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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court violated McPherson's Fourteenth Amendment right to equal protection when it sentenced him to a standard range sentence for second degree escape.

B. STATEMENT OF THE CASE

The State accepts the appellant's statement of the case.

C. ARGUMENT

1. The trial court correctly sentenced Mr. McPherson to 6 months confinement. The disparate sentencing of a misdemeanor who willfully failed to return to work release and a felon who engages in the same conduct does not violate a fundamental right. No statute entitles a misdemeanor to the same punishment as a felon. This distinction in sentencing is rational and does not violate the Equal Protection Clause.

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 equal protection clauses of the state and federal constitutions guarantee that persons situated similarly with respect to the legitimate purpose of the law must receive like treatment. *State v. Manussier*, 129 Wn.2d 652, 672, 672 P.2d 473 (1996). Equal protection is denied if a valid law is administered in a way that unjustly discriminates between similarly situated persons. *State v. Handley*, 115 Wn.2d 275, 289, 796 P.2d 1266 (1990). Before a court will scrutinize an equal protection

claim, the defendant must establish that he is situated similarly to others in a class. *Handley*, 115 Wn.2d at 289-90.

The issue in this case is similar to that in a 2009 Court of Appeals case which held that in view of the differences between felony and misdemeanor sentencing, a statute that entitled felons detained before trial on electronic home monitoring to be credited for time served, but not misdemeanants, was rational and did not violate the Equal Protection Clause. *Harris v. Charles*, No. 61629-3-I, 2009 Wash. App. Lexis 2181.

In *Harris*, the defendant was charged with one count of driving while license suspended in the third degree (DWLS Third) and one count of operating a vehicle without an ignition interlock. The court sentenced Harris to 90 days in jail on the first count, consecutive to a 90- day suspended on the second count. Harris had spent 140 days on electronic home monitoring prior to his conviction, and asked to be credited for that time. The municipal court denied his request. Harris filed a petition in Superior Court for a writ of habeas corpus, asking on equal protection grounds that the municipal court be ordered to give him credit for his time on electronic home monitoring, as is required by a statute when sentencing felons. Over the city's objection, the Superior Court found the rule for

felons also applied to Harris. *Harris*, 2009 Wash. App. Lexis 2181 at \* 1.

On appeal, the court in *Harris* held that “considering the differences between felony and misdemeanor sentencing, it is not arbitrary to limit the court’s discretion in one system and leave it unrestricted in the other.” *Harris*, 2009 Wash. App. Lexis 2181 at \* 10. The court further noted that there is a rational basis for treating misdemeanants differently from felons. The misdemeanor courts retain discretion to give credit for time served pretrial on electronic home monitoring, but they are not obliged to do so. *Id.* When the facts of the instant case are presented against the backdrop of *Harris*, it is clear that McPherson’s constitutional right was not violated. The “rational basis” test is used for analyzing equal protections claim when, as here, classification does not involve a suspect or semi-suspect class and does not threaten a fundamental right. *Manussier*, 129 Wn.2d at 673. Under that test, a law will be upheld if it rests upon a legitimate state objective and is not wholly irrelevant to achieving that objective. *Manussier*, 129 Wn.2d at 673. A person challenging the classification must show that it is “purely arbitrary.” *Omega Nat’l Ins. Co. v. Marquardt*, 115 Wn.2d 416, 431, 799 P.2d 235 (1990).

Further, the sentencing consequences for felonies and misdemeanors are significantly different. One significant difference is that felons typically face much higher maximum penalties. *State v. Bowen*, 51 Wn. App. 42, 46-47, 751 P.2d 1226 (1988). A felon may be sentenced to a life sentence without parole, or even death. RCW 9.94A.510. In contrast, the maximum punishment for a person convicted of a misdemeanor is 90 days in the county jail, a fine of one thousand dollars, or both. RCW 9.92.030; RCW 9A.20.021(3). In general, the maximum punishment for a person convicted of a gross misdemeanor is a year in the county jail, a fine of five thousand dollars, or both. RCW 9.92.020; RCW 9A.20.021 (2); RCW 3.50.440. Considering the differences between felony and misdemeanor sentencing, there can be rational reasons for treating persons differently based upon their status as misdemeanants or felons.

2. The statutory scheme to which McPherson objects does not treat similarly situated persons differently.

The *Harris* case cited above compares a person sentenced for a misdemeanor to a person sentenced for a felony. The situation McPherson complains of compares two people convicted of felonies but facing different sentences for essentially the same behavior. He correctly maintains that because he was serving a

sentence for gross misdemeanors when he escaped, he could not have been charged under former RCW 72.65.070, which applied only to those serving felony sentences when they escaped, but instead could only be charged with second degree escape, which applies to those serving non-felony sentences. The essence of his argument is that persons similarly situated, i.e., who escaped from detention, receive different sentences. However, the difference between former RCW 72.65.070 and second degree escape, RCW 9A.76.120, is not in the sentencing ranges. It is in the prior offenses that count toward the offender score.

The standard sentencing ranges for both willful failure to return from work release and second degree escape are identical until the offender score reaches nine. At that point second degree escape is capped at 60 months because it is a class C felony and the statutory maximum is five years, whereas willful failure to return from work release was a class B felony and the standard range with an offender score of nine reaches to 68 months. [CP51-52] The defendant convicted of willful failure to return would have an offender score of zero unless he had prior escape-related charges, no matter what his other criminal history. All prior felony convictions count toward the offender score of the person convicted

of escape. Therefore, the real question is whether it is an equal protection violation to count all prior felonies toward the offender score of an escapee who was serving time for gross misdemeanors but only prior escape-related convictions of an escapee who was serving time for a felony.

“[E]very defendant who commits the same type of crime, or indeed the same crime, will not necessarily be given the same penalty.” *State v. Mak*, 105 Wn.2d 692, 724, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986). *Harris, supra*, demonstrated that there is a rational basis on which to treat misdemeanants and felons differently.

A statute is presumed to be constitutional and the burden of proving it unconstitutional rests on the challenger. “If there are facts that would conceivably ‘justify the legislation, those facts will be presumed to exist and the statute will be presumed to have been passed with reference to those facts.’” *State v. Law*, 110 Wn. App. 36, 42, 38 P.3d 374 (2002), *citing to State v. Brayman*, 110 Wn.2d 183, 193, 751 P.2d 294 (1988). Because McPherson is not in a suspect class, the rational relationship test applies to his challenge. “The test for determining whether a disparity in sentencing violates equal protection is whether a rational basis

exists for differentiation between the defendants.” *Law*, 110 Wn. App. at 43, *citing to State v. Bresolin*, 13 Wn. App. 386, 397, 534 P.2d 1394 (1975).

In McPherson’s case, he was serving time for gross misdemeanors but had two felony convictions on his record. [CP 20] It is true that a felon with the same convictions, but no escape-related convictions, would have had an offender score of zero if convicted of willful failure to return from work release. However, the felon would quite likely have been serving a significantly longer sentence when he or she escaped, and would have to complete that sentence before beginning the sentence for willful failure to return. A person serving a gross misdemeanor sentence will by definition be serving a year or less, and while some felony sentences are less than a year, the likelihood is that the felon will be serving more time than the misdemeanant. The legislature may also reasonably have considered that a person serving a sentence for a gross misdemeanor is less likely to have a prior felony conviction, and therefore the issue would not even arise. In addition, willful failure to return from work release was a class B felony, whereas second degree escape is a class C felony, and therefore the person convicted of the former would incur additional

hurdles. For example, a class B felony does not wash out for ten years, whereas a class C felony washes out in five. RCW 9.94A.525(2)(b) and (c).

McPherson is correct that he personally would have had a lower standard range had he been convicted of willful failure to return, but a person convicted of second degree escape with no prior felony convictions would have an offender score of zero and therefore the same standard sentencing range as a first time escapee under the willful failure to return statute. His "class" is further narrowed to "persons serving time for misdemeanors or gross misdemeanors who also have prior felony convictions." He urges this court to find an equal protection violation based upon which prior convictions count toward the offender score. This is clearly contrary to the philosophy behind the Sentencing Reform Act, which assigns punishment based upon both the current offense and the criminal history.

Prior convictions are often counted differently in different circumstances. Where a person is convicted of a sex offense, prior sex offense convictions count as three points each, RCW 9.94A.525(18), whereas if the current conviction is for some other

type of offense, say first degree theft, those prior sex offense convictions would count as one point each. RCW 9.94A.525(7).

McPherson has failed to establish, as is his burden, that there is no rational relationship between the legislature's decision to count all felony convictions in the criminal history of a person convicted of second degree escape but only prior escape-related convictions in the criminal history of a person convicted of willful failure to return from work release. Because this is so, this court should reject his argument and affirm his sentence.

D. CONCLUSION

McPherson has not established an equal protection violation. The State respectfully asks this court to affirm his sentence.

Respectfully submitted this 5<sup>th</sup> of October, 2009.



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Rule 9 Intern



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
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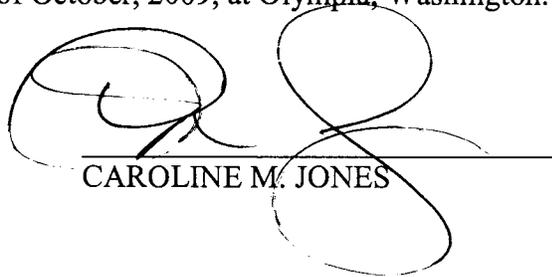
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TO: JODI R. BACKLUND  
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 6 day of October, 2009, at Olympia, Washington.

  
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CAROLINE M. JONES