

NO. 83684-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

**In the Matter of the Application for Relief From Personal Restraint
of:**

VERNON JACKSON,

Petitioner,

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PETITIONER'S REPLY TO DEPARTMENT OF CORRECTIONS'

ANSWER

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ORIGINAL

I. INTRODUCTION

Vernon Jackson, by and through his attorney, Richard Linn, submits this Reply to Department of Corrections' Answer to the Motion for Discretionary Review (Motion)

II. ARGUMENT

The Court of Appeals Decision is in Conflict with In re Malik

The Department of Corrections argues that the Court in In re Malik¹ did not address or rule on the issue of whether withholding copies of overheard telephone conversations at a prison disciplinary hearing violated a prisoner's due process rights. (Answer at 6)

In Malik, the facts were similar to the instant case. The inmate's infraction concerned introduction of contraband. The Initial Infraction Report consisted entirely of a report that the corrections officer had overheard a telephone conversation referring to a get well package and , second, the existence of a package of contraband received at DOC. (Motion, Appendix 2 at 2) Just as in Jackson's case, the inmate in Malik repeatedly asked the hearing officer for a

¹ Court of Appeals No. 62840-2-I (see Motion for Discretionary Review, App. 2)

copy of the recording, claiming that he did not make the statements that the reporting investigator was alleged to have overheard. (Id. at 3) Just as in the instant case, Malik contended that he was not allowed to present documentary evidence as part of his defense, and therefore his due process rights were violated. (Id. at 5). In Malik, DOC argued that Malik did not request witness statements or documents. The Court responded, saying that Malik had requested statements as well as a review of the telephone conversation. (Id. at 5-6) The Court added that the hearing officer never considered Malik's request for statements and recordings of phone conversations and even reiterated that "DOC has not offered any explanation for ignoring [Malik's] requests for statements and recordings. (Id. at 6) The Court again stated that, "no explanation was given for the hearing officer's failure to address [Malik's] request for recording of alleged telephone conversations. (Id. at 7) The Court concluded that, "under these circumstances, we conclude that Malik's due process rights were violated." (Id.)

The Court, in Malik, holds that a request for the telephone recording constitutes a request for the inmate to present documentary evidence at his disciplinary hearing, and a summary of an overheard conversation is not sufficient to satisfy due process. (Id. at 6-7) In the instant case, the Court of Appeals stated that in the identical situation (infraction based on an overheard telephone conversation, and the inmate's request for production of a recording of the conversation), Washington law prohibits production of a recording of the

overheard telephone conversation, and the reporting officer's written summary is sufficient as evidence. (Motion, Appendix 1 at 2)

The essence of Jackson's argument in this case is that the finding of guilt was primarily based on the overheard telephone conversation. His defense depended on the entirety of the phone conversation being presented as documentary evidence which would defeat the allegations in the infraction report. As long as the phone recording was not disclosed, or reviewed by the hearing officer, the summary contained in the Infraction report would stand. DOC policy 450.200 specifically allows the hearing officer to listen to an overheard recording for the purposes of conducting a disciplinary hearing. (see Motion, Appendix 3) In Jackson's case, both the Department of Corrections' Answer and the Court of Appeals, cite RCW 9.73.095(3)(b), as being an adequate reason for keeping the telephone recording out of the hearing. (Motion, App. 1 at 2; Answer at 5) Following this reasoning, a court could never hold that a recording or transcript of a telephone conversation can be considered as evidence and that the infraction report containing only a summary of the overheard conversation would always be sufficient, never rising to the level of a due process violation. This is clearly in conflict with the decision in Malik, where the Court held that denial of requests for the crucial telephone conversations does implicate due process. The Court of Appeals in the instant case treats a summary of the alleged conversation

as the only evidence allowed and the Court in In re Malik treats the recording itself as potentially part of the inmate's defense.

The Decision of the Court of Appeals Creates a Significant Issue of Public concern

DOC argues that since a summary of telephone conversation is provided, that is sufficient for an inmate to present a defense despite the prohibitions of RCW 9.73.095(3)(b) and therefore, no issue of public concern exists in this case. (Answer at 7)

This case presents an issue of substantial public interest. It is axiomatic that it is in the public interest for the prisons to be run in an orderly fashion. If it becomes the norm for prison staff to charge inmates with infractions, and then sanction them, based on evidence that is withheld from the inmate and not reviewed by the hearing officer, that creates an arbitrary prison disciplinary system that can be abused. RCW 9.73.095(3)(b) prohibits disclosure of the recording. DOC policy 450.200 allows the hearing officer to listen to the recording. Both DOC's Answer and the Court of Appeals decision in this case treat the telephone recording as non-confidential information that can never be disclosed and that can only be produced as a written summary as if it were, in fact, confidential information. Under these circumstances, this Court should clarify the standard for conducting disciplinary hearings where the inmate asks for

telephone recordings to be produced where the recordings present no danger to the security of the institution and would provide dispositive evidence of the inmate's guilt or innocence.

III. CONCLUSION

This court should accept review for the reasons indicated in the Motion for Discretionary Review.

Respectfully submitted this 9th day of November, 2009.

LAW OFFICE OF RICHARD LINN, PLLC

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CERTIFICATE OF SERVICE

On this day, the undersigned sent to the Attorney(s) of Record for the Department of Corrections listed below, a copy of this document (Petitioner's Reply to Department of Corrections' Answer) via Mail, 1st class prepaid. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Kimberly D. Frinell
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P.O. Box 40116
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Richard Linn Bellevue, WA 11/9/09
Signed Place Date