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No. 50951-2-II

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

MIN SIK KIM,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY  
The Honorable John Hickman

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OPENING BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR. . . . . 2

C. STATEMENT OF THE CASE. . . . . 3

D. ARGUMENT..... 10

    1. *Introduction*. . . . . 10

    2. *The Trial Court Erred When Not Considering Proffered Evidence at Sentencing*. . . . . 12

    3. *The Trial Judge Abused His Discretion By Basing The Length of the Exceptional Sentence on a Misunderstanding About the Crime to Which Mr. Kim Pled Guilty*. . . . . 23

    4. *The Trial Court Erred When Not Giving Mr. Kim Credit for Time Served in Pretrial Confinement*. . . . . 27

E. CONCLUSION. . . . . 36

**TABLE OF CASES**

	<b>Page</b>
<b><i>Washington Cases</i></b>	
<i>Harris v. Charles</i> , 171 Wn.2d 455, 256 P.3d 328 (2011). . . . .	30,33,34,35
<i>In re Pers. Restraint of Echeverria</i> , 141 Wn.2d 323, 6 P.3d 573 (2000). 15	15
<i>In re Phelan</i> , 97 Wn.2d 590, 647 P.2d 1026 (1982). . . . .	28
<i>In re Powell</i> , 117 Wn.2d 175, 814 P.2d 635 (1991). . . . .	15
<i>Reanier v. Smith</i> , 83 Wn.2d 342, 517 P.2d 949 (1974). . . . .	27,28,30,31,32
<i>State v. Burke</i> , 163 Wn.2d 204, 181 P.3d 1 (2008). . . . .	25
<i>State v. Canfield</i> , 154 Wn.2d 698, 116 P.3d 391 (2005). . . . .	15
<i>State v. Clarke</i> , 61 Wn.2d 138, 377 P.2d 449 (1962). . . . .	11
<i>State v. Ellison</i> , 186 Wn. App. 780, 346 P.3d 853 (2015). . . . .	18
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971). . . . .	25
<i>State v. Fain</i> , 94 Wn.2d 387, 617 P.2d 720 (1980). . . . .	14
<i>State v. Herzog</i> , 112 Wn.2d 419, 771 P.2d 739 (1989). . . . .	16
<i>State v. Hixson</i> , 94 Wn. App. 862, 973 P.2d 496 (1999). . . . .	18
<i>State v. Medina</i> , 180 Wn.2d 282, 324 P.3d 682 (2014). . . . .	33,34,35
<i>State v. Miller</i> , 103 Wn.2d 792, 698 P.2d 554 (1985). . . . .	10
<i>State v. Pascal</i> , 108 Wn.2d 125, 736 P.2d 1065 (1987). . . . .	22

<i>State v. Peterson</i> , 29 Wn. App. 655, 630 P.2d 480 (1981), <i>aff'd</i> 97 Wn.2d 864, 651 P.2d 211 (1982).....	15,16
<i>State v. Ritchie</i> , 126 Wn.2d 388, 894 P.2d 1308 (1995). . . . .	18,24
<i>State v. Sanchez</i> , 146 Wn.2d 339, 46 P.3d 774 (2002).....	15
<i>State v. Sledge</i> , 133 Wn.2d 828, 947 P.2d 1199 (1997). . . . .	15
<i>State v. Smith</i> , 124 Wn. App. 417, 102 P.3d 158 (2004), <i>aff'd</i> , 159 Wn.2d 778, 154 P.3d 873 (2007).....	22
<i>State v. Speaks</i> , 119 Wn.2d 204, 829 P.2d 1096 (1992). . . . .	27,28
<i>State v. Strauss</i> , 119 Wn.2d 401, 832 P.2d 78 (1992).....	13
<i>State v. Thomas</i> , 192 Wn. App. 721, 371 P.3d 58 (2015). . . . .	10

***Federal and Other State Cases***

<i>Crampton v. Ohio</i> , 408 U.S. 941, 92 S. Ct. 2873, 33 L. Ed. 2d 765 (1972).....	13
<i>Enmund v. Florida</i> , 458 U.S. 782, 102 S. Ct. 1140, 73 L. Ed. 2d 1140 (1982).....	26
<i>Lockett v. Ohio</i> , 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).....	14
<i>McGautha v. California</i> , 402 U.S. 183, 91 S. Ct. 1454, 28 L.Ed.2d 711 (1971). . . . .	13
<i>Miller v. Alabama</i> , 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).....	14
<i>Mullaney v. Wilbur</i> , 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).....	26

<i>Payne v. Tennessee</i> , 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991).....	19
<i>Rock v. Arkansas</i> , 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).....	13
<i>Solem v. Helm</i> , 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983).....	13
<i>State v. Thurston</i> , 781 P.2d 1296 (Utah Ct. App. 1989). . . . .	16
<i>United States v. DiFrancesco</i> , 449 U.S. 117, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980).....	32
<i>United States v. Shill</i> , 740 F.3d 1347 (9th Cir. 2015). . . . .	14
<i>Williams v. Illinois</i> , 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).....	32
<i>Williams v. New York</i> , 337 U.S. 241, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949).....	16
<i>Ylst v. Nunnemaker</i> , 501 U.S. 797, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991).....	25

***Statutes, Constitutional Provisions,  
and Other Authority***

CJC 2.5.....	12
CJC 2.6.....	12
Const. art. I, § 3. . . . .	3,12,13,27,28,36
Const. art. I, § 9. . . . .	3,12,27,28,36
Const. art. I, § 12. . . . .	3,12,27,28,36

Const. art. I, § 14. ....	13
CrRLJ 3.2.....	33
<i>House Bill Report</i> , EHB 1943 (2015). ....	29
Laws of 2015, Chapter 287, § 10.....	2,12,29,36
Former RCW 9.94A.110(1).....	15
RCW 9.94A.030. ....	28,33,35
RCW 9.94A.500. ....	15
RCW 9.94A.505. ....	29,30,35
RCW 9.94A.530. ....	17
RCW 9.94A.535. ....	1,17,22
RCW 9.94A.537. ....	17
RCW 9.94A.585. ....	18
RCW 9A.16.080. ....	10
RCW 9A.32.050. ....	24
RCW 9A.36.021. ....	24
<i>Senate Bill Report</i> , EHB 1943 (2015). ....	29
U.S. Const. amend. V.....	2,12,27,28,36
U.S. Const. amend. VI.....	13
U.S. Const. amend. VIII.....	13

U.S. Const. amend. XIV. ....	2,13,27,28,36
WPIC 35.50. ....	24

**A. ASSIGNMENTS OF ERROR**

1. Appellant Min Sik Kim assigns error to the entry of the judgment and sentence. CP 60-73 (attached as App. A).

2. Mr. Kim assigns error to Finding of Fact 8 and Conclusion of Law 5 in the *Findings of Fact and Conclusions of Law on Defense Motion for Exceptional Sentence Downward RCW 9.94A.535(1)*, CP 74-77 (attached as App. B).

3. The trial court erred when it failed to consider all evidence proffered to it at the sentencing hearing, including a video of the shooting and oral statements from supporters of Mr. Kim.

4. The trial court erred when it gave an incorrect reason for the length of the sentence.

5. The trial court erred when it denied Mr. Kim credit for time served on electronic home detention prior to trial, and thus the court erred when it crossed out “447 Days on Electric Home Mont [indecipherable]” in ¶ 4.5(c) of the judgment. CP 66.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Where the trial court declined to consider evidence proffered by both sides at a sentencing hearing because of time constraints, should the case be remanded for a new sentencing hearing?

2. The trial court found there to be substantial and compelling reasons to give an exceptionally low sentence. However, the trial court did not impose as low of a sentence as requested, and 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. Mr. Kim had not been charged or convicted for deliberately taking a life – he was charged and pled guilty to felony murder, based upon a second degree assault. CP 11, 13-32. Where the trial court based the duration of the exceptional sentence on an incorrect understanding of the charged offense, should the sentence be reversed and the case remanded for a new sentencing hearing?

3. Does a new statute depriving some people of credit for time served on pretrial electronic home detention, Laws of 2015, Chapter 287, § 10, violate due process, double jeopardy and equal protection of the laws, in violation of the Fifth and Fourteenth Amendments to the United States

Constitution and article I, sections 3, 9 and 12 of the Washington Constitution?

**C. STATEMENT OF THE CASE**

The appellant, Mr. Kim, and his wife, Seul Ah Lim, are both Korean immigrants with a strong work ethic. They own and operate a convenience store and gas station in Spanaway. Mr. Kim's and Ms. Lim's store also had persistent problems with crime. Because the couple did not have sufficient funds to hire security guards, they personally armed themselves with a firearm for protection. CP 38-59.

On February 18, 2016, Mr. Kim left his wife at the store alone so he could pick up their young daughter from school when she became ill. Someone came into the store and tried to rob Ms. Lim at gunpoint. When Ms. Lim tried to defend herself, the robber shot her in the abdomen. The assailant was subsequently arrested and convicted only of attempted first degree robbery and second degree assault. CP 41-42. Mr. Kim suffered personal guilt and depression over the fact that he believed he had put his wife in a position of danger. CP 42, 56, 59.

In March 2016, just 37 days after the robber shot Ms. Lim, Mr. Kim was working alone at the store. Mr. Kim had a confrontation outside his store

with Jakeel Mason and another male who were loitering and drinking on the property. Witnesses then saw Mr. Kim outside the store arguing with three other men who also refused to leave. Mr. Kim herded them off the property but they returned and again had a confrontation with Mr. Kim. In the meantime Mr. Mason ran inside the store and jumped behind the counter and began stealing items. CP 2-3, 42-43. It is unknown whether Mr. Mason and his associate were connected to the other three males who kept coming back onto the store's property.

Another customer told Mr. Kim about Mason's actions, and Mr. Kim rushed back into his store and confronted Mason. Mr. Kim had his firearm out when he came back into the store, but put it away after he was able to restrain Mason, and Mason put his hands up. As Mr. Kim restrained Mason, a fight broke out. Mason and Kim ended up on the ground, exchanging punches. Mason got up and began running towards the door, and Mr. Kim pulled out his gun and shot him. Mr. 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 video security footage that captured some of the events that led to Mr. Mason's death. CP 2-3, 42-43.

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, as a condition of release, Mr. Kim be confined to his home, on electronic home detention. RP (3/29/16) 6; CP 4-5. The prosecutor noted a new statute, enacted in July 2015, that would prevent Mr. Kim from receiving credit for time served against any sentence for time spent on electronic home detention. RP (3/29/16) 5. Mr. Kim posted bail, CP 6-8, and enrolled in the home confinement program. CP 9-10.

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, 13-22. 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 detention. 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. In his sentencing memorandum, Mr. Kim's counsel (Edward Nelson) described Kim's life and how the robbery and shooting of his wife had impacted him.

Mr. Nelson attached a number of support letters from people in the community. CP 38-59; RP (6/23/17) 11.

The State (represented by DPA Kathleen Proctor) sought a standard range sentence and asked the judge to review excerpts from the security video:

[By Ms. Proctor] I have prepared three excerpts from the security videos. I've asked that they be marked as a sentencing exhibit. I would ask that the Court view those before making a final determination. They're not very long to watch, and they're basically three different viewpoints from within -- from within the store, but I think it is important that the Court see those before hearing the -- making a determination.

RP (6/23/17) 5.

Defense counsel told the court that he had three people present who would speak on Mr. Kim's behalf. RP (6/23/17) 6. However, the court stated that it did not want to listen to people "simply retell what they've already written in the letters," and thus ruled that Mr. Kim could have one person speak on his behalf, "even if he's written a letter before, I would be happy to hear that person." RP (6/23/17) 7. Mr. Kim chose his wife to give a statement to the court. RP (6/23/17) 7-9.

Mr. Kim's lawyer then argued why an exceptional sentence should be imposed. RP (6/23/17) 9-12. Mr. Kim himself addressed the court, stating

that “I know now that I was still depressed, anxious and scared about what happened to my wife one month earlier when she was shot,” that he did not intend to kill Mr. Mason, and that in his mind, he was defending himself. RP (6/23/17) 13.

The court then ruled that it would not review the video because of lack of time:

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.

I read the Declaration of Probable Cause, which would indicate that this gentleman was shot in the back as he was exiting the store. And is there any other point that you want to make that you would say, Judge, if you’re not going to view it, here’s what we’re concerned about as to what showed in the tape?

RP (6/23/17) 13-14 (emphasis added). The exhibit itself (the video) was never actually marked and is not in the record of this appeal.

The prosecutor relayed to the judge her own opinion as to what was contained in the video recording:

[By Ms. Proctor] So the only thing that I would disagree with is 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 that was in his store. . . . [W]hen 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.

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 a witness said that:

[By Mr. Nelson] there was a struggle about the firearm as  
they were fighting on the ground. So I just wanted to add that  
to the Court since you're not reviewing the video and since it  
was recited. I think that information should be available to the  
Court as well.

RP (6/23/17) 16.

The court then ruled:

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 (6/23/17) 16. The court then 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. The court  
rejected, as a basis for an exceptional sentence, arguments that Mr. Kim was  
acting in self-defense or was suffering from emotional distress:

[T]he Court finds that the use of deadly force when your own safety is not threatened does not justify shooting someone in the back as they are attempting to leave a store. The defendant may have been depressed due to the shooting of his wife, but the Court can't find the degree of mental disorder or duress which would act as a mitigating factor in a downward mitigation sentence.

RP (6/23/17) 17.

Rather than departing down to the requested 24 months, the court 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.

Mr. Kim's attorney then asked the court to give his client credit for time served on electronic home detention, 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.<sup>1</sup> The State argued that there was a statute that prohibited credit for time served on electronic home detention for a violent offense. The court ruled that if Mr. Kim was legally entitled to such credit,

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<sup>1</sup> Counsel stated Mr. Kim had completed 447 days. RP (6/23/17) 22. This was based on the calculation as of June 20, 2017. CP 47. The final report letter, however, stated that Kim had completed 450 days without a violation, as of *May* [sic] 23, 2017. CP 78-80. This must be a mistake since sentencing was *June* 23, 2017, and 450 days is the duration between the date of enrollment (3/30/17) and sentencing. If both the day of enrollment and the day of termination are included, Mr. Kim had been confined for 451 days in EHM.

it would absolutely give him that credit. The parties agreed to look for the statute, and would come back to court if required. RP (6/23/17) 20-25. The final signed judgment reflects that credit was denied – the section of the judgment regarding credit for time served had a handwritten provision about credit for 447 days of electronic home detention, but that language was crossed out. CP 66.

Written findings and conclusions regarding the exceptional sentence were entered without a hearing. CP 74-77. This appeal then timely followed. CP 81-116.

#### **D. ARGUMENT**

##### **1. *Introduction***

Mr. Kim is serving 100 months in prison because he shot someone who was robbing<sup>2</sup> his store, a month after his wife was shot during another

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<sup>2</sup> The prosecutor referred to Mr. Mason as a “shoplifter.” RP (6/23/17) 14-15. However, Mason did not simply just try to pocket goods quietly without detection and leave the store. Rather, there was a prior confrontation outside the store with Mr. Kim, before Mason ran into the store and jumped behind the counter to steal things. It was also not clear whether Mason had accomplices (i.e. the other people that Mr. Kim was trying to get off the store property). Then, Mason ended up struggling with Mr. Kim, exchanging punches with him and rolling on the floor, possibly trying take the gun from Kim. This conduct is more than “shoplifting,” and would qualify as “robbery.” *See State v. Thomas*, 192 Wn. App. 721, 724-26, 371 P.3d 58 (2015). Mr. Kim would normally have the right to use reasonable force to detain Mason, which could include deadly force. RCW 9A.16.080; *State v. Miller*, 103 Wn.2d 792, 794-95, 698 P.2d 554 (continued...)

robbery. Whether or not Mr. Kim was justified in using deadly force, the case is a serious one that has led to the extended incarceration of a dedicated and hard-working immigrant, to the detriment of his family and to the community.

Yet, the judge assigned to hear the case could not be bothered to review the evidence because he was too busy. Because a jury in another case had a question, the judge did not want to review the videotape offered by the State itself, and only wanted to hear from one of three of Mr. Kim's witnesses who were present to speak on Mr. Kim's behalf. This was reversible error and the case should be returned for a new sentencing hearing.

Similarly, reversal is required because the judge clearly misunderstood the nature of the charge. He based the duration of the exceptionally long sentence on the misconception that this case involved intentional murder, not felony murder. While a judge has discretion as to the length of an exceptional sentence, a judge whose sentence is based on a misunderstanding of the nature of the charge, abuses his or her discretion and reversal is required.

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<sup>2</sup>(...continued)  
(1985); *State v. Clarke*, 61 Wn.2d 138, 142-45, 377 P.2d 449 (1962). Of course, whether the force used was excessive would have been an issue at trial, if there had been such a trial.

Finally, while there is a new statute that prevents the awarding of credit for time served to those who were on electronic home detention (“confinement”) before sentencing, Laws of 2015, Chapter 287, § 10, this law is unconstitutional. It violates due process, equal protection of the laws and double jeopardy to deny anyone, whether convicted of a violent offense or not, of credit for time served in confinement prior to sentencing. U.S. Const. amends. V and XIV; Const. art. I, §§ 3, 9 & 12.

**2. *The Trial Court Erred When Not Considering Proffered Evidence at Sentencing***

Although it seems rather basic, judges are supposed to listen to testimony, consider the evidence and then make decisions. Even when dealing with crowded dockets and calendars, justice requires deliberative consideration. The Code of Judicial Conduct provides:

(A) A judge shall perform judicial and administrative duties, competently and diligently.

CJC 2.5. The Comment to this section states:

[2] In accordance with GR 29, a judge should seek the necessary docket time, court staff, expertise, and resources to discharge all adjudicative and administrative responsibilities.

*See also* CJC 2.6(A) (“A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard

according to law.”). When, as in this case, a judge violates these rules because he or she is too rushed to be able to consider all the evidence, several important rights can be violated.

While there may be some dispute as to whether a defendant has an absolute constitutional right to present evidence at sentencing,<sup>3</sup> “[t]he due process clause<sup>4</sup>] requires that a defendant in a sentencing hearing be given an opportunity to refute the evidence presented and that the evidence be reliable.” *State v. Strauss*, 119 Wn.2d 401, 418-19, 832 P.2d 78 (1992). Further, while the boundaries of punitive sentencing in non-capital cases are still subject to dispute, both the Eighth Amendment and article I, section 14, contain general requirements of proportionality. *See Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983) (life imprisonment without

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<sup>3</sup> *See McGautha v. California*, 402 U.S. 183, 218, 91 S. Ct. 1454, 28 L.Ed.2d 711 (1971) (stating that the “Court has not directly determined whether or to what extent the concept of due process of law requires that a criminal defendant wishing to present evidence or argument presumably relevant to the issues involved in sentencing should be permitted to do so”), *vacated Crampton v. Ohio*, 408 U.S. 941, 92 S. Ct. 2873, 33 L. Ed. 2d 765 (1972). On the other hand, the wording of the Compulsory Process Clause of the Sixth Amendment makes it clear that it applies, not just to “trials” but to “all criminal prosecutions,” which would seem to apply to sentencing proceedings. *See also Rock v. Arkansas*, 483 U.S. 44, 51 n.9, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) (right to testify “reaches beyond the criminal trial: the procedural due process constitutionally required in some extrajudicial proceedings includes the right of the affected person to testify.”).

<sup>4</sup> U.S. Const. amend. XIV; Const. art. I, § 3.

possibility of parole violated the Eighth Amendment because it was “grossly disproportionate” when based on seven underlying nonviolent felonies); *State v. Fain*, 94 Wn.2d 387, 617 P.2d 720 (1980) (life with parole sentence for habitual criminal convicted of property offenses violated article I, section 14). Proportionality requires that the parties be allowed to offer evidence of mitigation. *See Lockett v. Ohio*, 438 U.S. 586, 608, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) (capital case); *Miller v. Alabama*, 567 U.S. 460, 469-80, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) (juvenile offender).<sup>5</sup>

The Sentencing Reform Act of 1981 (“SRA”) requires the trial court to conduct a sentencing hearing:

Before imposing a sentence upon a defendant, the court shall conduct a sentencing hearing. . . .

. . .

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

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<sup>5</sup> Whether a particular sentence (even a mandatory sentence) is, in the end, constitutional does not answer the question of whether a defendant facing such a sentence has a right to offer mitigating evidence so that the issue of proportionality can be decided. Sentences can either be disproportionate as a class (i.e. life without parole sentences imposed on juvenile offenders not convicted of homicide) or can be disproportionate “given all the circumstances in a particular case.” *United States v. Shill*, 740 F.3d 1347, 1355 (9th Cir. 2015). To argue the latter constitutional violation, a defendant must be allowed to introduce evidence to illustrate the disproportionality.

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).<sup>6</sup> This statute codifies the common law right of allocution. *State v. Canfield*, 154 Wn.2d 698, 703-04, 116 P.3d 391 (2005).<sup>7</sup>

The right of allocution includes within it the right to present evidence in support of mitigation of a sentence. For instance, in *State v. Peterson*, 97 Wn.2d 864, 651 P.2d 211 (1982), *limited on other grounds by State v. Sledge*, 133 Wn.2d 828, 840, 947 P.2d 1199 (1997), the Supreme Court held that a defendant's right to allocution was violated when the trial court denied the defense request to have prosecutor explain the reasons for his sentencing recommendation. The prosecutor had recommended that the defendant serve no jail time, and after a presentence report recommended the defendant serve

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<sup>6</sup> Importantly, the statute "prescribes only who the court must hear from. . . [I]t does not . . . specifically limit who may present testimony at the sentencing hearing to only those parties listed in the statute." *State v. Sanchez*, 146 Wn.2d 339, 354 n.10, 46 P.3d 774 (2002) (construing former RCW 9.94A.110(1)).

<sup>7</sup> At one time, the Washington Supreme Court noted that the right to allocution was grounded in the Due Process Clause of the Fourteenth Amendment. *See In re Powell*, 117 Wn.2d 175, 200, 814 P.2d 635 (1991) ("[I]t is a violation of due process to . . . deny a defendant the opportunity to speak immediately prior to the imposition of a sentence."). The Court has retreated from that position, and now holds that the right of allocution is non-constitutional in nature. *See State v. Canfield*, 154 Wn.2d at 698; *In re Pers. Restraint of Echeverria*, 141 Wn.2d 323, 331-38, 6 P.3d 573 (2000).

six months, the defense asked that the court allow the prosecutor to explain the reasons for the recommendation of no jail time, but the trial court denied the request. *Id.* at 865-66. The Supreme Court held that the right of allocution included the right to present “‘any information’ in mitigation of punishment. The purpose of the rule is to allow defendant’s position on sentencing to be considered by the trial court before the pronouncement of the sentencing. The rule is not satisfied merely by permitting defense counsel to speak.” *Id.* at 868.

The right to present evidence to the sentencing judge is important because traditionally judges are allowed to consider a wide array of information to make an informed sentencing decision, with the goal being that “the punishment should fit the offender and not merely the crime.” *Williams v. New York*, 337 U.S. 241, 247, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949) (quoted in *State v. Herzog*, 112 Wn.2d 419, 423-24, 771 P.2d 739 (1989)). *See also State v. Thurston*, 781 P.2d 1296, 1300 (Utah Ct. App. 1989) (“It should be obvious that a judge cannot properly use his discretion to fashion an informed sentence if he is deprived of relevant information.”) (citing *State v. Peterson*, 29 Wn. App. 655, 661, 630 P.2d 480 (1981), *aff’d*, *State v. Peterson*, *supra*).

The need for full information is particularly the case where a judge is determining whether there are “substantial and compelling” reasons justifying an exceptional sentence under RCW 9.94A.535 and the extent of the downward departure. In a case involving a request for an exceptionally low sentence, the SRA provides:

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.

RCW 9.94A.535(1). The SRA therefore requires the presentation of “evidence” and an adjudicative proceeding such that the court makes “findings.”

The requirement of an adjudicative proceeding is mirrored in RCW 9.94A.530(2), which provides in part:

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.*

Emphasis added.

The SRA gives much discretion to the judge in determining how much of a departure should be given. *See* RCW 9.94A.585(4) (review on appeal: “clearly excessive or clearly too lenient”); *State v. Ritchie*, 126 Wn.2d 388, 394-97, 894 P.2d 1308 (1995). This discretion, though, does not extend to the refusal to consider relevant and material evidence offered by the parties at sentencing. While a court certainly can bar the introduction of irrelevant evidence at sentencing,<sup>8</sup> or even limit a defendant’s allocution where he or she rambles off and starts talking about the unfairness of the trial,<sup>9</sup> when a court refuses to consider properly proffered evidence, it interferes with the ability of the parties to litigate whether a court should depart from the standard range, and, if so, how much of a departure is warranted.

In this case, Mr. Kim was being sentenced for a fairly serious and traumatic event – the shooting of someone who had been committing criminal acts at Mr. Kim’s business establishment. Mr. Kim had friends and family present to speak on his behalf, but an impatient judge restricted his presentation to only one person, his wife. While the judge did not want

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<sup>8</sup> *See State v. Hixson*, 94 Wn. App. 862, 866-67, 973 P.2d 496 (1999) (exclusion of evidence of victim’s prior bad acts).

<sup>9</sup> *See State v. Ellison*, 186 Wn. App. 780, 785, 346 P.3d 853 (2015).

people simply to re-tell in person what they wrote in their letters of support, RP (6/23/17) 7, one cannot underestimate the power of an in-person emotional plea for mercy. Perhaps, a busy court docket would be inconvenienced by the tears of Mr. Kim's parents, but the quality of justice requires a judge to see and hear such emotional pleas. *See generally Payne v. Tennessee*, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) (upholding admission of emotional victim impact evidence in capital case).

Then, when the prosecutor wanted to play the security video from the store, the judge refused to consider it because of time pressures related to another case. But, the judge did not simply make a decision that his waiting jury was more important the time it would take to review a few clips of the store security video. When the judge refused to view the video, the prosecutor went on to describe her perceptions of what took place:

[By Ms. Proctor] *[W]hen 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 that was in his store. . . . [W]hen 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 (emphasis added).

Essentially, the prosecutor testified about what *she* (and others in her office) saw on the video – the demeanor of Mr. Kim -- and the judge stated

that what she said was “well said.” RP (6/23/17) 15. While Mr. Kim’s attorney tried to counter the description of the video’s contents with his own take on what took place in the store, RP (6/23/17) 16,<sup>10</sup> the judge made a finding, without viewing the video, that the Affidavit of Probable Cause “is pretty accurate in terms of what the video showed.” RP (6/23/17) 16. In this way, the prosecutor testified about what she felt the facts were (“I see a very angry man”) and the judge made a credibility determination that the affidavit of probable cause accurately relayed what the video showed.

This procedure violated the requirements of the SRA that there be an evidentiary hearing regarding disputed facts (i.e. whether Mr. Kim was a “very angry man”), as well as violating the aforementioned constitutional and statutory rights of a defendant to allocute and to put on evidence in mitigation of the sentence.

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<sup>10</sup> Mr. Nelson stated:

I would only add that there were some disputed issues with a witness who said there was a struggle about the firearm as they were fighting on the ground. So I just wanted to add that to the Court since you’re not reviewing the video and since it was recited. I think that information should be available to the Court as well.

RP (6/23/17) 15-16.

The prejudice is apparent. The judge did find there to be substantial and compelling circumstances warranting an exceptionally low sentence. CP 74-77. The issue, then, is how far below the range the judge should have gone.

Having not considered the evidence that was offered, but then having agreed with the prosecutor's personal opinions that the video showed Mr. Kim to be "angry," and having made a finding that the Certification of Probable Cause accurately portrayed the video, it is apparent that the judge's decision to go only 23 months under the standard range was likely impacted by his refusal not to review the evidence.

Moreover, without hearing and seeing all of the proffered evidence, the judge rejected some possible alternative grounds for a low sentence – that Mr. Kim was not acting in self defense or that he was not operating with

diminished capacity. RP (6/23/17) 17.<sup>11</sup> Had the judge considered all of the proffered evidence, he may well have concluded otherwise.

In general, to someone looking in at this system from outside (perhaps an immigrant from Korea who was concerned about how their relative was being treated in the American legal system), it is apparent that the judge announced that essentially he was not interested in hearing about the facts of the case and did not want to hear the tearful pleas of Mr. Kim's relatives and friends because some other case was more important.

Again, this is not a case where the defendant was abusing the right to allocute by bringing up issues that were not pertinent, nor was there a ruling that the video, for instance, was not relevant. Rather, this was a case where

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<sup>11</sup> The trial court's conclusions here seem to suggest that to qualify for an exceptionally low sentence under RCW 9.94A.535(1), the defendant must actually prove he or she acted in self-defense or with diminished capacity. This is incorrect since if the defendant truly was acting in self-defense or with diminished capacity, he or she would not be guilty at all and there would not be a need for an exceptional sentence. Rather, RCW 9.94A.535 allows for an exceptionally low sentence where there is only a "failed" claim of a defense. *See State v. Pascal*, 108 Wn.2d 125, 137, 736 P.2d 1065 (1987) (where defendant was convicted of manslaughter after claim of self-defense based on battered woman syndrome failed, trial judge properly evaluated evidence of statutory mitigating factors, including that victim was initiator, aggressor or provoker of incident, and imposed sentence below the standard range); *State v. Smith*, 124 Wn. App. 417, 436 n. 18, 102 P.3d 158 (2004), *aff'd*, 159 Wn.2d 778, 154 P.3d 873 (2007) ("Smith raised self-defense and the trial court instructed the jury on it. Failed defenses may constitute mitigating factors.").

the judge simply did not want to hear from two relatives of the defendant who could have pled for mercy and did not want to take the time to view the video of the events inside the store simply because he could not be bothered, given his crowded docket. Given how the prosecutor essentially testified about her own views of the video, this procedure was improper.

The judgment should be reversed and the case remanded for a new sentencing hearing.

**3. *The Trial Judge Abused His Discretion By Basing The Length of the Exceptional Sentence on a Misunderstanding About the Crime to Which Mr. Kim Pled Guilty***

Although finding there were substantial and compelling reasons to impose an exceptionally low sentence, the judge rejected the 24-month sentence requested by the defense. Instead, the judge imposed 100 months. The only reason given for the duration of the exceptional sentence was: “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 (6/23/17) 19 (emphasis added).

Mr. Kim, however, had not been charged or convicted for deliberately taking a life – he was charged and pled guilty to felony murder, based upon

an Assault in the Second Degree. RCW 9A.32.050(1)(b); CP 11, 13-32. Mr. Kim's guilty plea statement specifically stated that the killing was not deliberate:

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).

Indeed, Assault in the Second Degree does not even require that Mr. Kim shot *at* Mr. Mason, while intending to cause him harm. RCW 9A.36.021(1)(c) is committed by assaulting another with a deadly weapon, a crime that can be committed simply by trying to scare the person by firing a gun in their general direction.<sup>12</sup> There was no "deliberate" taking of a life in this case.

As noted above, once a court decides to impose an exceptional sentence, the duration to be imposed is a matter of the court's discretion. *State v. Ritchie, supra*. A court need not give any reasons for the length of an exceptional sentence. *Id.* at 395. Such an order is difficult to review

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<sup>12</sup> See WPIC 35.50 ("[An assault is [also] an act[, with unlawful force,] done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.]").

because, as Justice Scalia once noted, “The essence of unexplained orders is that they say nothing.” *Ylst v. Nunnemaker*, 501 U.S. 797, 804, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991).

However, where a judge does give reasons, the traditional standard of review is that the order “will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court abuses its discretion if its decision is based on a misunderstanding of the underlying law. *State v. Burke*, 163 Wn.2d 204, 210, 181 P.3d 1 (2008).

In this case, the judge sentenced Mr. Kim as if he had been charged and convicted of deliberately taking another person’s life, apparently mistakenly thinking that Kim had been convicted of intentional second degree murder. Yet, as noted, Mr. Kim’s conviction could have been based upon the fact that he intended to scare a fleeing robber by shooting in his general direction, but unfortunately struck him, thereby unintentionally killing him.

The difference is significant. “American criminal law has long considered a defendant’s intention -- and therefore his moral guilt -- to be

critical to ‘the degree of [his] criminal culpability,’ . . . and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing.” *Enmund v. Florida*, 458 U.S. 782, 800, 102 S. Ct. 1140, 73 L. Ed. 2d 1140 (1982) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 698, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975)).

As noted above at p. 10, n. 2, Mr. Kim had a good faith basis for using the threat of deadly force to restrain someone who, possibly working in conjunction with other boisterous people outside the store, forcefully ran into Mr. Kim’s store, jumped behind the counter, began grabbing things and then struggled with Mr. Kim inside the store, fighting him and possibly trying to grab Mr. Kim’s gun. Whether Mr. Kim used excessive force when he shot his gun when Mason was going out the front door is not the issue at this juncture. What is the issue is that this was not a case where Mr. Kim intentionally and deliberately killed Mr. Mason.<sup>13</sup> His moral culpability is far less than someone who deliberately killed, and such lessened culpability should normally lead to a lower sentence than a situation where someone intentionally killed another.

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<sup>13</sup> Nor was this a case where *Mr. Kim* was committing some other offense, such as robbery, and Mr. Mason was killed during that crime. As Mr. Kim’s guilty plea statement makes clear, Kim was trying to stop a crime at his work place, and Mr. Mason was unintentionally killed as a result. CP 30.

Here, where the trial court based the duration of the exceptional sentence on a misunderstanding of Mr. Kim's mental state and his moral culpability, the trial court's decision was manifestly unreasonable. Mr. Kim should have been sentenced for what he did, not what the judge mistakenly thought he did. The trial judge abused his discretion when departing downward only 23 months based upon an incorrect understanding of the charges. The case should be sent back for a new sentencing hearing.

**4. *The Trial Court Erred When Not Giving Mr. Kim Credit for Time Served in Pretrial Confinement***

The trial court wanted to give Mr. Kim credit for the time he served pending trial, but the State brought to the court's attention a new statute, passed in 2015, that bars awarding credit for time served for time spent on pretrial home detention for certain categories of defendants. RP (6/23/17) 20. This new law, however, is unconstitutional and violates the prohibitions against double jeopardy and the equal protection and due process provisions in the U.S. and Washington Constitutions. U.S. Const. amends. V & XIV; Const. art. I, §§ 3, 9 & 12.

A person sentenced to confinement has a constitutional right to receive credit for time served before sentencing. *State v. Speaks*, 119 Wn.2d 204, 206, 829 P.2d 1096 (1992) (citing *Reanier v. Smith*, 83 Wn.2d 342, 517

P.2d 949 (1974); *In re Phelan*, 97 Wn.2d 590, 647 P.2d 1026 (1982)). This is required 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 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.

Pretrial electronic home detention is a form of "confinement." 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."). As "confinement," the Supreme Court has held that even if someone is not eligible for electronic home detention as a form of post-conviction punishment, the defendant still must be given credit for time spent on pre-trial electronic home detention against whatever sentence is imposed. *State v. Speaks, supra*.

In 2015, for unknown reasons,<sup>14</sup> the Legislature passed a new statute (Laws of 2015, ch. 287, § 10), that prevents courts from giving credit for time for certain categories of defendants towards their sentences for time spent while confined pretrial on electronic home detention. RCW 9.94A.505 now provides:

(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 . . . ;
- (e) Assault in the third degree . . . ;

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<sup>14</sup> The legislative history does not reflect any reason for denial of credit for time served for time spent on electronic home detention, with most attention focused on setting standards for such programs to increase public confidence. *See, e.g., House Bill Report, EHB 1943 (2015); Senate Bill Report, EHB 1943 (2015)*. The desire to increase “accountability” in electronic monitoring programs generally has nothing to do with decision to deprive whole classes of defendants from obtaining credit for time served on such programs.

- (f) Assault of a child in the third degree . . . ;
- (g) Unlawful imprisonment . . . ; or
- (h) Harassment . . .

RCW 9.94A.505.

Thus, those who steal large amounts of money from the most vulnerable members of our society or white collar criminals who are convicted for securities fraud will receive credit against their prison sentences for pretrial confinement at home, but someone who is sentenced to prison for selling a rock of cocaine or a relatively powerless small shopkeeper who unintentionally kills someone robbing his or her establishment will serve additional time in prison if confined prior to trial on electronic home detention. This disparity and arbitrary classification makes no sense. Even if the classification at issue does not involve a suspect or semi-suspect class, the mean-spirited nature of a law that denies credit for time served in pretrial confinement based upon the type of crime the person is convicted of committing fails to meet even the “rational basis” test.<sup>15</sup>

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<sup>15</sup> The Supreme Court has used the “rational basis” test in the past when reviewing discrimination regarding credit for pretrial electronic home detention. *Harris v. Charles*, 171 Wn.2d 455, 463, 256 P.3d 328 (2011).

More importantly, the discrimination is not just between those convicted of certain offenses listed in the new statute and those convicted of other offenses. Rather, there is a difference in treatment of those who are charged with the same offense. For instance, if someone charged with second degree murder is released from jail without any electronic home detention, upon the posting of bail or without any conditions at all (a “PR” release), and is then later sentenced to serve 100 months in prison, that person will serve only 100 months of confinement. Yet, someone like Mr. Kim, who is confined pretrial for 451 days on electronic home detention will serve additional time of confinement – the 100 months plus the 451 days.

This difference – between people charged with exactly the same offense, which results in some people serving more time than others, – is irrational and violates equal protection even under a rational basis test:

We can see no practical, realistic or substantive difference between time spent in pretrial detention for want of bail and time spent in detention pending an appeal of a conviction or time spent under a subsequently vacated and reinstated sentence. 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.

*Reanier v. Smith*, 83 Wn.2d at 351.<sup>16</sup>

The difference imposes double punishment on Mr. Kim based solely upon his pretrial custody status – he has to serve 451 days more than the person who is not confined pretrial. *See United States v. DiFrancesco*, 449 U.S. 117, 129, 101 S. Ct. 426, 66 L. Ed. 2d 328 (1980) (double jeopardy prohibition protects against multiple punishments for the same offense). Here, Mr. Kim is being punished twice – he was confined for 451 days pretrial and then, because he was not PR'd or simply pursuant to bail, he must serve those same days again, a second time in prison. Again, double jeopardy and equal protection are violated because Mr. Kim is serving more time in prison than someone else charged with the same offense serves who was not confined at home pursuant to EHM, but who was simply released on bail pending trial.

To be sure, in recent years, the Supreme Court has restricted the extent of its earlier holdings and has not required credit for time served for pretrial release on community based supervision programs that did not qualify

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<sup>16</sup> *See also Williams v. Illinois*, 399 U.S. 235, 244, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970) (“We hold only that the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status.”) (quoted in *Reanier*, 83 Wn.2d at 350-51).

as “confinement.” *See State v. Medina*, 180 Wn.2d 282, 324 P.3d 682 (2014). The Court has also upheld the denial of credit for time served on pretrial electronic home detention against the sentenced imposed in misdemeanor and gross misdemeanor cases. *Harris v. Charles*, 171 Wn.2d 455, 256 P.3d 328 (2011).

In *Harris v. Charles*, *supra*, the Court noted the distinctions between felony sentencing and misdemeanor sentencing. In particular, there is no misdemeanor correlate to RCW 9.94A.030(36), which defines confinement to include “partial confinement,” which includes electronic home detention. Thus, the Court looked to see whether CrRLJ 3.2’s authorization of pretrial release on electronic home detention 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 pretrial release for misdemeanors did not violate double jeopardy. *Harris*, 171 Wn.2d at 467-73.

In its analysis, the Court stressed how important it was for courts in misdemeanor cases to retain jail time as a sentencing option:

First, declining to credit misdemeanants for presentencing time on EHM preserves jail time as a sentencing option. There is a large disparity in sentencing consequences for misdemeanor and felony offenses. . . . *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 misdemeanor's presentencing time on EHM serves the legitimate state interest of preserving jail time as a possible sentence for misdemeanor defendants. . . . Second, the distinct treatment of misdemeanants and felons for purposes of sentencing credit rationally relates to maintaining the traditional discretion that courts have when sentencing a misdemeanor offender. . . . The different treatment of felons and misdemeanants when granting sentencing credit serves the legitimate government interest in maintaining the purpose and discretion of misdemeanor sentencing.

*Harris*, 171 Wn.3d at 464-65 (emphasis added).

None of these justifications apply to the denial of credit for time served to people accused of certain types of felonies, people who will in fact be subject to lengthy prison sentences. A decision to give credit for time served to only to some felons and not to others furthers no legitimate sentencing goal as explained by the Supreme Court in *Harris*. There is simply not even a rational basis to deny some people, based on the type of offense they are convicted of, credit for time served in confinement pretrial.

In *State v. Medina, supra*, the Court explained the extent of its holding in *Harris*:

If the legislature wants to credit pretrial time that *does not amount to confinement* — like the CCAP time at issue here — for nonviolent offenders, but not for violent offenders, it may do so under *Harris*.

180 Wn.2d at 293 (emphasis added). What appears to be critical in making this assessment is whether or not the pretrial time “amount[s] to confinement” or not. If it is not “confinement,” then the State can deny credit against the sentence for pretrial time.

When the Legislature, though, amended RCW 9.94A.505 to deny credit for time served based on certain categories of cases, the Legislature did not at the same time change the definition of “confinement” in RCW 9.94A.030, which, as noted includes electronic home detention for all categories of felons (not just those singled out for special treatment in RCW 9.94A.505) in the definition “confinement.” RCW 9.94A.030 (8) & (36). Thus, the Legislature still considers electronic home detention even for those accused of the type of felonies listed in the new statute as being “confinement.” In this regard, the intent of RCW 9.94A.505(7) is clearly punitive and thus violates double jeopardy in that it imposes additional punishment (“confinement”) on people like Mr. Kim who were subject to 451 days of pretrial confinement but not on people, charged with the exact same offense, who were released simply on bail or personal recognizance.

If the Legislature changes the definition of “confinement” to exclude electronic home detention, then perhaps *Harris* and *Medina* would control.

But as long as the Legislature continues to categorize those people whose liberty is restricted sufficiently so as to be confined to their homes, subject to electronic monitoring, as being in “confinement,” the new statute’s deprivation of credit for time served for certain people is unconstitutional.

Laws of 2015, Chapter 287, § 10, is arbitrary and violates due process, equal protection of the laws and the ban against double jeopardy. U.S. Const. amends. V & XIV; Const. art. I, §§ 3, 9 & 12. This Court should remand the case for entry of an order giving Mr. Kim credit for the time he served in pretrial confinement, subject to electronic home detention.

**E. CONCLUSION**

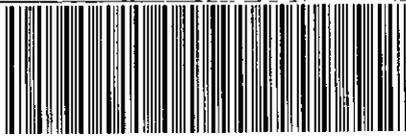
For the foregoing reasons, the judgment should be reversed and the case remanded for resentencing or for an order giving Mr. Kim credit for pretrial confinement on electronic home detention.

Dated this 4th day of December 2017.

Respectfully submitted,

s/ Neil M. Fox  
WSBA NO. 15277  
Attorney for Appellant

## **APPENDIX A**



16-1-01310-6 49459920 JDSWCD 06-26-17



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO: 16-1-01310-6

vs

MIN SIK KIM,

Defendant.

WARRANT OF COMMITMENT

- 1)  County Jail
- 2)  Dept. of Corrections
- 3)  Other Custody

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[ ] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Pierce County Jail).

[X] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections, and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

[ ] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: 6/23/17



By direction of the Honorable

*John R. Hickman*  
JUDGE

JOHN R. HICKMAN

KEVIN STOCK

CLERK

By: *Dorilee Reyes*  
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF

Date JUN 26 2017 By *Dorilee Reyes*  
Deputy

STATE OF WASHINGTON

ss:

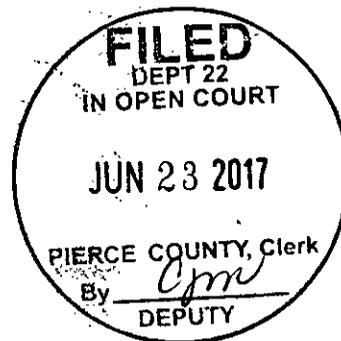
County of Pierce

I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office. IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

KEVIN STOCK, Clerk

By: \_\_\_\_\_ Deputy

SHS





SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 16-1-01310-6

vs.

JUDGMENT AND SENTENCE (J/S)

MIN SIK KIM

Defendant.

- Prison
- RCW 9.94A.712/9.94A.507 Prison Confinement
- Jail One Year or Less
- First-Time Offender
- Special Sexual Offender Sentencing Alternative
- Special Drug Offender Sentencing Alternative
- Alternative to Confinement (ATC)
- Clerk's Action Required, para 4.5 (SDOSA), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8
- Juvenile Decline  Mandatory  Discretionary

SID: 28326021  
DOB: 10/04/1985

I HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 03/16/2017 by [ X ] plea [ ] jury-verdict [ ] bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	MURDER IN THE SECOND DEGREE (D5)	9A.32.050(1)(b) 9.41.010 9.94A.533		03/25/2016	Pierce County Sheriff #1608501803

\* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Horn, See RCW 46.61.520, (JP) Juvenile present, (SM) Sexual Motivation, (SCF) Sexual Conduct with a Child for a Fee. See RCW 9.94A.533(8). (If the crime is a drug offense, include the type of drug in the second column.)

as charged in the Amended Information

17.9.05290.7

- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

NONE KNOWN OR CLAIMED

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	0	XIV	123 - 220 MOS.		123 - 220 MOS.	LIFE

2.4  EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence:

- within  below the standard range for Count(s) 7
- above the standard range for Count(s) \_\_\_\_\_

The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

Aggravating factors were  stipulated by the defendant,  found by the court after the defendant waived jury trial,  found by jury by special interrogatory. *- WILL BE SENTENCED BY LAY JURY.*  
Findings of fact and conclusions of law are attached in Appendix Z4.  Jury's special interrogatory is attached. The Prosecuting Attorney  did  did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

2.6  FELONY FIREARM OFFENDER REGISTRATION. The defendant committed a felony firearm offense as defined in RCW 9.41.010.

- The court considered the following factors:
  - the defendant's criminal history.
  - whether the defendant has previously been found not guilty by reason of insanity of any offense in this state or elsewhere.
  - evidence of the defendant's propensity for violence that would likely endanger persons.
  - other: \_\_\_\_\_

1  
2  The court decided the defendant [ ] should  should not register as a felony firearm offender.

3 **III. JUDGMENT**

4 3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

5 3.2 [ ] The court DISMISSES Counts \_\_\_\_\_ [ ] The defendant is found NOT GUILTY of Counts \_\_\_\_\_

6 **IV. SENTENCE AND ORDER**

7 **IT IS ORDERED:**

8 4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

9 JASS CODE

10 *RTNRJN* \$ \_\_\_\_\_ Restitution to: \_\_\_\_\_

11 \$ \_\_\_\_\_ Restitution to: \_\_\_\_\_

(Name and Address--address may be withheld and provided confidentially to Clerk's Office).

12 *PCV* \$ 500.00 Crime Victim assessment

13 *DNA* \$ 100.00 DNA Database Fee

14 *PUB* \$ \_\_\_\_\_ Court-Appointed Attorney Fees and Defense Costs

15 *FRC* \$ 200.00 Criminal Filing Fee

16 *FCM* \$ \_\_\_\_\_ Fine

17 **OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)**

18 \$ \_\_\_\_\_ Other Costs for: \_\_\_\_\_

19 \$ \_\_\_\_\_ Other Costs for: \_\_\_\_\_

20 \$ 20000 TOTAL

21  The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

22 [ ] shall be set by the prosecutor.

23 [ ] is scheduled for \_\_\_\_\_

24 [ ] RESTITUTION. Order Attached

25  Restitution ordered above shall be paid jointly and severally with:

26 NAME of other defendant CAUSE NUMBER (Victim name) (Amount-\$)

27 RJN \_\_\_\_\_

28 \_\_\_\_\_

[ ] The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

[X] All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than \$\_\_\_\_\_ per month commencing \_\_\_\_\_ RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b)

[ ] COSTS OF INCARCERATION. In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

COSTS ON APPEAL An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW. 10.73.160.

4.1b ELECTRONIC MONITORING REIMBURSEMENT. The defendant is ordered to reimburse \_\_\_\_\_ (name of electronic monitoring agency) at \_\_\_\_\_ for the cost of pretrial electronic monitoring in the amount of \$\_\_\_\_\_.

4.2 [X] DNA TESTING. The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

[ ] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.3 NO CONTACT *NO HOSTILE*  
The defendant shall not have contact with Jakeel Mason's family including, but not limited to, personal, verbal, telephonic, written or contact through a third party for LIFE years (not to exceed the maximum statutory sentence). ~~EXCEPT PERIODIC CO-PROSECUTOR'S OFFICES.~~

[ ] Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.4 OTHER. Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days. After 90 days, if you do not make a claim, property may be disposed of according to law.


4.4a Property may have been taken into custody in conjunction with this case. Property may be returned to the rightful owner. Any claim for return of such property must be made within 90 days unless forfeited by

agreement in which case no claim may be made. After 90 days, if you do not make a claim, property may be disposed of according to law.

4.4b BOND IS HEREBY EXONERATED

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

<u>100</u>	months on Count	<u>I</u>	_____	months on Count	_____
_____	months on Count	_____	_____	months on Count	_____
_____	months on Count	_____	_____	months on Count	_____

Actual number of months of total confinement ordered is: 100 mos

(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

[ ] The confinement time on Count(s) \_\_\_\_\_ contain(s) a mandatory minimum term of \_\_\_\_\_.

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with juvenile present as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: \_\_\_\_\_

The sentence herein shall run consecutively to all felony sentences in other cause numbers imposed prior to the commission of the crime(s) being sentenced. The sentence herein shall run concurrently with felony sentences in other cause numbers imposed after the commission of the crime(s) being sentenced except for the following cause numbers. RCW 9.94A.589: \_\_\_\_\_

Confinement shall commence immediately unless otherwise set forth here: \_\_\_\_\_

(c) Credit for Time Served. The defendant shall receive credit for eligible time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The jail shall compute time served. THE DEPARTMENT OF CORRECTIONS SHALL CALCULATE

GARNGP  
RENGNSC

TIME ~~SERVED~~ RCW 9.94A.729(B)

AND CERTIFY IT TO THE DEPARTMENT OF CORRECTIONS:

~~457 DAYS ON ELECTRIC HOME MONITORING~~

4.6 [ ] COMMUNITY PLACEMENT (pre 7/1/00 offenses) is ordered as follows:

Count 1 for 9 months;

Count \_\_\_\_\_ for \_\_\_\_\_ months;

Count \_\_\_\_\_ for \_\_\_\_\_ months;

[X] COMMUNITY CUSTODY (To determine which offenses are eligible for or required for community custody see RCW 9.94A.701)

The defendant shall be on community custody for:

Count(s) 1 36 months for Serious Violent Offenses

Count(s) \_\_\_\_\_ 18 months for Violent Offenses

Count(s) \_\_\_\_\_ 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

Note: combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum. RCW 9.94A.701.

(B) While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706 and (10) for sex offenses, submit to electronic monitoring if imposed by DOC. The defendant's residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The court orders that during the period of supervision the defendant shall:

[ ] consume no alcohol.

[ ] have no contact with: \_\_\_\_\_

[ ] remain [ ] within [ ] outside of a specified geographical boundary, to wit: \_\_\_\_\_

[ ] not serve in any paid or volunteer capacity where he or she has control or supervision of minors under 13 years of age

[ ] participate in the following crime-related treatment or counseling services: \_\_\_\_\_

[ ] undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse

[ ] mental health [ ] anger management and fully comply with all recommended treatment.

[ ] comply with the following crime-related prohibitions: \_\_\_\_\_

[ ] Other conditions: \_\_\_\_\_

[ ] For sentences imposed under RCW 9.94A.702, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

PROVIDED: That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense

4.7 [ ] WORK ETHIC CAMP. RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 OFF LIMITS ORDER (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

V. NOTICES AND SIGNATURES

5.1 COLLATERAL ATTACK ON JUDGMENT. Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 LENGTH OF SUPERVISION. For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505. The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 NOTICE OF INCOME-WITHHOLDING ACTION. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW

9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 **RESTITUTION HEARING**

Defendant waives any right to be present at any restitution hearing (sign initials): M.S.

5.5 **CRIMINAL ENFORCEMENT AND CIVIL COLLECTION.** Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.

5.6 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.7 **SEX AND KIDNAPPING OFFENDER REGISTRATION.** RCW 9A.44.130, 10.01.200.

N/A

5.8 [ ] The court finds that Count \_\_\_\_\_ is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.9 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

5.10 **OTHER:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

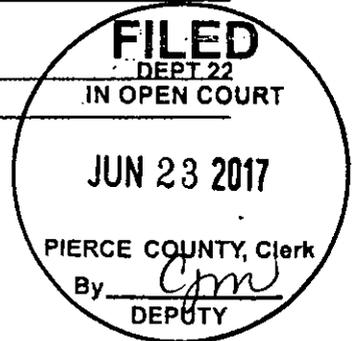
DONE IN OPEN COURT and in the presence of the defendant this date: 6/23/17

JUDGE [Signature]  
Print name John R. Nickman

[Signature]  
Deputy Prosecuting Attorney  
Print name: KATHLEEN PROCTOR  
WSB # 14811

[Signature]  
Attorney for Defendant  
Print name: Nelson  
WSB # 3071

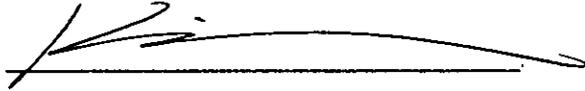
[Signature]  
Defendant  
Print name: Min Sik Kim.



**Voting Rights Statement:** I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

1  
2 My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of  
3 confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-  
4 register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal  
5 financial obligations or an agreement for the payment of legal financial obligations

6 My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of  
7 discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring  
8 the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW  
9 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored  
10 is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW  
11 29A.84.140.

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Defendant's signature: 



APPENDIX "F"

The defendant having been sentenced to the Department of Corrections for a:

- sex offense
- serious violent offense
- assault in the second degree
- any crime where the defendant or an accomplice was armed with a deadly weapon
- any felony under 69.50 and 69.52

The offender shall report to and be available for contact with the assigned community corrections officer as directed:

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions:

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC:

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

(I) The offender shall remain within, or outside of, a specified geographical boundary: \_\_\_\_\_

(II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: \_\_\_\_\_

(III) The offender shall participate in crime-related treatment or counseling services;

(IV) The offender shall not consume alcohol; \_\_\_\_\_

(V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or

(VI) The offender shall comply with any crime-related prohibitions.

(VII) Other: \_\_\_\_\_

APPENDIX F

IDENTIFICATION OF DEFENDANT

SID No. 28326021  
(If no SID take fingerprint card for State Patrol)

Date of Birth 10/04/1985

FBI No. 525373PG1

Local ID No. 20160922017

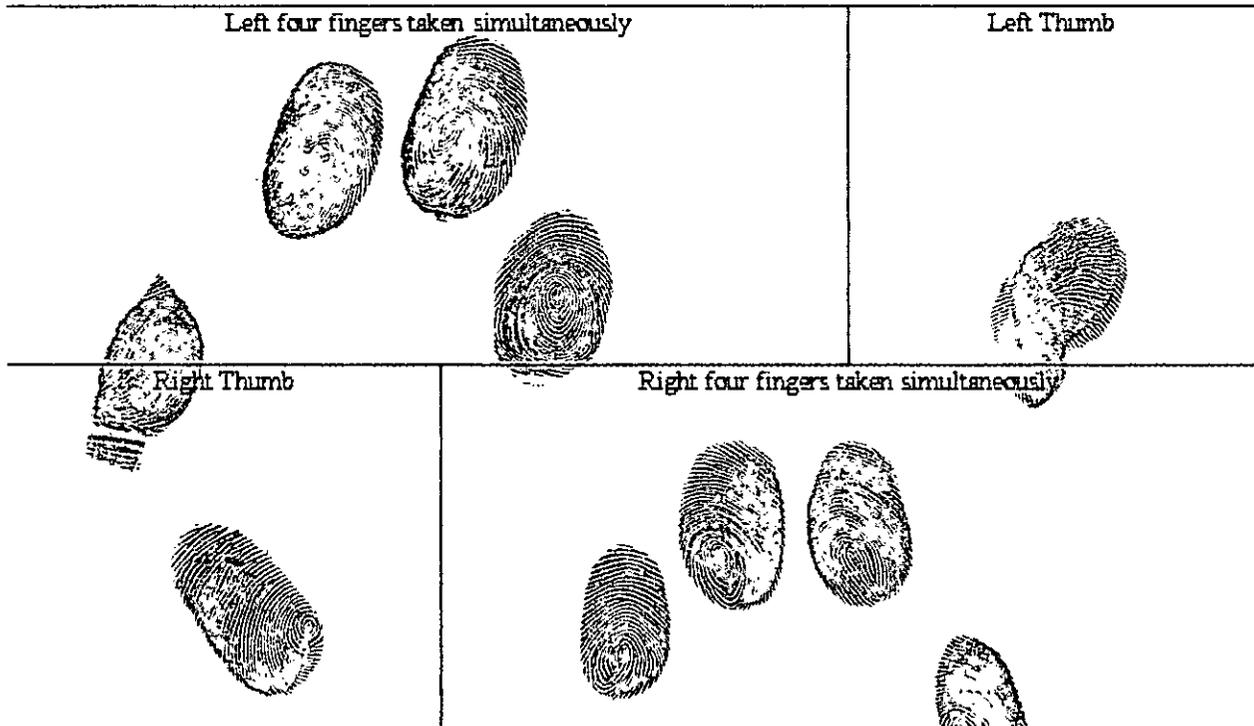
PCN No. 541579354

Other

Alias name, SSN, DOB: NONE KNOWN NOR CLAIMED

<b>Race:</b>					<b>Ethnicity:</b>	<b>Sex:</b>
<input checked="" type="checkbox"/> Asian/Pacific Islander	<input type="checkbox"/>	<input type="checkbox"/> Black/African- American	<input type="checkbox"/>	<input type="checkbox"/> Caucasian	<input type="checkbox"/> Hispanic	<input checked="" type="checkbox"/> Male
<input type="checkbox"/> Native American	<input type="checkbox"/>	<input type="checkbox"/> Other: :			<input checked="" type="checkbox"/> Non- Hispanic	<input type="checkbox"/> Female

FINGERPRINTS

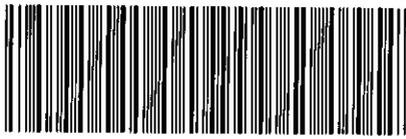


I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk, \_\_\_\_\_ Dated: \_\_\_\_\_

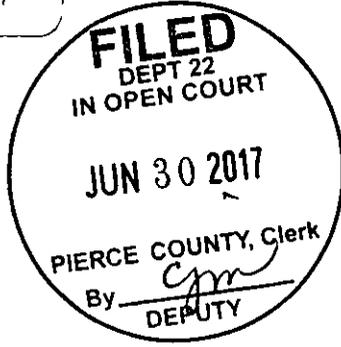
DEFENDANT'S SIGNATURE: [Signature]

DEFENDANT'S ADDRESS: 4026 S. 380th PL Auburn WA 98001.

## **APPENDIX B**



16-1-01310-6 49503120 FNFL 07-03-17



Room 946  
COPY RECEIVED

JUN 29 2017

PIERCE COUNTY  
PROSECUTING ATTORNEY

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

MIN SIK KIM,

Defendant.

No. 16-1-01310-6

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW ON DEFENSE  
MOTION FOR EXCEPTIONAL  
SENTENCE DOWNWARD  
RCW 9.94A.535(1)

THIS MATTER having come on before the Honorable John R. Hickman on June 23, 2017, and the court having rendered an oral ruling thereon, the court herewith makes the following findings of fact and conclusions of law as required under RCW 9.94A.535.

FINDING OF FACT

1. On March 16, 2017, the defendant pleaded guilty to one count of Murder in the Second Degree. The shooting that led to this charge occurred on March 25, 2016.
2. The defendant appeared before this court for sentencing on June 23, 2017.

- 1 3. The standard sentencing range in this matter is 123 – 220 months.
- 2 4. Prior to imposing sentence, the court reviewed the defendant's criminal history, the
- 3 State's recommendation, a statement regarding the facts of the incident, the defense
- 4 sentencing memorandum, and letters submitted in support of the defendant Mr.
- 5 Kim. The court also heard directly from the defendant's wife who was present in
- 6 court and the defendant himself.
- 7 5. The Defense asked the court to impose an exceptional sentence downward.
- 8
- 9 6. The court reviewed the mitigating circumstances outlined in RCW 9.94A.535(1)
- 10 and noted that those circumstances are illustrative only and are not intended to be
- 11 exclusive reasons for an exceptional sentence.
- 12
- 13 7. The court outlined the mitigating circumstances it was considering and concluded
- 14 that the following mitigating circumstances are compelling reasons justifying an
- 15 exceptional sentence: 1) The defendant's wife had been shot and injured by
- 16 different person in a similar incident approximately one month prior to this
- 17 incident; 2) The defendant immediately and fully cooperated with the investigation;
- 18 3) The defendant took responsibly for his actions in his plea and demonstrated clear
- 19 remorse in his allocution.
- 20 8. The court imposed an exceptional sentence downward of 100 months.
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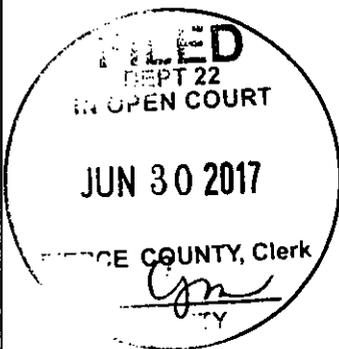
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CONCLUSIONS OF LAW

1. The court concludes that a sentence outside the standard sentence range in this matter is appropriate, as there are substantial and compelling reasons justifying an exceptional sentence.
2. While the court considered mitigating circumstances noted in RCW 9.94A.535(1), it concludes that compelling mitigating circumstances beyond that list support and exceptional sentence downward.
3. The court concludes that the following mitigating circumstances are compelling reasons justifying the exceptional sentence: 1) The defendant's wife had been shot and injured by different person in a similar incident approximately one month prior to this incident; 2) The defendant immediately and fully cooperated with the investigation; 3) The defendant took responsibly for his actions in his plea and demonstrated clear remorse in his allocution.
4. The court concludes that under RCW 9.94A.535, there are substantial and compelling reasons justifying an exceptional sentence downward.
5. The court imposes an exceptional sentence downward of 100 months.

ENTERED this 30 day of June, 2017.



John R. Hickman  
 Honorable John R. Hickman, JUDGE



## **STATUTORY APPENDIX**

## Relevant Statutory Provisions and Rules

**Code of Judicial Conduct 2.5** provides:

Competence, Diligence, and Cooperation

(A) A judge shall perform judicial and administrative duties, competently and diligently.

(B) A judge shall cooperate with other judges and court officials in the administration of court business.

### COMMENT

[1] Competence in the performance of judicial duties requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a judge's responsibilities of judicial office.

[2] In accordance with GR 29, a judge should seek the necessary docket time, court staff, expertise, and resources to discharge all adjudicative and administrative responsibilities.

[3] Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court officials, litigants, and their lawyers cooperate with the judge to that end.

[4] In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

**Code of Judicial Conduct 2.6** provides in part:

Ensuring the Right to Be Heard

(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.

**RCW 9.94A.030** provides in part:

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

...

(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. . . .

**RCW 9A.16.080** provides:

In any criminal action brought by reason of any person having been detained on or in the immediate vicinity of the premises of a mercantile establishment for the purpose of investigation or questioning as to the ownership of any merchandise, it shall be a defense of such action that the person was detained in a reasonable manner and for not more than a reasonable time to permit such investigation or questioning by a peace officer, by the owner of the mercantile establishment, or by the owner's authorized employee or agent, and that such peace officer, owner, employee, or agent had reasonable grounds to believe that the person so detained was committing or attempting to commit theft or shoplifting on such premises of such merchandise. As used in this section, "reasonable grounds" shall include, but not be limited to, knowledge that a person has concealed possession of unpurchased merchandise of a mercantile establishment, and a "reasonable time" shall mean the time necessary to permit the person detained to make a statement or to refuse to make a statement, and the time necessary to examine employees and records of the mercantile establishment relative to the ownership of the merchandise.

**RCW 9A.32.050** provides:

(1) A person is guilty of murder in the second degree when:

(a) With intent to cause the death of another person but without premeditation, he or she causes the death of such person or of a third person; or

(b) He or she commits or attempts to commit any felony, including assault, other than those enumerated in RCW 9A.32.030(1)(c), and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants; except that in any prosecution under this subdivision (1)(b) in which the defendant was not the only participant in the underlying crime, if established by the defendant by a preponderance of the evidence, it is a defense that the defendant:

(i) Did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid the commission thereof; and

(ii) Was not armed with a deadly weapon, or any instrument, article, or substance readily capable of causing death or serious physical injury; and

(iii) Had no reasonable grounds to believe that any other participant was armed with such a weapon, instrument, article, or substance; and

(iv) Had no reasonable grounds to believe that any other participant intended to engage in conduct likely to result in death or serious physical injury.

(2) Murder in the second degree is a class A felony.

**RCW 9A.36.021** provides:

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or

(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or

(c) Assaults another with a deadly weapon; or

(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or

(e) With intent to commit a felony, assaults another;  
or

(f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or

(g) Assaults another by strangulation or suffocation.

(2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.

(b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony

**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. VIII** provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**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.

**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, § 14** provides:

Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.

**WPIC 35.50** provides:

[An assault is [also] an act[, with unlawful force,] done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.]

CERTIFICATE OF SERVICE

I, Neil Fox, certify and declare as follows:

On December 4, 2017, I served a copy of the OPENING BRIEF OF APPELLANT on counsel for the Respondent by filing a copy through the Portal and thus a copy will be delivered electronically.

I further caused a copy to be deposited into the United States Mail, with proper postage attached, in an envelope addressed to:

Min Sik Kim  
DOC # 400238  
Washington State Penitentiary  
1313 N. 13th Ave.  
Walla Walla, WA, 99362

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 4th day of December 2017, at Seattle, Washington.

s/ Neil M. Fox  
\_\_\_\_\_  
WSBA No. 15277

**LAW OFFICE OF NEIL FOX PLLC**

**December 04, 2017 - 9:51 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
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**Appellate Court Case Title:** State of Washington, Respondent v Min Sik Kim, Appellant  
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