allegation. *Havier*, at 1093; *U.S. v. Chatelain*, 360 F.3d 114, 121 (2nd Cir. 2004). Here, DOC provided notice that was deficient for three reasons.

A. The Notice of Allegations did not allege that Mr. Blackburn “willfully” violated the terms of his sentence.

Under the statute in effect at the time Mr. Blackburn was sentenced, DOSA revocation required a finding “that conditions have been willfully

violated...” Former RCW 9.94A.660 (2004). This is in contrast to the current statute, which does not require a finding of willfulness. *See* RCW 9.94A.660, RCW 9.94A.737.

DOC did not notify Mr. Blackburn that he was accused of “willfully” violating his sentence. Notice, Amended Notice. In the absence of proper notice, Mr. Blackburn did not know revocation required a finding of willfulness. In fact, it appears that the hearing officer was also unaware of the requirement, as he did not mention it either in his oral ruling or in his written reports.

B. The Notice of Allegations did not allege that Mr. Blackburn failed to “obey all laws” by committing a specific crime.

DOC did not notify Mr. Blackburn that he was accused of felony harassment (or any other specific crime). Nothing in the original or amended notice specifically alleged a violation of RCW 9A.46.020. The amended notice listed “RCW 9A.46.020” as evidence DOC intended to present; however, neither notice alleged a violation of that statute. Notice; Amended Notice.

C. The Notice of Allegations did not outline the essential elements of the crime Mr. Blackburn was accused of committing.

In a criminal case, all essential elements—both statutory and nonstatutory—must be included in the charging document. *State v. Johnson*, 119 Wn.2d 143, 146-147, 829 P.2d 1078 (1992). Similarly, under *Morrisey*, notice of a community custody violation premised on commission of an uncharged crime must include all essential elements of the uncharged crime.

This is especially important because in most cases the offender will be unrepresented, and thus will be even less likely to understand the nature of the charge than in the context of a new criminal charge.

An essential element is “one whose specification is necessary to establish the very illegality of the behavior.” *Johnson*, at 147 (citing *U.S. v. Cina*, 699 F.2d 853, 859 (7th Cir.), *cert. denied*, 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983)). Felony harassment occurs when a person knowingly threatens to kill another and, by words or conduct, places the person threatened in reasonable fear that it will be carried out. RCW 9A.46.020. There is an additional, nonstatutory element: to avoid First Amendment violations, the state must prove the threat constitutes a “true threat” rather than idle chat.⁵ *State v. Williams*, 144 Wn.2d 197, 26 P.3d 890 (2001).

DOC alleged that Mr. Blackburn violated his conditions: “Failure to obey all laws; specifically, threatening to kill Shelley Blackburn on or about 5/14/08.” Notice, Amended Notice. Neither notice alleged Mr. Blackburn’s words or conduct placed the person threatened in reasonable fear that the threat would be carried out, or that his words constituted a “true threat.”⁶ Notice,

⁵ Division I has decided that the requirement of a “true threat” is not an element of the offense, and need not be alleged in a charging document. *State v. Tellez*, 141 Wn.App. 479, 483-484, 170 P.3d 75 (2007). This is incorrect: a threat that is not a “true threat” is not illegal. Thus the existence of a “true threat” is essential “to establish the very illegality of the behavior.” *Johnson*, at 147. The Supreme Court has not adopted Division I’s position.

⁶ The Amended Notice did cite RCW 9A.46.020, and a copy of that statute was apparently attached to the notice; however, even if this provided sufficient notice of the statutory elements, nothing in the paperwork mentioned the “true threat” requirement. Notice, Amended Notice.

Amended Notice.

D. Mr. Blackburn's revocation must be reversed because DOC provided constitutionally deficient notice.

DOC's notice to Mr. Blackburn was constitutionally deficient.

Although the notice did accuse Mr. Blackburn of "Failure to Obey all Laws" and described his behavior, it did not allege a willful violation, did not allege that Mr. Blackburn had violated any particular statute, and did not outline the essential elements of RCW 9A.46.020 or any other crime.

II. MR. BLACKBURN'S DOSA MAY NOT BE REVOKED BASED ON HIS FAILURE TO "OBEY ALL LAWS."

A. The 2004 DOSA statute did not authorize the trial court to require Mr. Blackburn to "obey all laws" as a condition of community custody.

A sentencing court may only impose a sentence authorized by statute.

In re Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). This includes a court's authority to require law-abiding behavior as a condition of sentence. *See, e.g., State v. Jones*, 118 Wn.App. 199, 204-206, 76 P.3d 258 (2003).⁷ Here, the trial court exceeded its authority by requiring Mr. Blackburn to "obey all laws" as a condition of community custody.

1. Former RCW 9.94A.660 (2004) is unambiguous, and did not authorize courts to require offenders to "obey all laws."

The meaning of a statute is a question of law reviewed *de novo*. *State v.*

Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). The court's inquiry

"always begins with the plain language of the statute." *State v. Christensen*,

153 Wn.2d 186, 194, 102 P.3d 789 (2004). Where the language of a statute is clear, legislative intent is derived from the language of the statute alone. *Engel*, at 578.⁸

Prior to enactment of the SRA, sentencing courts had broad authority to impose conditions of probation tending to prevent the commission of additional crimes. *Jones*, at 204. The SRA eliminated a trial court's authority to order an offender (other than a first-time offender) to obey all laws. *Jones*, at 205. Subsequent amendments permitted such conditions for certain offenders. *Jones*, at 205-206. However, these amendments did not apply to all crimes or to all sentences.

The 2004 DOSA statute did not include any provision specifically authorizing a sentencing court to require law-abiding behavior as a condition of community custody for DOSA sentences. Former RCW 9.94A.660(2) (2004). Accordingly, under the plain language of the statute, the requirement that Mr. Blackburn "obey all laws" was imposed in excess of the court's statutory authority. *Leach*.

2. If former RCW 9.94A.660 (2004) is ambiguous, it must be interpreted to prohibit sentencing courts from requiring offenders to "obey all laws" as a condition of community custody.

⁷See also *State v. Raines*, 83 Wn.App. 312, 315-316, 922 P.2d 100 (1996); *State v. Barclay*, 51 Wn.App. 404, 753 P.2d 1015 (1988).

⁸See also *State v. Punsalan*, 156 Wn.2d 875, 879, 133 P.3d 934 (2006) ("Plain language does not require construction.")

A statute is ambiguous if it is “amenable to more than one reasonable interpretation.” *State v. Mendoza*, 165 Wn.2d 913, 921, 205 P.3d 113 (2009). To determine legislative intent, courts turn to rules of statutory construction. *Delyria v. State*, 165 Wn.2d 559, 563, 199 P.3d 980 (2009). In the case of the 2004 DOSA statute, the rules of statutory construction require an interpretation prohibiting sentencing courts from requiring law-abiding behavior as a condition of community custody for DOSA sentences.

The only portion of the statute that could authorize sentencing courts to require an offender to “obey all laws” is the provision allowing imposition of “[s]uch other conditions as the court may require such as affirmative conditions.” Former RCW 9.94A.660(2) (2004). This language does not permit a court to require law-abiding behavior for four reasons.

First, it is an “elementary rule” of statutory construction that the use of certain language in one instance and different language in another establishes a difference in legislative intent. *Spain v. Employment Sec. Dep’t*, 164 Wn.2d 252, 185 P.3d 1188 (2008). The statutes that have been found to authorize a court to require law-abiding behavior use language that differs from that used in former RCW 9.94A.660(2) (2004).

For example, in *Jones*, Division II upheld a requirement of law-abiding behavior based on a statute allowing the court to order certain offenders to “perform affirmative conduct reasonably related to the circumstances of the

offense, the offenders [sic] risk of reoffending, or the safety of the community...” *Jones*, at 205 (quoting former RCW 9.94A.120(11)(b) (2000)). This language, by its plain terms, “permit[s] a court to order an offender to perform affirmative conduct reasonably related to the offenders risk of reoffending or to the safety of the community. Such conduct includes obeying the community’s laws.” *Jones*, at 205. This language was not included in the 2004 DOSA statute.⁹ Former RCW 9.94A.660 (2004). The use of different language suggests a difference in legislative intent. *Spain*.

Second, the maxim *expressio unius est exclusio alterius* compels the same interpretation. *In re Detention of Martin*, 163 Wn.2d 501, 510, 182 P.3d 951 (2008). Under this rule, omissions are deemed to be exclusions. *Adams v. King County*, 164 Wn.2d 640, 650, 192 P.3d 891 (2008). The omission of any reference to law-abiding behavior or preventing recidivism suggests that the legislature intended to deny sentencing courts authority to impose a requirement that offenders “obey all laws.” *Martin*.

Third, “subsequent legislative changes can be considered when trying to determine legislative intent.” *Mendoza*, at 921. The current DOSA statute references another provision that permits a court to require “affirmative conduct reasonably related to... the offender’s risk of reoffending, or the safety

⁹ The current DOSA statute references a provision outlining required and permitted community custody conditions. RCW 9.94A.660(6)(a). That provision permits a court to require “affirmative conduct reasonably related to... the offender’s risk of
(Continued)

of the community.” RCW 9.94A.703(3)(d), RCW 9.94A.660(6)(a). Because the legislature changed the DOSA statute to explicitly permit sentencing courts to require law-abiding behavior, the previous version of the statute must not have authorized such a requirement as a condition of sentence.

Fourth, the rule of lenity requires criminal statutes to be construed in the manner most favorable to the accused person. *State v. Gonzales Flores*, 164 Wn.2d 1, 17, 186 P.3d 1038 (2008); *State v. Jackson*, 61 Wn.App. 86, 93, 809 P.2d 221 (1991). The policy underlying the rule is “to place the burden squarely on the Legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are.” *Jackson*, at 93. Applying this rule, former RCW 9.94A.660 (2004) must be read to prohibit sentencing courts from imposing a requirement that offenders “obey all laws” as a condition of community custody. *Gonzales Flores*.

For all these reasons, the 2004 DOSA statute must be interpreted to prohibit sentencing courts from imposing a requirement that offenders “obey all laws” as a condition of sentence.

B. The requirement that Mr. Blackburn “obey all laws” is vague and overbroad and cannot support a revocation of his DOSA.

The Fourteenth Amendment’s due process clause requires that citizens have fair warning of proscribed conduct. *State v. Bahl*, 164 Wn.2d 739, 752-

reoffending, or the safety of the community.” RCW 9.94A.703(3)(d).

754, 193 P.3d 678 (2008). This “fair warning” requirement applies not only to statutes, but also to the conditions of a criminal sentence. *Bahl*, at 753. Unlike legislative enactments, conditions of sentence are not entitled to a presumption of constitutionality. *Bahl*, at 753.

A sentence condition is unconstitutionally vague unless it allows ordinary people to understand what conduct is proscribed, and provides ascertainable standards of guilt to protect against arbitrary enforcement. *Bahl*, at 753-754. Conditions affecting rights guaranteed by the First Amendment may exert “a chilling effect on the exercise of sensitive First Amendment freedoms.” *Bahl*, at 753. For such conditions, vagueness concerns become more acute, and “a stricter standard of definiteness applies.” *Bahl*, at 753.

Here, Mr. Blackburn was required to “obey all laws.” Judgment and Sentence, Paragraph 4.6. Presumably, the sentencing court desired Mr. Blackburn to refrain from additional *criminal* violations while on community custody; however, as written, the condition is much broader. An overzealous CCO could legitimately allege that Mr. Blackburn failed to “obey all laws” if he received a parking ticket (*see, e.g.*, RCW 46.61.570), or filed a pleading in a dissolution case using a nonstandard form (*see* RCW 26.09.006, Mandatory Use of Approved Forms). Furthermore, the language could be used (as it apparently was here) to require compliance with statutes such as RCW 9A.46.020 without reference to the constitutionally required “true threat”

element.¹⁰

The requirement to “obey all laws” violates due process because it is unconstitutionally vague. The language does not allow an ordinary person to understand what conduct is proscribed, and does not provide ascertainable standards of guilt to protect against arbitrary enforcement.

III. DOC VIOLATED MR. BLACKBURN’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY REVOKING HIS DOSA WITHOUT OBSERVING THE MINIMAL PROTECTIONS REQUIRED BY THE CONSTITUTION.

A. Under the circumstances of this case, DOC violated Mr. Blackburn’s due process right to be represented by counsel at his revocation hearing.

Ordinarily, the government is not required to provide (or even to allow) counsel for a revocation hearing. *Gagnon*, at 789-791. However, the Supreme Court has made clear that “[a]lthough the presence and participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees.” *Gagnon*, at 789-790. In such cases, the assistance of counsel is necessary to secure the rights guaranteed by the due process clause:

the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence.

¹⁰ Because of this, the condition implicates First Amendment rights, bringing into play the stricter standards mentioned in *Bahl*.

Gagnon, at 786-787. Although the Court refused to formulate precise and detailed guidelines, it held that “counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.” *Gagnon*, at 790. The Court also suggested that the appointing agency consider “whether the probationer appears to be capable of speaking effectively for himself.” *Gagnon*, at 790-791.

Here, Mr. Blackburn was told he could not be represented by counsel, whether retained or appointed. Notice, Amended Notice. This notification, DOC’s failure to offer appointed counsel, and DOC’s failure to make the case-specific inquiry required by the Supreme Court in *Gagnon* violated Mr. Blackburn’s due process right to counsel under the Fourteenth Amendment.¹¹

Gagnon.

¹¹ Division I has held that counsel may be excluded from community custody revocation hearings, and that *Gagnon*’s case-by-case standard does not apply to such hearings. *In re McNeal*, 99 Wn.App. 617, 634, 994 P.2d 890 (2000). The Supreme Court should not follow *McNeal*. The *McNeal* rationale—that community custody is different from and more punitive than parole—does not relate to the U.S. Supreme Court’s basis for its decision in *Gagnon*. Further, even if the *McNeal* rationale made sense, Mr. Blackburn’s term of community custody is more rehabilitative than punitive, in that as a DOSA participant he was required to learn out to live a clean and sober lifestyle while in the community.

Several factors suggest that Mr. Blackburn should have been represented by counsel. First, he denied violating the law, and had colorable defenses to the charges DOC alleged—that his remark was not a “true threat” and that his words and conduct did not create a reasonable fear. Second, his defenses required him to cross-examine the witnesses against him, present documentary evidence supporting his position, and make legal arguments to the hearing officer.¹² These defenses involved more than a simple “he said/she said” denial of the facts; rather, they required more subtle cross-examination to expose more malleable concepts such as “unreasonableness.” The skills required were beyond those possessed by the average offender. Third, Mr. Blackburn is not highly educated (as can be seen from the spelling and grammar errors in his PRP), and had difficulty communicating his position to the hearing officer. Fourth, under the unique circumstances of this case, in which Mr. Blackburn was the subject of a restraining order, an attorney was necessary to act as a proxy who could cross-examine Shelly Blackburn, DOC’s main witness, without risk of new criminal charges.

DOC violated Mr. Blackburn’s due process right to counsel under the Fourteenth Amendment. By categorically refusing to allow counsel at revocation hearings, by refusing to offer appointed counsel, and by failing to

¹² For example, if DOC alleged that he were guilty of Harassment, Mr. Blackburn would have argued that he did not make a “true threat,” and that he did not place another in reasonable fear that the threat would be carried out.

analyze the need for counsel in each case, DOC violated the Supreme Court's rule in *Gagnon*.

B. Mr. Blackburn was denied his due process right to confront and cross-examine witnesses against him at his revocation hearing.

Due process requires that an offender facing revocation be afforded "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)..."

Gagnon, at 786 (quoting *Morrissey*, at 489).¹³ Here, a restraining order prohibited Mr. Blackburn from cross-examining Shelly Blackburn, the main witness against him, yet DOC made no attempt to have the order modified, to appoint counsel for Mr. Blackburn, or to find a legal means of circumventing the restraining order. Under these circumstances, Mr. Blackburn's right to confront and cross-examine witnesses was infringed, and his right to due process was violated. *Gagnon*.

C. DOC denied Mr. Blackburn his right to due process by revoking his DOSA for failure to "obey all laws" without finding that he violated a particular statute, without finding facts sufficient to establish a criminal law violation, and without finding a "willful" violation.

Following a revocation hearing, due process requires "a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation or] parole." *Gagnon*, at 786 (alterations in original) (quoting *Morrissey* at 489). In Washington, the right to a written decision is

¹³ The right is also guaranteed by statute. RCW 9.94A.737.

also secured by regulation. WAC 137-24-040(11).

Here, the hearing officer produced a handwritten statement with a guilty finding for “FTOL by threat to kill 5-14-08,” and a fact summary that recites “1. Obey Law cond. per [Deanna] Wolf P said would ‘kill her’ referring to Ms. Blackburn... [A]dmittid he said it after Miranda rights... Deanna’s statement was consistent + clear she was afraid. RCW (IV)(b) person placed in fear threat carried out.” Hearing and Decision Summary. Nowhere does the handwritten decision specify which statute Mr. Blackburn was alleged to have violated.¹⁴ Nor does the decision include sufficient factual findings for a RCW 9A.46.020 violation: there was no finding that anyone was placed in *reasonable* fear the threat to kill would be carried out, and nor was there a finding that the nonstatutory element of a “true threat” was met. *See* RCW 9A.46.020, *Williams*. The hearing officer himself appeared unaware of these requirements.

The hearing officer also produced a document titled “Community Custody Hearing Report.” This indicates that Mr. Blackburn was found guilty of “Failure to obey all laws: specifically, threatening to kill Shelly Blackburn....” Community Custody Hearing Report, p. 2. RCW 9A.46.020 was referenced as part of the evidence relied upon; however, this document also reflects a failure to find *reasonable* fear, nor a “true threat.” Community

Custody Hearing Report, p. 4. Instead, the officer noted that Mr. Blackburn admitted “that he knew Ms. Wolf took the threat seriously,” and that Ms. Blackburn “took the threat seriously and the RCW fits this threatening behavior.” Community Custody Hearing Report, p. 4.

Further, the hearing officer never made a finding—either orally or in writing—that Mr. Blackburn willfully violated the terms of his community custody. A finding of willfulness is a prerequisite to revocation of DOSA under former RCW 9.94A.660 (2004), which applies to Mr. Blackburn’s case.

IV. MR. BLACKBURN IS ENTITLED TO RELIEF BECAUSE HE IS UNLAWFULLY RESTRAINED UNDER RAP 16.4.

Ordinarily, a person seeking relief through a personal restraint petition must show that constitutional error caused actual and substantial prejudice. *See, e.g., In re Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004). However, where the petitioner has not had a prior opportunity for judicial review, this heightened threshold does not apply. *In re Isadore*, 151 Wn.2d 294, 298-299, 88 P.3d 390 (2004). Instead, under such circumstances, a petitioner is entitled to relief upon a showing that she or he is restrained (pursuant to RAP 16.4(b)), and such restraint is unlawful (pursuant to RAP 16.4(c)).¹⁵ *Isadore*, at 298-299.

Since Mr. Blackburn has not had a prior opportunity for judicial

¹⁴ The citation to RCW (IV)(b) fails to clarify.

¹⁵ The availability of administrative review does not trigger the heightened threshold. *See, e.g., Bahl*.

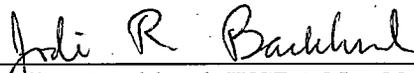
review, the more lenient standards apply. *Isadore*. Mr. Blackburn is under restraint because he is held as a result of the revocation hearing. Further, his restraint is unlawful because it was achieved in violation of his Fourteenth Amendment right to due process. Thus Mr. Blackburn is entitled to relief. *Isadore*. Even under the more stringent standard, Mr. Blackburn is entitled to relief because the denial of due process caused actual and substantial prejudice. Each of the errors outlined above contributed to the improper revocation of Mr. Blackburn's DOSA. *Orange*.

CONCLUSION

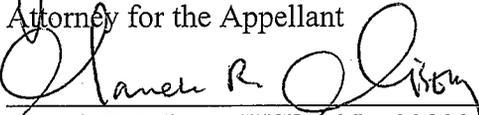
The revocation of Mr. Blackburn's DOSA violated his Fourteenth Amendment right to due process. The notice was deficient, the requirement to "obey all laws" was unlawful and unconstitutional, the evidence of violation was insufficient, and the findings were insufficient. *Morrissey, Havier, Bahl, Gagnon*. Mr. Blackburn is unlawfully restrained and his revocation must be reversed.

Respectfully submitted on September 8, 2009.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

09 SEP -8 PM 3:55

CERTIFICATE OF MAILING

BY RONALD R. CARPENTER

I certify that I mailed a copy of this Supplemental Brief, postage prepaid, to:
CLERK

Douglas Blackburn
C/O Leanna Christian
1389 N. Zelstran Rd.
Oak Harbor, WA 98277

and to:

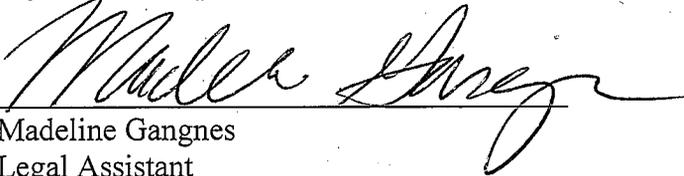
Office of the Attorney General
P. O. Box 40116
Olympia, WA 98504-0116

And that I personally delivered the original and one copy to the Supreme Court
for filing;

All on September 8, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND
CORRECT.

Signed at Olympia, Washington on September 8, 2009.



Madeline Gangnes
Legal Assistant