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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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No. 39163-5-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**James McPherson,**

Appellant.

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Thurston County Superior Court Cause No. 99-1-00287-7

The Honorable Judge Carol Murphy

**Appellant's Opening Brief**

Jodi R. Backlund

Manek R. Mistry

Attorneys for Appellant

**BACKLUND & MISTRY**

203 East Fourth Avenue, Suite 404

Olympia, WA 98501

(360) 352-5316

FAX: (866) 499-7475

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### **ASSIGNMENTS OF ERROR**

1. Mr. McPherson's sentence was imposed in violation of his Fourteenth Amendment right to equal protection.
2. The trial court erred by sentencing Mr. McPherson with a standard range of 4-12 months incarceration.
3. The trial court erred by imposing 6 months incarceration.

### **ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

A statute violates the Fourteenth Amendment right to equal protection when it employs a classification that is not rationally related to a legitimate state purpose. Under laws in effect in 1999, a misdemeanor who willfully failed to return to work release was punished more severely than a felon who engaged in the same conduct. Did the imposition of a more severe punishment on Mr. McPherson than on similarly situated felons who willfully failed to return to work release violate equal protection, because it was wholly unrelated to any legitimate state purpose?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

In January of 1999, Mr. McPherson was confined in the Thurston County Jail, serving time on two gross misdemeanor convictions. CP 3-4. He was a participant in the jail's Chemical Dependency Program, and was allowed to serve part of his time on work release. CP 4. On January 14, he check out for a job interview, and failed to return as required. CP 4. A warrant was issued, and he was arrested in 2008. CP 4.

Mr. McPherson was charged with Escape in the Second Degree. CP 2. Following a stipulated facts trial, he was convicted. Stipulation: Bench Trial, Supp. CP; CP 3-5; CP 19. His standard range was determined to be 4-12 months. RP (3/13/09) 3, 5.

Had Mr. McPherson been confined pursuant to a felony conviction when he failed to return to work release, he would have been charged under a different statute, and subject to a standard range of 1-3 months. *See* Offense Reference Sheets, attached to Defendant's Sentencing Memorandum, Supp. CP. In light of this, defense counsel argued for an exceptional sentence below the 4-12 month standard range. RP (3/13/09) 5-8; Defendant's Sentencing Memorandum, Supp. CP.

The court sentenced Mr. McPherson to 6 months confinement, and he appealed. CP 23, 28.

## ARGUMENT

### **MR. MCPHERSON'S SENTENCE WAS IMPOSED IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION.**

The Fourteenth Amendment prohibits the states from denying “to any person within its jurisdiction the equal protection of the laws.” U.S. Const. Amend. XIV. The core purpose of the Equal Protection Clause is to ensure that similarly situated persons are treated in a similar fashion. *State v. Berrier*, 110 Wn.App. 639, 648, 41 P.3d 1198 (2002). A statute is constitutionally invalid “as applied” when it deprives an individual of a protected right (even if the statute is not unconstitutional on its face). *Boddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). Where a legislative classification does not involve a suspect class or threaten a fundamental right, it need only be rationally related to a legitimate state objective.<sup>1</sup> *Berrier*, at 649.

In *Berrier*, the defendant was sentenced for unlawful possession of a short-barreled firearm with a firearm enhancement. Under former RCW 9.94A.310(f), the enhancement applied to those convicted of possessing short-barreled shotguns or short-barreled rifles, but not to those convicted under the same statute of possessing machine guns. *Berrier*, at 649-651.

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<sup>1</sup> When a statute infringes physical liberty but does not involve a suspect class, no fundamental right is threatened. *Berrier*, at 649.

The court found this distinction irrational, held that imposition of the enhancement violated equal protection, and vacated the enhancement. *Berrier*, at 651.

In this case, the state charged Mr. McPherson with Escape in the Second Degree, alleging that he escaped from a detention facility on or about January 14<sup>th</sup>, 1999, in violation of RCW 9A.76.120(1)(a). CP 2. At that time, another statute (former RCW 72.65.070) criminalized willful failure to return to work release; however, that statute applied only to convicted felons, while Escape in the Second Degree covered people serving time on misdemeanor and gross misdemeanor convictions. RCW 9A.76.120(1)(a).

Had Mr. McPherson been serving time for a felony conviction, he would have been charged with a violation of former RCW 72.65.070 (since that was the more specific offense) and would have received a lesser penalty.<sup>2</sup> *See State v. Brasford*, 56 Wn.App. 268, 783 P.3d 129 (1989). But since he was serving time for DUI and DWLS, both gross

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<sup>2</sup> Under former RCW 72.65.070, the offender score was calculated using only prior escape-like offenses. By contrast, all prior felonies were counted to calculate the offender score for a violation of the escape statute. *See* Offense Reference Sheets, attached to Defendant's Sentencing Memorandum, Supp. CP.

misdemeanors, he was instead charged with Escape in the Second Degree, which carried a higher penalty.<sup>3</sup> CP 2.

This statutory scheme violated equal protection.<sup>4</sup> There is no legitimate state objective served by punishing misdemeanants who willfully fail to return from work release more severely than felons who engage in the same conduct. Accordingly, Mr. McPherson is entitled to have his sentence vacated and the case remanded for resentencing using the 1-3 month standard range he would have had for a violation of former RCW 72.65.070.<sup>5</sup> *Berrier, supra*.

### CONCLUSION

For the foregoing reasons, Mr. McPherson's sentence must be vacated, and the case must be remanded to the trial court with instructions to sentence Mr. McPherson within the 1-3 month standard range.

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<sup>3</sup> See Offense Reference Sheets, attached to Defendant's Sentencing Memorandum, Supp. CP.

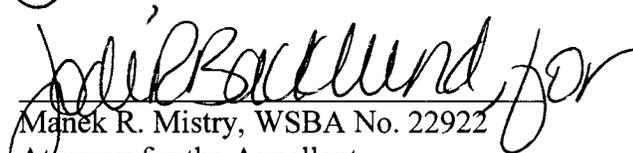
<sup>4</sup> The legislature implicitly recognized this by repealing former RCW 72.65.070, allowing both felons and misdemeanants who willfully left work release to be charged with escape.

<sup>5</sup> See Offense Reference Sheet III-85, attached to Defendant's Sentencing Memorandum, Supp. CP.

Respectfully submitted on July 10, 2009.

**BACKLUND AND MISTRY**

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

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

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

James McPherson  
9085 Steel Creek Loop NE  
Bremerton, WA 98311

and to:

Thurston County Prosecuting Attorney  
2000 Lakeridge Dr. S.W., Building 2  
Olympia, WA 98502

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 10, 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 July 10, 2009.

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

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