No. 96994-9
COA No. 50951-2-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MIN SIK KIM,

Petitioner.

On Appeal from Pierce County Superior Court
The Honorable John Hickman, Presiding

PETITION FOR REVIEW

NEIL M. FOX,
WSBA No. 15277
Attorney for Petitioner
2125 Western Ave. Suite 330
Seattle WA 98121

Phone: 206-728-5440
e-mail: nf@neilfoxlaw.com

TABLE OF CONTENTS

TABLE OF CASES

Page

Washington Cases

Federal and Other State Cases

Statutes, Constitutional Provisions, and Other Authority

A. IDENTITY OF PETITIONER

Min Sik Kim asks this Court to accept review of the Court of Appeals' decision terminating review set out in Part B, *infra*.

B. COURT OF APPEALS' DECISION

Mr. Kim seeks review of the Court of Appeals' decision in *State of Washington v. Min Sik Kim*, No. 50951-2-II, a partially published opinion, issued on March 8, 2019. A copy is attached in Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Does a new statute depriving some people of credit for time served on presentence electronic home monitoring ("EHM"),[1] violate due process, double jeopardy and equal protection of the laws, in violation of the United States and Washington Constitutions?

2. Where the trial judge refused to consider proffered evidence at the sentencing hearing because of time constraints and then justified the duration of the exceptional sentence based on his own misunderstanding about what crime Mr. Kim was convicted of committing, should Mr. Kim have a new sentencing hearing?

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[1] Laws of 2015, Chapter 287, § 10. All pertinent statutes are set out in the "Statutory Appendix" to this petition.

D. STATEMENT OF THE CASE

Mr. Kim, and his wife, Seul Lim, are both Korean immigrants with a strong work ethic. They operated a convenience store and gas station in Spanaway. In February 2016, a robber shot Ms. Lim in the abdomen when she was alone in the store after Mr. Kim went to pick up their young daughter at school. CP 38-42.

Only 37 days later, Mr. Kim was working alone at the store and had a confrontation with Jakeel Mason and others who were loitering and drinking on the store's property. While Mr. Kim was dealing with others outside the store, Mr. Mason ran inside and aggressively jumped behind the counter and began stealing items. CP 2-3, 42-43; Ex. 1.[2] Another customer told Mr. Kim about Mason's actions, and Mr. Kim rushed back into his store and detained Mason at gunpoint. A fight broke out, and Mason and Kim ended up on the ground, exchanging punches. Mason got up and began running towards the door, and Mr. Kim shot him. Mason died from the injuries. Mr. Kim immediately called the police and cooperated with the investigation. He voluntarily turned over to the police his store's security

[2] The State designated the disk containing a security video (marked as Ex. 1) to the Court of Appeals, so it should be of record in this Court.

video footage that captured some of the events that led to Mr. Mason's death. CP 2-3, 42-43; Ex. 1.

In Pierce County Superior Court, the State charged Mr. Kim with felony murder in the second degree, while armed with a firearm. CP 1. At the March 29, 2016, arraignment, Mr. Kim pled not guilty. The court set bail and ordered that, if bail was posted, Mr. Kim be subject to electronic home monitoring. RP (3/29/16) 6; CP 4-5. Mr. Kim posted bail, CP 6-8, and enrolled in the home confinement program. CP 9-10.[3]

On March 16, 2017, Mr. Kim pled guilty to an amended information charging felony murder in the second degree, based on an assault in the second degree. CP 11, 13-32. Because he had no criminal history, Mr. Kim's standard range was 123 to 220 months. Pending sentencing, the trial court ordered that Mr. Kim continue to be confined on electronic home monitoring. RP (3/16/17) 14; CP 36-37.

Sentencing took place on June 23, 2017, the Hon. John Hickman presiding. Mr. Kim sought an exceptionally low sentence of 24 months. RP (6/23/17) 11. At the hearing, counsel wanted to call three people to speak on

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[3] Laws of 2015, Chapter 287, Section 1, modified RCW 9.94A.030, to adopt definitions of "electronic monitoring" and "home detention. Here, the trial court placed Mr. Kim on "electronic home monitoring," which is electronically monitored home detention.

Kim's behalf, but the judge ruled that he could have only one person of his choosing to address the court. Mr. Kim chose his wife to speak. RP (6/23/17) 7-9.

The State sought a standard range sentence and asked the judge to review excerpts from the security video. RP (6/23/17) 5. The judge ruled that he would not review the video because he did not have the time -- he had a jury deliberating in another case. RP (6/23/17) 13-14. The prosecutor then relayed to the judge her own opinion as to what was contained on the video. She stated that when she viewed the video she saw "a very angry man," taking out his anger about what happened to his wife on what the prosecutor described as a "shoplifter" – "when we looked at these videotapes, it was clear to us that it was not an appropriate use of deadly force under the laws of the state, and that's why we're here today." RP (6/23/17) 14-15.[4] The court responded "That's well said." RP (6/23/17) 15. Mr. Kim's counsel responded by stating that there were some disputes about what was in the statement of probable cause, noting that there was actually a struggle over the firearm while the two men were fighting on the ground. RP (6/23/17) 16.

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[4] Mason was hardly a "shoplifter." Not only had there been a prior confrontation with Mason and his compatriots outside the store, but the level of aggression inherent in his rushing behind the counter and then his struggle with Mr. Kim made him more of a robber than a thief.

Judge Hickman imposed an exceptionally low sentence, finding substantial and compelling mitigating circumstances based the prior shooting of Mr. Kim's wife, Mr. Kim's immediate and full cooperation with the investigation and his remorse. CP 74-77, FF 7 & CL 3. Rather than departing down to the requested 24 months, the judge imposed 100 months, stating, "I don't believe 24 months, Counsel, in all fairness, would reflect a just sentence *for the deliberate taking of a life*." RP (6/23/17) 19 (emphasis added). In fact, Mr. Kim pled guilty not to deliberately taking a life, but to felony murder based on an assault.[5]

Mr. Kim's attorney asked the court to give his client credit for time served on EHM, noting that Mr. Kim had completed, as of June 20, 2017, 447 days with no program violations. RP (6/23/17) 22; CP 78-80. The State objected based on the new statute. Judge Hickman ruled if Mr. Kim was legally entitled to such credit, he would absolutely give him that credit, but

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[5] Mr. Kim admitted, in his plea statement, the following:

> On March 25, 2016, in Pierce County, Washington, while attempting to stop a crime at the store where I worked, I unlawfully committed the crime of assault in the second degree, *unintentionally causing the death* of Jakeel Mason.

CP 30 (emphasis added).

the final judgment denied Mr. Kim that credit (by means of a handwritten cross-out). RP (6/23/17) 20-25; CP 66.

Mr. Kim appealed to Division Two, raising three issues:

1. A constitutional challenge to the denial of credit for time served on presentence confinement while on EHM;

2. A claim of error based upon the trial judge's refusal to consider evidence because he had a jury waiting in another case;

3. A claim of error based on the trial judge's setting of the duration of the exceptional sentence based upon a misunderstanding of the nature of the charge against Mr. Kim.

In the published portion of the opinion, the Court of Appeals rejected Mr. Kim's constitutional objections to Laws of 2015, Chapter 287, Section 10, concluding EHM was not punitive and that, while still "confinement," it was not "incarceration." Thus, credit for presentence confinement on EHM could be denied. Slip Op. at 2-8. In the unpublished portion, the court held that the trial court did not err when refusing to consider evidence at sentencing and that Mr. Kim did not preserve an objection to the prosecutor giving her own opinions about what was on the video. Slip Op. at 10-12. As for the judge basing his sentence on his erroneous belief that Mr. Kim had

deliberately killed someone, because the judgment contained a citation to the proper statutory section, any oral error was corrected. Slip Op. at 12-13.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. *The Court Should Accept Review of the Electronic Home Monitoring Issue*

a. Introduction

In 2015, the Legislature adopted Laws of 2015, Chapter 287, Section 10, which bars the award of credit for presentence EHM towards a person's sentence for certain categories of offenders, including those convicted of unintentional murder. Thus, for some offenders, the new statute attempted to overrule this Court's ruling in *State v. Speaks*, 119 Wn.2d 204, 829 P.2d 1096 (1992), where this Court held that defendants were entitled to credit for time spent on presentence EHM. The reason for depriving people of credit for time spent on presentence EHM is unclear, as the bill that led to the new law was really meant to insure that electronic monitoring programs were administered responsibly.[6]

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[6] The legislative history for Engrossed House Bill 1943 (2015) focused on improving home detention "accountability" with very little attention paid to the denial of credit for time served. *See* Senate Bill Report, EHB 1943 (2015) (summarizing testimony for bill which "standardization among the home monitoring industry"); *see also* House Bill Report, EHB 1943 (2015) (noting equal protection concerns with limiting credit for time served, but not explaining why such limitations were being adopted).

Yet, the Legislature failed to change the definition of "confinement" in RCW 9.94A.030. Because this definition still includes EHM, there is no question but that Mr. Kim was "confined" prior to trial. Accordingly, the new statute, by denying Mr. Kim credit for presentence confinement, violates due process of law, equal protection of the law, and double jeopardy under the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 3, 9 and 12 of the Washington Constitutions. Review is appropriate under RAP 13.4(b)(3).

Moreover, the Court of Appeals' decision directly conflicts with a string of this Court's cases, not only *Speaks*, but also *Reanier v. Smith*, 83 Wn.2d 342, 517 P.2d 949 (1974), *In re Phelan*, 97 Wn.2d 590, 647 P.2d 1026 (1982), and *Harris v. Charles*, 171 Wn.2d 455, 256 P.3d 328 (2011). With the exception of *Harris*, the Court of Appeals did not even mention these other cases. Review is appropriate under RAP 13.4(b)(1).

Finally, the issue raised in this case – whether Laws of 2015, Chapter 287, Section 10, is constitutional – is an issue of public importance. Not only is the Court of Appeals' decision published, and thus has statewide application, but the new statute will impact the lives of hundreds, if not thousands, of people who will end up serving more time in prison as a result.

It is undeniable that American society today is plagued by the problem of mass incarceration, and a statute that adds to that burden should be closely examined by this Court.[7] Review should be granted under RAP 13.4(b)(4).

b. Because Presentence EHM for Felonies is Still "Confinement," a Person Must Be Given Credit Towards a Sentence for Time Spent Confined on EHM

In a series of cases, dating back to the 1970s, this Court has held that a person has a constitutional right that "presentence detention time . . . be credited against the sentence ultimately imposed." *State v. Speaks*, 119 Wn.2d at 206 (citing *Reanier v. Smith*, *supra* & *In re Phelan*, *supra*). The Court's decisions required such credit as a matter of due process and equal protection of the laws under the Fourteenth Amendment and article I, sections 3 and 12, and double jeopardy under the Fifth Amendment and article I, section 9:

> Fundamental fairness and the avoidance of discrimination and possible multiple punishment dictate that an accused person, unable to or precluded from posting bail or otherwise procuring his release from confinement prior to trial should, upon conviction and commitment to a state penal

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[7] The fiscal note for EHB 1943 focused on the costs to DOC of new crimes defined by other portions of the bill, with no apparent analysis of the projected costs of the extended incarceration that results by denying credit for time served for presentence EHM. *See* Cheri Keller (OFM), Multiple Agency Fiscal Note Summary, 3/19/2015 (https://app.leg.wa.gov/committeeschedules/Home/Document/109909).

> facility, be credited as against a maximum and a mandatory minimum term with all time served in detention prior to trial and sentence. Otherwise, such a person's total time in custody would exceed that of a defendant likewise sentenced but who had been able to obtain pretrial release.

Reanier v. Smith, 83 Wn.2d at 346.[8] Because Mr. Kim is being denied credit for time spent prior to sentencing in "confinement," Laws of 2015, ch. 287, Section 10, violates Mr. Kim's aforementioned constitutional rights. Review is justified under RAP 13.4(b)(3).

In *Speaks*, this Court unambiguously held: "Sentencing courts are required to give offenders credit for presentence confinement time served on electronically monitored home detention." *Speaks*, 119 Wn.2d at 206. *Speaks* was based on statutory interpretation and avoided the constitutional issues involved, *id*. at 207, but the holding was predicated on a statute that is still in force and a statute that unambiguously defines "confinement" to include

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[8] The Court of Appeals noted that Mr. Kim had raised a due process challenge, but did not address it because "Kim only provided conclusory arguments and passing treatment to this issue." Slip Op. at 2 n.1. However, Mr. Kim cited to due process to make clear that the federal constitutional provisions involving double jeopardy and equal protection applied to the states through the Due Process Clause of the Fourteenth Amendment. Additionally, because this Court held that "fundamental fairness" requires giving credit for pretrial confinement. *Reanier v. Smith*, 83 Wn.2d at 346, Mr. Kim needed to cite to due process as there is no "fundamental fairness" clause of the Constitution. *See Duncan v. Henry*, 513 U.S. 364, 364-66, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995) (*per curiam*) (claim that an error was a "miscarriage of justice" was not sufficient to exhaust a federal due process claim).

presentence EHM. *Id*. at 207-09 (citing RCW 9.94A.030).[9] When the Legislature amended RCW 9.94A.505 in 2015 to deny credit for time served on presentence EHM for some categories of offenders, the Legislature never amended RCW 9.94A.030's definition of "confinement."[10]

This Court's construction of state law is binding on lower courts. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). Yet, the Court of Appeals' published decision in this case never even mentioned or attempted to distinguish *Speaks*, *Phelan* or *Reanier*. This alone is a basis to grant review under RAP 13.4(b)(1) – a published decision of the Court of Appeals addressing an issue of statewide significance (whether a prisoner should receive credit for time confined in presentence EHM) at least ought to mention, if not distinguish, past cases from this Court on the subject.

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[9] *See* RCW 9.94A.030(8) ("'Confinement' means total or partial confinement."); RCW 9.94A.030(36) ("Partial confinement includes work release, home detention, work crew, electronic monitoring, and a combination of work crew, electronic monitoring, and home detention.").

[10] The Court of Appeals stated:

> But the legislature, in making a specific statute, carved out an exception for when confinement does not include EHM. Kim's argument is based on nomenclature, not constitutional grounds.

Slip Op. at 8. However, the Legislature never carved out an exception to the definition of "confinement" in RCW 9.94A.030. This is not an argument based on "nomenclature" but on the plain language of the statute.

The failure even to mention this Court's key cases on the subject led the Court of Appeals astray on a key point regarding double jeopardy:

> Kim's argument conflates the statutory definition of "confinement" with the constitutionally mandated double jeopardy term of "incarceration." The Washington and United States constitutions require only that defendants receive credit for time served for the latter.

Slip Op. at 5. Yet, the allegation of "conflation" ignores the plain language of the statutes involved which requires credit for time served not of presentence "incarceration," but of presentence "confinement time." *See* RCW 9.94A.505(6). Moreover, this Court's prior cases also use the term presentence "confinement" without distinguishing between such confinement and "incarceration."[11] The Court of Appeals' failure to look critically at this Court's jurisprudence therefore led it to misconstrue the constitutional

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[11] *See, e.g., Reanier*, 83 Wn.2d at 346-47 ("Fundamental fairness and the avoidance of discrimination and possible multiple punishment dictate that an accused person, unable to or precluded from posting bail or otherwise procuring his release from *confinement* prior to trial should, upon conviction and commitment to a state penal facility, be credited as against a maximum and a mandatory minimum term with all time served in detention prior to trial and sentence. . . . Thus, two sets of maximum and mandatory minimum terms would be erected, one for those unable to procure pretrial release from *confinement* and another for those fortunate enough to obtain such release.") & at 851 ("It is all time spent in *confinement* and, if not credited against a maximum or mandatory minimum sentence, has the ultimate effect of enlarging the time of potential *confinement* dictated by the maximum or mandatory minimum sentence.") (emphasis added); *Phelan*, 97 Wn.2d at 594 ("Whether the pretrial *confinement* be occasioned by the inability to post bail or the individual's inability to 'otherwise procur[e] his release from confinement prior to trial', *Reanier* requires that credit for time served be granted against the individual's maximum sentence") (emphasis added).

significance of the Legislature's categorizations of electronic home monitoring as "confinement," a categorization that requires credit be given under the due process, double jeopardy and equal protection provisions of the Fifth and Fourteenth Amendments and article I, sections 3, 9 and 12.

The main case relied on by the Court of Appeals was *Harris v. Charles*, *supra*. Slip Op. at 3-7. In *Harris*, this Court upheld the denial of presentence EHM time towards a sentence in cases involving misdemeanors and gross misdemeanors. However, the reasoning behind *Harris* actually supports Mr. Kim's arguments rather than the Court of Appeals' decision.

In *Harris*, the Court noted the distinctions between felony sentencing and misdemeanor sentencing. In particular, there is no misdemeanor correlate to RCW 9.94A.030(36) defining confinement to include EHM. Without such a definition, the Court looked to see whether CrRLJ 3.2's authorization of presentence release on electronic monitoring was "punitive" or not. Finding that the court rule was not intended to punish misdemeanor offenders, the Court held that the denial of credit for time spent on presentence EHM for misdemeanors did not violate double jeopardy. *Harris*, 171 Wn.2d at 467-73. In reaching this conclusion, the Court stressed the differences between misdemeamant sentencing and felony sentencing:

> A felony defendant who receives credit for presentencing EHM will frequently be subject to a lengthy prison sentence. But requiring a court to give credit to a misdemeanor defendant for presentencing EHM time could significantly affect the court's discretion to impose jail time at the defendant's sentencing. . . . Not requiring credit for a misdemeanant's presentencing time on EHM serves the legitimate state interest of preserving jail time as a possible sentence for misdemeanor defendants.

Harris, 171 Wn.3d at 464-65.

A narrow reading of *Harris* was recently adopted by Division Two itself in an unpublished opinion. *State v. Nemetz*, 3 Wn. App. 2d 1014 (48788-8-II, 4/10/18) (unpub.). At issue in *Nemetz* was the application of Laws of 2015, Chapter 287, Section 10, to someone already on presentence EHM at the time of the effective date of the new statute, and thus whether the retroactive application of the law to the defendant violated *ex post facto*.[12] This question in turn rested on whether EHM was punitive or not, and two members of Division Two[13] held that EHM was in fact punitive because it increased the severity of punishment, by restricting Nemetz's liberty by confining him to a military base: "[T]he 2015 amendments at issue in this case are substantive because Nemetz was no longer eligible to receive credit

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[12] U.S. Const. Art. I, § 10, cl. 1.

[13] Including Judge Maxa who also signed the decision in Mr. Kim's case.

for presentence time on EHM, *which thereby increased the severity of punishment*." *Nemetz*, Slip Op. at 14 (emphasis added).

As for the State's citation to *Harris*, Division Two held that case was distinguishable, not just because it addressed equal protection and double jeopardy, but also:

> by its application to misdemeanants, not felons. The fact remains, under the previous statutory scheme, the legislature did provide felons with credit for presentence time on EHM. The legislature did not provide similar credit to misdemeanants, which was the issue in *Harris*. Nemetz had a reasonable expectation that he would receive credit for the presentence time he served on EHM. *Subsequently nullifying that credit increased the quantum of punishment* as applied to Nemetz, which is a substantive change.

Nemetz, Slip Op. at 15 (emphasis added).

This conclusion – that nullifying credit for time spent on presentence EHM increases the quantum of punishment – stands diametrically opposed to Division Two's current conclusion in Mr. Kim's case that presentence EHM was not punitive. There is no reason to suppose that a practice could be "punitive" in an *ex post facto* context, but "non-punitive" in the contexts of double jeopardy and equal protection.[14] Thus, while RAP 13.4(b)(2)

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[14] *See Kansas v. Hendricks*, 521 U.S. 346, 369-71, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997) (same test used to determine if statute violated double jeopardy and *ex post facto* provisions).

provides for review if there is a conflict with a published decision of the Court of Appeals, the existence of the unpublished opinion in *Nemetz* is an alternative basis for review under RAP 13.4(b)(4), as an issue of public importance.

c. The New Statute Sets Out Irrational and Arbitrary Classifications

Laws of 2015, Chapter 287, Section 10, makes arbitrary classifications – *first*, by requiring credit for presentence EHM for some crimes, but not others, with no rational basis for such discrimination, and *second*, by treating those confined on EHM before sentencing more harshly than those people charged with the same offense who are simply "PR'd." These arbitrary classifications violate equal protection guaranteed by the Fourteenth Amendment and article I, section 12.[15]

Division Two rejected this argument, positing the Legislature's purported concern for public safety: "[T]he legislature has made a determination that people who are charged with more serious crimes are a greater threat to society and should not receive presentence EHM credit."

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[15] *See State v. Anderson*, 132 Wn.2d 203, 937 P.2d 581 (1997) (equal protection violated where there was no rational basis to distinguish between presentence and post-sentence EHM; both required credit for time served).

Slip Op. at 7.[16] This analysis fails because someone who is supposedly a "greater threat to society" is not a greater threat if given credit towards their sentence for presentence confinement on EHM. Whether someone charged with a serious crime ought to be released on EHM *at all* may be a factor that relates to public safety, but there is no tie to public safety by denying someone credit for time served in presentence confinement. Similarly, giving someone credit for presentence confinement on EHM when someone who is released prior to trial without such a condition does not get credit also has no tie to increasing public safety. Making the person confined on EHM serve additional time compared to the person simply released on PR is not rationally related to any legitimate government objective. The new statute violates equal protection. Review should be accepted under RAP 13.4(b)(3).

2. *The Court Should Accept Review of the Issues in the Unpublished Sections of the Opinion*

Mr. Kim unintentionally killed someone who was committing a violent crime at his store. He had the right to be treated with dignity by the judge who sent him away from his family to prison for years. Yet, here, the judge unfortunately could not be bothered to give measured consideration to

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[16] Because the legislative history for EHB 1943 fails to contain any stated reason for denying credit for EHM for some categories of offenders, there is no basis to conclude that "public safety" was the reason for the change.

a serious case. He was pressed for time and not only did not want to review the evidence offered by both sides (the video from the store and family members), but then the judge justified not imposing a sentence as low as Mr. Kim requested by reference to the wrong crime (intentional murder).

To be sure, the final judgment contained a citation to the proper section of the murder statute, as noted by the Court of Appeals. Slip Op. at 13. This citation, however, was not tied to duration of the actual sentence imposed, but rather is located in the section of the judgment describing the "current offense." CP 62. The citation did not cure the judge's indisputable error when he justified not departing downward to the requested 24 months because he mistakenly thought Mr. Kim had deliberately killed someone. In this regard, there is nothing in the written findings and conclusions regarding the length of the exceptionally low sentence that corrected the judge's oral error. CP 75-76. Thus, the judge's decision to impose 100 months in prison, rather than 24 months, was based on the mistaken belief that Mr. Kim had "deliberately" killed Mr. Mason, and that error was never corrected in the final judgment.

"An appellate court is permitted to use the trial court's oral decision to interpret findings of fact and conclusions of law if there is no

inconsistency." *State v. Moon*, 48 Wn. App. 647, 653, 739 P.2d 1157 (1987). Here, since there are no written finding or conclusion explaining the duration of the exceptional sentence, it is entirely appropriate for a reviewing court to look at the sole reason explicitly stated by the judge as to why he was not sentencing Mr. Kim below 100 months – a reason that is clearly improper.

The judge's mistake about what crime Mr. Kim committed should be viewed along with the judge's refusal to consider evidence at sentencing (the video and the family members), which resulted in Mr. Kim being denied the right to present evidence, to rebut the State's allegations and to allocute fully.[17] While the Court of Appeals faulted trial counsel for not objecting when the prosecutor relayed her impressions of the in-store video, Slip Op. at 11-12, Mr. Kim's lawyer did not have to object to the prosecutor's sentencing presentation, after the judge made a final ruling.[18] But, the more

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[17] These rights are protected by the right to compulsory process and due process of law under the Sixth and Fourteenth Amendments and article I, sections 3 and 22, and RCW 9.94A.500(1), RCW 9.94A.530(2), RCW 9.94A.535(1). *See State v. Strauss*, 119 Wn.2d 401, 418-19, 832 P.2d 78 (1992); *State v. Peterson*, 97 Wn.2d 864, 865-68, 651 P.2d 211 (1982); *Rock v. Arkansas*, 483 U.S. 44, 51 n.9, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).

[18] *See State v. Goldberg*, 123 Wn. App. 848, 853, 99 P.3d 924 (2004) ("[O]bjections during legal argument to the court are rare, viewed with disfavor, or not even permitted by many judges.").

serious error was the judge's failure to review proffered evidence simply because he was too busy.

If someone from outside our legal system looked in at what took place at Mr. Kim's sentencing hearing, they could only be shocked that the judge announced that, because he was too busy, he was not interested in learning the facts of the case, did not want to hear the tearful pleas of Mr. Kim's relatives, and misunderstood the nature of the charges. This warrants review under RAP 13.4(b)(4) as an issue of public importance. The Court should also accept review under RAP 13.4(b)(3) based on the violation of Mr. Kim's constitutional rights to due process and compulsory process under the Sixth and Fourteenth Amendments and article I, sections 3 and 22. *See supra* n. 17.

F. CONCLUSION

The Court should accept review and remand for a new sentencing hearing or give Mr. Kim credit towards his sentence for time he was confined on EHM.

DATED this 25th day of March 2019.

Respectfully submitted,

s/ Neil M. Fox
WSBA No. 15277
Attorney for Petitioner

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

March 8, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MIN SIK KIM, Appellant.	No. 50951-2-II PUBLISHED IN PART OPINION

MELNICK, J. — Min Sik Kim plead guilty to murder in the second degree, a serious violent offense. He appeals his sentence. In the published portion of this opinion, we reject Kim's argument that he should have received credit for his presentence electronic home monitoring (EHM). The 2015 amendment to RCW 9.94A.505 precludes felons convicted of certain crimes, including murder in the second degree, from receiving credit for time served on EHM before sentencing. In the unpublished portion of this opinion, we reject Kim's other arguments regarding his sentence. We affirm.

FACTS

In March 2016, Kim shot and killed Jakeel Mason who attempted to steal items from Kim's convenience store. The State charged Kim with murder in the second degree. Pretrial, the court released Kim from custody but imposed numerous conditions including he could only reside at his home address, he could not travel outside Pierce, King, Thurston, or Kitsap counties, he could not contact victims or witnesses, he could not possess weapons or firearms, and he could not consume or possess alcohol or marijuana. The court also ordered him to be on EHM.

Approximately one year later, Kim plead guilty to the murder charge. Pending sentencing, the court released Kim on similar conditions, including continued EHM.

The court sentenced Kim to 100 months. Kim sought credit for the 450 days he had spent on EHM. Because of RCW 9.94A.505(7), the court did not give Kim credit for time spent on EHM. Kim appeals.

ANALYSIS

Kim argues that RCW 9.94A.505(7) violates the double jeopardy, equal protection, and due process clauses of the United States and Washington constitutions.[1] We disagree.

I. APPLICABLE STATUTES

The general rule is that a person shall receive credit for time served in confinement. RCW 9.94A.505(6). The term "confinement" means "total or partial confinement." RCW 9.94A.030(8). Under RCW 9.94A.030(36), "partial confinement" includes electronic monitoring. However, a "sentencing court shall not give [an] offender credit for any time the offender was required to comply with an electronic monitoring program prior to sentencing if the offender was convicted of . . . [a] violent offense." RCW 9.94A.505(7)(a).[2]

Murder in the second degree is a serious violent offense and a subcategory of a violent offense. RCW 9.94A.030(46)(a)(iii).

[1] The State argues that Kim failed to present an adequate record for review of Kim's double jeopardy, equal protection, and due process claims. We disagree. However, as to Kim's due process claim, Kim only provided conclusory arguments and passing treatment to this issue; therefore, we do not consider it. RAP 10.3(a)(6); *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004).

[2] The legislature added this subsection in 2015. LAWS OF 2015, ch. 287, § 10.

II. DOUBLE JEOPARDY

Kim argues that because he served 450 days on EHM, and because EHM continues to be statutorily defined as "confinement," RCW 9.94A.505(7) is punitive in intent. Therefore, Kim claims that he is being subjected to unconstitutional "confinement" twice for the 450 days he served on EHM. We disagree.

The Fifth Amendment to the United States Constitution[3] and article I, section 9 of the Washington Constitution provide a prohibition against double jeopardy that protects defendants from multiple punishments for the same offense. *State v. Kelley*, 168 Wn.2d 72, 76, 226 P.3d 773 (2010).

Double jeopardy challenges are analyzed using a two-part test. The first part asks whether the government intends the action to be punitive, and if it does not, the second part asks whether the action's purpose or effect is nevertheless so punitive as to negate the government's nonpunitive intent. *Harris v. Charles*, 171 Wn.2d 455, 467, 256 P.3d 328 (2011). Kim only alleges a violation of the first part of the test.

As noted previously, partial confinement includes EHM. RCW 9.94A.030(36). In 2015, the legislature amended RCW 9.94A.505 to exclude credit for any time served presentence on EHM if the offender was convicted of a violent offense. RCW 9.94A.505(7); LAWS OF 2015, ch. 287, § 10. The 2015 amendment did not affect RCW 9.94A.505(6) or any relevant RCW 9.94A.030 definitions. We need to determine if the legislature's changes evince an intent that presentence EHM is punitive. *Harris*, 171 Wn.2d at 467.

[3] This provision applies to states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).

In *Harris*, the court decided that pretrial EHM for a misdemeanor was not punitive. When "imposed as a condition of pretrial release pursuant to CrR 3.2 or CrRLJ 3.2, [EHM] is not intended as punishment but rather as a means of alleviating the burdens of pretrial detention and of assuring the defendant's future appearance in court." *Harris*, 171 Wn.2d at 469 n.10. In determining whether the purpose or effect was punitive, *Harris* noted the "clear distinction [Washington courts recognize] between jail time and nonjail time." 171 Wn.2d at 470. *Harris* concluded that the petitioner failed to "explain how his time on EHM was so punitive in effect as to overcome its intended nonpunitive purpose." 171 Wn.2d at 472.

For further support that presentence EHM is not punitive, as stated in *Harris*, "a defendant in pretrial detention 'is severely handicapped in his defense preparation' and 'is often unable to retain his job and support his family, and is made to suffer the public stigma of incarceration even though he may later be found not guilty.'" 171 Wn.2d at 468 (quoting CRIMINAL RULES TASK FORCE, WASHINGTON PROPOSED RULES OF CRIMINAL PROCEDURE Rule 3.2 cmt. at 22 (1971)). "As a condition of pretrial or presentencing release, EHM addresses these concerns and furthers the intent of the original pretrial release rule because a defendant on EHM may visit his attorney and continue to go to a job." *Harris*, 171 Wn.2d at 469.

The Minority and Justice Commission proposed adding EHM as an alternative to be used with pretrial release to avoid discrimination based on people who are economically disadvantaged. *Harris*, 171 Wn.2d at 469 (citing Proposed amendment to CrR 3.2, 145 Wn.2d Proposed–67 (Official Advance Sheet No. 4, Jan. 8, 2002)). It was not proposed as punishment. *Harris*, 171 Wn.2d at 469.

Kim argues that because the legislature amended RCW 9.94A.505 to deny EHM credit for certain crimes but did not modify the definition of "confinement" in RCW 9.94A.030, Kim is

subject to double "confinement," and the amended law fails the first prong of the double jeopardy test because it is punitive in its intent. We disagree.

Kim's argument conflates the statutory definition of "confinement" with the constitutionally mandated double jeopardy term of "incarceration." The Washington and United States constitutions require only that defendants receive credit for time served for the latter. *Harris*, 171 Wn.2d at 470-71 ("[T]his court has acknowledged that credit for home detention time might not be constitutionally required. . . . [While] double jeopardy demand[s] that all defendants receive credit for time spent in incarceration prior to sentencing.").

As discussed above, *Harris* makes clear that EHM as a condition of pretrial release is not intended as punishment. 171 Wn.2d at 469 & n.10. As a result, we conclude that the legislature did not intend presentence EHM as punishment.

IV. EQUAL PROTECTION

Kim argues that the 2015 amendment to RCW 9.94A.505 violates equal protection because it makes two arbitrary classifications. First, Kim argues that it draws improper classifications between different crimes. For example, the amendment permits sentencing courts to give credit for EHM to white collar criminals but not to murderers, as is the case here. Second, he contends it draws improper classifications among defendants who have committed the same crime. For example, Kim argues that if one person is released without any conditions and the other is released subject to EHM, the person who is subject to EHM will end up serving more time in "confinement" for the same crime and for the same sentence. We disagree that there is an equal protection violation.

"Equal protection requires that persons similarly situated with respect to the legitimate purpose of the law receive like treatment." *State v. Simmons*, 152 Wn.2d 450, 458, 98 P.3d 789

(2004). Article I section 12 of the Washington Constitution and the equal protection clause of the Fourteenth Amendment are "substantially identical and they are thus considered one issue." *In re Pers. Restraint of Ramsey*, 102 Wn. App. 567, 573, 9 P.3d 231 (2000). "Equal protection is not intended to provide complete equality among individuals or classes but equal application of the laws." *Simmons*, 152 Wn.2d at 458.

The parties agree that under *Harris*, Kim's equal protection argument should be analyzed under the rational basis test because "it does not involve a suspect or semisuspect class or a fundamental right." 171 Wn.2d at 463. Under rational basis review, "[a] party challenging the application of a law as violating equal protection principles has the burden of showing that the law is irrelevant to maintaining a state objective or that it creates an arbitrary classification." *Simmons*, 152 Wn.2d at 458.

In *Harris*, the court concluded that two legitimate government interests rationally related to the legislature's decision to allow felons, but not misdemeanants, sentencing credit for presentence EHM. 171 Wn.2d at 462-66. First, "[r]equiring courts to grant misdemeanants credit for time on EHM would hinder the ability of sentencing judges to order jail time for misdemeanor offenses." *Harris*, 171 Wn.2d at 473. Second, the distinction maintained misdemeanor sentencing courts' discretion to impose rehabilitative sentencing, which is a goal of nonfelony sentencing but is "not a justification for [felony] sentencing under the [Sentencing Reform Act of 1981 (SRA)]." *Harris*, 171 Wn.2d at 465.

But in *State v. Anderson*, 132 Wn.2d 203, 213, 937 P.2d 581 (1997), the court held that no rational basis existed for the legislature to distinguish between presentence and post-sentence EHM. The statutes at issue in *Anderson* required sentencing courts to give credit for the former but not the latter. 132 Wn.2d at 208-09.

Here and in *Harris* we are looking at what crimes are eligible for credit for presentence time spent on EHM. *Anderson* discussed the differences between presentence and post-sentence EHM. Therefore, *Harris* is more on point. A rational basis supports the legislature's decision.

Here, as Kim points out, the 2015 amendment leads to two classifications. First, the amendment distinguishes between felons convicted of violent offenses and felons convicted of all other felonies not listed in the statute. RCW 9.94A.505(6)-(7). Second, the amendment distinguishes between violent offenders, i.e., between defendants released on presentence EHM who are "confined" but not given credit for that confinement and defendants released with no conditions who do not serve an additional and unaccounted for "confinement" period.

Regarding Kim's first argument, a rational basis exists for the legislature's decision to not allow credit for time served on presentence EHM release. The legislature has made a determination that people who are convicted of more serious crimes should not get credit for time served on presentence EHM.

The State has at least two legitimate interests and must balance these sometimes-competing interests. First, it has a legitimate interest in protecting its citizens. It also has a legitimate interest in affording criminal defendants adequate defense preparation. EHM can conflict with the State's first interest, but it undoubtedly furthers the State's second interest. *See Harris*, 171 Wn.2d at 469. In an attempt to balance these interests, the legislature looked to the relative seriousness of various crimes to determine which felons should receive credit for presentence EHM. Thus, the legislature has made a determination that people who are charged with more serious crimes are a greater threat to society and should not receive presentence EHM credit. There is a sufficient rational basis for the legislature to make this distinction because it is an attempt to balance and further its two legitimate interests identified above.

As to Kim's second argument, there is also a rational basis. Kim argues that the legislature's action had no rational basis because, as currently defined, the statute imposes more "confinement" on defendants subject to EHM than on defendants who committed the same crime and were sentenced identically but who were released without any conditions. However, there is a rational basis for the legislature to distinguish between these two types of defendants because other factors, including a person's flight risk, are taken into consideration by a judge in determining whether a defendant should be released on EHM or without conditions. CrR 3.2. Kim's argument is based on the legislature's use of the term "confinement." But the legislature, in making a specific statute, carved out an exception for when confinement does not include EHM. Kim's argument is based on nomenclature, not constitutional grounds.

We conclude that RCW 9.94A.505(7) does not violate Kim's equal protections rights.

CONCLUSION

RCW 9.94A.505(7) does not infringe Kim's constitutional rights under the double jeopardy or equal protection clauses under the United States and Washington constitutions. We affirm.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

ADDITIONAL FACTS

Kim plead guilty to felony murder in the second degree predicated on assault in the second degree. Kim's standard range for felony murder in the second degree was 123 to 220 months. The State recommended a 123-month sentence, and Kim sought an exceptional downward sentence of 24 months. Kim's sentencing memorandum detailed his immigration from South Korea, his work ethic, his commitment to family and worship, his compliance with law enforcement after the

incident, and the fact that his wife had been shot by a robber at their convenience store one month prior to the incident. Kim stated that he was still under the influence of that traumatic experience on the day of the incident. Kim's sentencing memorandum attached 10 letters of support from members of the community.

At Kim's sentencing hearing, he attempted to present three individuals to make statements on his behalf. The court stated,

> I've read the letters, and if these people are here to simply retell what they've already written in the letters, it kind of gets—you know, I don't need to hear it again necessarily, but if there's one person that you would like to have speak on your behalf, I would be more than—even if he's written a letter before, I would be happy to hear that person.

Report of Proceedings (RP) (June 23, 2017) at 7. Kim's wife gave a statement on his behalf. Kim also gave a statement.

The State requested that the judge review three excerpts of security footage from the incident. The court refused, stating,

> Counsel, I'm not going to have time to review this tape. I've got a jury deliberating, and they have a question that we've deferred until we can resolve this case because this case has priority.

RP (June 23, 2017) at 13. At the court's request, the State then discussed how it viewed the surveillance footage: "when I look at these tapes, I see a very angry man, and I see a man that's taking out his anger about what happened to his wife against a shoplifter." RP (June 23, 2017) at 14.

The court then permitted the defense to supplement the State's statement. The defense stated,

> I don't disagree with what [the State] said, in that most of what [it] said is in the probable cause statement that the Court referred to. I would only add that there were some disputed issues with a witness who said there was a struggle about the firearm as [Kim and Mason] were fighting on the ground.

RP (June 23, 2017) at 15-16. The court then concluded,

> Well, I'm not going to view the video because I have a sense of what occurred here from listening to you, as well as reading the Affidavit of Probable Cause, which I think is pretty accurate in terms of what the video showed.

RP (June 23, 2017) at 16.

The court then discussed its reasons for granting the defense's request for an exceptional downward sentence. The court did not grant the defense's request for a 24-month sentence; instead, the court imposed a 100-month sentence. The court stated,

> I don't believe 24 months, Counsel, in all fairness, would reflect a just sentence for the deliberate taking of a life, but I am taking into consideration the other factors that you've argued and making the mitigation to 100 months.

RP (June 23, 2017) at 19. The court then entered findings of fact and conclusions of law.

ANALYSIS

I. FAILURE TO CONSIDER EVIDENCE AT SENTENCING

Kim argues that the sentencing court committed reversible error when it restricted who spoke on Kim's behalf and when it relied on the State's version of what the surveillance video showed. We disagree.

A. Restricting Who Spoke[4]

1. Allocution

Kim argues that the trial judge violated his right to allocution by refusing to hear from the defense's proffered witnesses. We disagree.

"Allocution is the right of a criminal defendant to make a personal argument or statement to the court before the pronouncement of sentence." *State v. Canfield*, 154 Wn.2d 698, 701, 116

[4] We reject the State's argument that Kim did not preserve this issue, and we decide it on the merits. CR 46; CrR 8.6.

P.3d 391 (2005). Because Kim was allowed to speak at his sentencing hearing, we conclude that his statutory right to allocution was not denied.

2. SRA

Kim argues that the trial judge violated the SRA by refusing to hear the defense's proffered witnesses. We disagree.

"[A]n offender may always challenge the procedure by which a sentence was imposed." *State v. Grayson*, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). But, in order to allege such a procedural error, the appellant must show "that the sentencing court had a duty to follow some specific procedure required by the SRA, and that the court failed to do so." *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993).

Under the SRA,

> The court shall consider the risk assessment report and presentence reports, if any, including any victim impact statement and criminal history, and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigative law enforcement officer as to the sentence to be imposed.

RCW 9.94A.500(1).

Here, Kim has not shown how the sentencing court's decision to restrict the number of statements given on his behalf violated the SRA. Accordingly, we conclude that no procedural error occurred.

B. The State's Comment on the Unwatched Video

Kim argues that the court violated the SRA by allowing the prosecution to describe what the video showed rather than watching the video. We disagree.

The record shows that Kim did not object to the State's comment or request an evidentiary hearing. Generally, we will not review an issue raised for the first time on appeal. RAP 2.5(a). A

party must make a timely and specific objection at trial unless the error constitutes a "manifest error affecting a constitutional right." RAP 2.5(a)(3). When the defendant fails to object to an alleged error at trial, he "has the initial burden of showing that (1) the error was 'truly of constitutional dimension' and (2) the error was 'manifest.'" *State v. Grimes*, 165 Wn. App. 172, 185-86, 267 P.3d 454 (2011) (quoting *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009)).

Kim fails to show how the State's comment constituted manifest error affecting a constitutional right. Accordingly, we conclude that Kim waived his challenge to the State's comment.

II. ERRONEOUSLY CLASSIFYING KIM'S CONVICTION

Kim argues that the sentencing court abused its discretion by basing the length of his exceptional sentence below the standard range on a misunderstanding of his crime. We disagree.

The duration of an exceptional sentence is clearly too excessive or lenient only when it constitutes an abuse of discretion. *State v. Oxborrow*, 106 Wn.2d 525, 530, 723 P.2d 1123 (1986). "[D]iscretion is abused if it is exercised on untenable grounds or for untenable reasons, such as a misunderstanding of the underlying law that causes nonharmless error." *State v. Burke*, 163 Wn.2d 204, 210, 181 P.3d 1 (2008).

"Washington is a written order state." *State v. Huckins*, 5 Wn. App. 2d 457, 469, 426 P.3d 797 (2018). "[A] trial court's oral statements are 'no more than a verbal expression . . . and may be altered, modified, or completely abandoned.'" *State v. Dailey*, 93 Wn.2d 454, 458, 610 P.2d 357 (1980) (quoting *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963)).

Here, the State charged felony murder in the second degree[5] and Kim plead guilty to it. This crime does not require the "intent to cause the death of another person." RCW

[5] RCW 9A.32.050(1)(b).

9A.32.050(1)(a). At Kim's sentencing hearing, however, the judge indicated that Kim plead guilty to murder in the second degree predicated on intentional murder. But Kim's judgment and sentence, filed the same day as his sentencing hearing, recognized that Kim plead guilty to felony murder under RCW 9A.32.050(1)(b). Therefore, to the extent the judge erroneously described Kim's conviction during his sentencing hearing, the judgment and sentence clarified that the judge was aware of the crime to which Kim plead guilty. Accordingly, we conclude that the trial court did not base its decision of imposing an exceptional downward sentence of 100 months on a misunderstanding of the legal violation to which Kim plead guilty, and therefore, it did not abuse its discretion.

We affirm.

Melnick, J.

We concur:

Maxa, C.J.

Lee, J.

STATUTORY APPENDIX

Relevant Statutory Provisions and Rules

CrRLJ 3.2 provides in part:

> (b) Showing of Likely Failure to Appear--Least Restrictive Conditions of Release. If the court determines that the accused is not likely to appear if released on personal recognizance, the court shall impose the least restrictive of the following conditions that will reasonably assure that the accused will be present for later hearings, or, if no single condition gives that assurance, any combination of the following conditions:
>
> (1) Place the accused in the custody of a designated person or organization agreeing to supervise the accused;
>
> (2) Place restrictions on the travel, association, or place of abode of the accused during the period of release;
>
> (3) Require the execution of an unsecured bond in a specified amount;
>
> (4) Require the execution of a bond in a specified amount and the deposit in the registry of the court in cash or other security as directed, of a sum not to exceed 10 percent of the amount of the bond, such deposit to be returned upon the performance of the conditions of release or forfeited for violation of any condition of release. If this requirement is imposed, the court must also authorize a surety bond under subsection (b)(5);
>
> (5) Require the execution of a bond with sufficient solvent or the deposit of cash in lieu thereof;
>
> (6) Require the accused to return to custody during specified hours or to be placed on electronic monitoring, if available; or

(7) Impose any condition other than detention deemed reasonably necessary to assure appearance as required.

RAP 13.4 provides in part:

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RCW 9.94A.030 provides in part:

(8) "Confinement" means total or partial confinement.
. . . .

(24) "Electronic monitoring" means tracking the location of an individual, whether pretrial or posttrial, through the use of technology that is capable of determining or identifying the monitored individual's presence or absence at a particular location including, but not limited to:

(a) Radio frequency signaling technology, which detects if the monitored individual is or is not at an approved location and notifies the monitoring agency of the time that

the monitored individual either leaves the approved location or tampers with or removes the monitoring device; or

(b) Active or passive global positioning system technology, which detects the location of the monitored individual and notifies the monitoring agency of the monitored individual's location.

. . . .

(29) "Home detention" is a subset of electronic monitoring and means a program of partial confinement available to offenders wherein the offender is confined in a private residence twenty-four hours a day, unless an absence from the residence is approved, authorized, or otherwise permitted in the order by the court or other supervising agency that ordered home detention, and the offender is subject to electronic monitoring.

. . . .

(36) "Partial confinement" means confinement for no more than one year in a facility or institution operated or utilized under contract by the state or any other unit of government, or, if home detention, electronic monitoring, or work crew has been ordered by the court or home detention has been ordered by the department as part of the parenting program, in an approved residence, for a substantial portion of each day with the balance of the day spent in the community. Partial confinement includes work release, home detention, work crew, electronic monitoring, and a combination of work crew, electronic monitoring, and home detention.

RCW 9.94A.500 provides in part:

(1) Before imposing a sentence upon a defendant, the court shall conduct a sentencing hearing. The sentencing

hearing shall be held within forty court days following conviction. Upon the motion of either party for good cause shown, or on its own motion, the court may extend the time period for conducting the sentencing hearing. . . .

RCW 9.94A.505 provides in part

(1) When a person is convicted of a felony, the court shall impose punishment as provided in this chapter.

. . .

(6) The sentencing court shall give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

(7) The sentencing court shall not give the offender credit for any time the offender was required to comply with an electronic monitoring program prior to sentencing if the offender was convicted of one of the following offenses:

(a) A violent offense;

(b) Any sex offense;

(c) Any drug offense;

(d) Reckless burning in the first or second degree as defined in RCW 9A.48.040 or 9A.48.050;

(e) Assault in the third degree as defined in RCW 9A.36.031;

(f) Assault of a child in the third degree;

(g) Unlawful imprisonment as defined in RCW 9A.40.040; or

(h) Harassment as defined in RCW 9A.46.020.

RCW 9.94A.530 provides in part:

> (2) In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing. Where the defendant disputes material facts, the court must either not consider the fact or grant an evidentiary hearing on the point. The facts shall be deemed proved at the hearing by a preponderance of the evidence, except as otherwise specified in RCW 9.94A.537. On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.

RCW 9.94A.535 provides in part:

> The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.
>
> Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

. . .

(1) Mitigating Circumstances - Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

U.S. Const. amend. V provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. XIV, § 1 provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Art. I, § 10, cl. 1 provides:

> No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

Wash. Const. art. I, § 3 provides:

> No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. I, § 9 provides:

> No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

Wash. Const. art. I, § 12 provides:

> No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Wash. Const. art. I, § 22 (Amendment 10) provides:

> In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: *Provided,* The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

CERTIFICATE OF SERVICE

I, Alex Fast, certify and declare as follows:

On March 25, 2019, I served a copy of this PETITION FOR REVIEW on counsel for the Respondent by filing a copy through the Portal and thus a copy will be delivered electronically.

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 25th day of March 2019, at Seattle, Washington.

s/ Alex Fast
Legal Assistant

LAW OFFICE OF NEIL FOX PLLC

March 25, 2019 - 11:56 AM

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