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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MIN SIK KIM, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John Hickman

No. 16-1-01310-6

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this court consider claims of erroneous sentencing procedure raised for the first time on appeal?
2. Did appellant ask the trial court for an evidentiary hearing in the course of his sentencing proceeding?
3. Did appellant object to any of the statements made in the course of his sentencing proceeding?
4. Are sentencing hearing procedure claims appealable where the claim is not based upon the Sentencing Reform Act?
5. Can the oral statements of a sentencing court be used to impeach the unchallenged findings of fact and conclusions of law in this case?
6. Has appellant presented a record sufficient for this court to determine whether his pretrial electronic home monitoring equated to confinement?
7. Can this court conclude that electronic home monitoring equates to punishment given the record presented in this case?

B. STATEMENT OF THE CASE.

1. Procedure

This appeal pertains only to appellant's sentencing. Appellant presented no objections in the course of his sentencing hearing and never requested an evidentiary hearing. *See* 6/23/17 VRP 2-25.

During the sentencing hearing, the trial court made several statements regarding the circumstances of the murder committed by appellant in the course of considering the appropriate sentence. 6/23/17 VRP 16, 19, 21. Appellant presented the findings of fact and conclusions of law supporting an exceptional sentence in this case. CP 77. Those findings and conclusions do not include those statements. CP 78-80.

Respondent served 450 days on electronic home monitoring pretrial. CP 78-80. Appellant was ordered to "reside/stay only at" a specified arrest.¹ (2) Appellant was required to comply with "Electronic Home Monitoring: **EHM upon release.**"² (3) Appellant was not to drive a motor vehicle without a valid license and insurance.³ (4) Appellant's travel was restricted to Pierce, King, Thurston, and Kitsap Counties.⁴

¹ CP 4; CP 37.

² CP 4; CP 37.

³ CP 4.

⁴ CP 4.

Further details about the restrictiveness or permissiveness of appellant's electronic home monitoring are unknown.

2. Facts

Without any lawful excuse, appellant intentionally shot another person, causing the death of that person. CP 11, CP 13-32. This conduct resulted in appellant's conviction for murder in the second degree. CP 60-73.

C. ARGUMENT.

1. APPELLANT'S CLAIMS OF ERROR BASED UPON SENTENCING PROCEDURE ARE NOT WELL TAKEN.

Only SRA based procedural arguments are available to appellant.

State v. Mail, 121 Wn.2d 707, 711, 854 P.2d 1042, 1044 (1993).

Appellant presents two SRA-based procedural arguments and several others. The inadequacy of the SRA-based procedural arguments is addressed next. The subsections in this section that follow present alternative arguments as to why each of the non-SRA based procedural arguments should be rejected.

- a. Appellant's two SRA-based claims of procedural error are not well taken—and those are the only procedural arguments available to appellant.

The Sentencing Reform Act (SRA) is the sole statutory source of sentencing authority. *State v. Mail*, 121 Wn.2d at 711. There are only two statutory ways to reverse a sentence which is outside the standard range:

To reverse a sentence which is outside the standard sentence range, the reviewing court must find: (a) Either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense; or (b) that the sentence imposed was clearly excessive or clearly too lenient.

RCW 9.94A.585. Appellant seeks reversal on neither of these two bases.

The only other possible challenge is a challenge to the process by which the sentence was imposed. *Mail*, 121 Wn.2d at 712. To succeed on a procedural challenge, appellant must show “that the sentencing court had a duty to follow some specific procedure required by the SRA, and that the court failed to do so.”⁵ *Id.*

⁵ *Mail* addressed the analysis to be followed with a standard range sentence, where no appeal was permitted. *Id.* The reasoning for exceptional sentences should be similar: Other than the specified bases for appeal (RCW 9.94A.585(4)), only a “specific procedure required by the SRA” can warrant reversal. *Mail* has been cited in an exceptional sentence case. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183, 1188 (2005).

- i. **The SRA only requires an evidentiary hearing if an evidentiary hearing is requested. No evidentiary hearing was requested in this case.**

Appellant's first SRA-based procedural claim invokes RCW 9.94A.535(1) and RCW 9.94A.530(2)⁶ for the assertion that the SRA "requires the presentation of evidence and an adjudicative proceeding." (emphasis added) Appellant's Brief at 17. RCW 9.94A.535(1) states:

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.

Assuming, arguendo, that RCW 9.94A.535(1) requires an adjudicative hearing, then the failure to comply with RCW 9.94A.535(1) must, by the statute's own terms, invalidate an exceptional sentence below the standard range imposed without an adjudicative hearing. This presents a significant problem of invited error for appellant, because the appellant who requested an exceptional sentence cannot claim on appeal that the sentencing court erroneously granted him an exceptional sentence. *In re Breedlove*, 138 Wn.2d 298, 312-13, 979 P.2d 417 (1999).

Alternatively, that SRA-based procedural claim is foreclosed by *State v. Garza*, 123 Wn.2d 885, 889, 872 P.2d 1087, 1089 (1994): "A sentencing court is not required to hold an evidentiary hearing where the

⁶ Appellant also cites, RCW 9.94A.500(1)'s sentencing hearing requirement

defendant does not specifically object to factual statements made in a presentence report and does not request an evidentiary hearing to challenge disputed statements.” *Id.* In this case appellant neither specifically objected to a factual statement, nor challenged any disputed statements.

ii. Appellant’s overbroad construction of allocution is founded upon the obsolete holding of an abrogated case.

Appellant’s second SRA-based procedural claim is founded upon *State v. Peterson*, 97 Wn.2d 864, 651 P.2d 211, 214 (1982), *abrogated by State v. Sledge*, 133 Wn.2d 828, 947 P.2d 1199 (1997). Appellant asserts that the right of allocution means the right to present “any information in mitigation of punishment,” and cites *Peterson* as authority for that proposition. Appellant’s Brief at 15-16. That argument must fail because *Peterson* is founded upon CrR 7.1(a)(1),⁷ a court rule that no longer exists.

The former rule broadly stated:

Before disposition the court shall afford counsel an opportunity to speak and shall ask the defendant if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

⁷ *Peterson*, 97 Wn.2d at 868-69. *State v. Sledge*, 133 Wn.2d 828, 947 P.2d 1199 (1997), the case that abrogated *Peterson*, addressed an equally broad sentencing evidence rule (RCW 13.40.150) in the juvenile court. *Id.*, 97 Wn.2d at 841-42. No such broad rule is available to appellant in this case.

(emphasis added) *Peterson*, 97 Wn.2d at 867. The present rule is significantly narrower. RCW 9.94A.500(1) provides:

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

Id. This limitation does not constrain the sentencing court from receiving more evidence, but it does provide for “a baseline—a minimum amount of information which, if available and offered, *must* be considered in sentencing.” *Mail*, 121 Wn.2d at 711. Because appellant has not established any nonconformance with RCW 9.94A.500(1), *Mail* controls this issue and this claim should be rejected.

As appellant asserts no other SRA-based procedural claims, all his remaining procedural claims of error should be denied. *State v. Mail*, *supra*.

- b. The sentencing court properly—and without objection—limited the presentation of cumulative information.

Appellant’s evidentiary constraint argument stems from this statement by the sentencing court:

What I'd like to do is -- I've read the letters, and if these people are here to simply retell what they've already written in the letters, it kind of gets -- you know, I don't need to hear it again necessarily, but if there's one person that you would

like to have speak on your behalf, I would be more than -- even if he's written a letter before, I would be happy to hear that person. But you had a lot of letters of support, so I have a very good idea of how the community feels about you and your friends feel about you, but I want you to have the opportunity to call someone to speak on your behalf, if you could just pick one person.

6/23/17 VRP 7.

The sentencing court sought to avoid cumulative testimony that repeated statements made in material already received by the court. *Id.* The needless presentation of cumulative evidence is a valid reason for excluding otherwise relevant evidence. *See, e.g.*, ER 403. The record reveals neither unrepresented evidence nor any offer of proof. 6/23/17 VRP 1-25. “[E]rror without prejudice is not reversible.” *State v. Barry*, 183 Wn.2d 297, 317, 352 P.3d 161, 172 (2015). The record reveals no objection to the sentencing court’s manner of proceeding, or any request that the sentencing court proceed in a different fashion. 6/23/17 VRP 7. If there was any error in the sentencing court’s exclusion of cumulative evidence, a timely objection would have provided the court with an opportunity to learn what that objection was and to remedy it, perhaps even with a continuance.

Appellant claims, for the first time on appeal, that the sentencing court denied him an opportunity to present an “emotional plea for mercy” along with “the tears of Mr. Kim’s parents.” Appellant’s Brief at 19. The

record below does not explain what the “emotional plea for mercy” consisted of or how “the tears of Mr. Kim’s parents” were relevant to appellant’s sentencing. A sentencing court that enters a sentence based upon “emotional pleas for mercy” and “the tears of Mr. Kim’s parents, rather than upon reason, is not a court of law.⁸ Appellant’s claim that the sentencing court restrained his presentation of evidence is not the kind of error which should be considered for the first time on appeal. RAP 2.5(a).

- c. Appellant’s claim that the prosecutor erroneously related information to the sentencing court should fail because it was not raised before the sentencing court.

Appellant also takes issue with the fact that the prosecutor related her own perceptions relating to video recordings of appellant murdering his victim. Appellant’s Brief at 19-20. Defense counsel did not object to those statements and did not move to strike them. 6/23/17 VRP 15-16. Nor did defense counsel suggest that the prosecutor’s statements were an inaccurate portrayal of the video recordings’ content. *Id.* Given the presumption of competent defense counsel, this Court should readily

⁸ The legal authority appellant cites for his argument is *Payne v. Tennessee*, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), a death penalty case. *Payne* only held that the Eighth Amendment presents no *per se* bar to the admissibility of victim impact testimony. *Id.*, 501 U.S. at 827. But victim impact testimony “must not be so unduly prejudicial that its admission allows emotion to overwhelm reason.” *United States v. McVeigh*, 153 F.3d 1166, 1217 (10th Cir. 1998). *See also, State v. Rice*, 110 Wn.2d 577, 612, 757 P.2d 889, 908 (1988) (“A sentence of death must be based on reason, not on emotions such as sympathy for the victims.”)

conclude that defense counsel determined that it was a tactically advantageous to have the prosecutor describe the videotape, rather than have the sentencing court watch the videotape of the defendant murdering his victim.⁹ “[I]n order to dispute any of the information presented for consideration at a sentencing hearing, a defendant must make a timely and specific challenge.” *State v. Garza*, 123 Wn.2d 885, 890, 872 P.2d 1087, 1090 (1994), and appellant has not done so. Additionally, before the prosecutor made the statements now objected to, defense counsel had exploited the informal nature of this sentencing hearing to introduce his own personal recitation of facts. 6/23/17 VRP 9-12. This is another issue which should not be considered for the first time on appeal. RAP 2.5(a).

- d. Failure to conduct an evidentiary hearing is not error where an evidentiary hearing is not requested.

Appellant argues that the sentencing 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”)...” Appellant’s Brief at 20. Defense counsel never asked the sentencing court for an evidentiary hearing and never framed the matter as a dispute over evidence:

⁹ Respondent has designated the unviewed video recordings as exhibits for review.

MR. NELSON: I don't disagree with what Ms. Proctor said, in that most of what she said is in the probable cause statement that the Court referred to. I would only add that there were some disputed issues with a witness who said there was a struggle about the firearm as 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.

6/23/17 VRP 19. Any objection to this process was waived and should not be considered for the first time on appeal. *State v. Garza*, 123 Wn.2d at 890-91; RAP 2.5(a).

2. APPELLANT CANNOT IMPEACH THE FINDINGS OF FACT AND CONCLUSIONS OF LAW IN THIS CASE WITH THE ORAL STATEMENTS MADE BY THE TRIAL COURT.

“Error cannot be assigned upon an oral opinion.” *Jones v. National Bank of Commerce of Seattle*, 66 Wn.2d 341, 402 P.2d 673 (1965). “No error can be assigned upon an oral statement or written memorandum of the court, as the final decision in an action at law is the judgment signed, based upon the court's findings of fact and conclusions of law.” *Becwar v. Bear*, 41 Wn.2d 37, 40, 246 P.2d 1110, 1112 (1952). The trial court's oral opinion may be used to clarify the formal findings when necessary, but it is not itself a finding of fact. *State v. Kingman*, 77 Wn.2d 551, 552, 463 P.2d 638 (1970). Oral statements of the trial court, when at variance with the written findings of fact, cannot be used to impeach the findings, although when consistent therewith, the findings

may be read in their light. *Rutter v. Rutter's Estate*, 59 Wn.2d 781, 784, 370 P.2d 862, 864 (1962). See also *Mairs v. Department of Licensing*, 70 Wn. App. 541, 545, 854 P.2d 665 (1993); *State v. Reynolds*, 80 Wn. App. 851, 860 n.7, 912 P.2d 494, 500 (1996); *State v. Williamson*, 72 Wn. App. 619, 623, 866 P.2d 41 (1994). This Court has held that oral statements made by the sentencing court, in an exceptional sentence hearing, that are not included in the written findings of fact are not considered on appeal. *State v. Reynolds*, 80 Wn. App. 851, 860 n.7, 912 P.2d 494, 500 (1996).

The findings of fact and conclusions of law at issue in this case were presented by appellant's counsel. CP 77. Other than the findings which recite the duration of the exceptional sentence, the sufficiency of the findings are undisputed.¹⁰ Appellant's Brief at 1. Appellant does not assert that his exceptional sentence downward was either clearly excessive or clearly too lenient. *Id.*

Appellant's assertion of error is based upon a claim that the sentencing court based the duration of appellant's exceptional downward on untenable grounds or for untenable reasons. Appellant's Brief at 25; See *State v. Ritchie*, 126 Wn.2d 388, 395-96, 894 P.2d 1308 (1995). As evidence of untenable grounds/untenable reasons, appellant presents only

¹⁰ It is well settled that the findings of fact need not express the reasons for an exceptional sentence. *State v. Ritchie*, 126 Wn.2d 388.

the oral statements of the sentencing court. Appellant argues that the sentencing judge erred by orally stating that “the Certification of Probable Cause accurately portrayed the video”¹¹ (Appellant’s Brief at 21; 6/23/17 VRP 16), by stating “I don’t believe that 24 months . . . would reflect a just sentence for the deliberate taking of a life” (Appellant’s Brief at 23; 6/23/17 VRP 19), and by agreeing “with the prosecutor’s personal opinions [sic] that the video showed Mr. Kim to be ‘angry’...” Appellant’s Brief at 21.

The findings of fact and conclusions of law in this case, presented by appellant, are unchallenged and sufficiently support the duration of petitioner’s exceptional sentence downward. *See State v. Ritchie*, 125 Wn.2d at 392. The oral statements of the trial court are not available to impeach those written findings. *Reynolds, et al., supra*.

3. APPELLANT’S PRETRIAL CREDIT
ARGUMENTS ARE NOT WELL TAKEN.

Home detention was not an authorized component of appellant’s sentence for murder in the second degree, a violent offense. CP 60-73;

¹¹ The sentencing court considered the declaration of probable cause filed in this case (CP 2-3) at sentencing. 6/23/17 VRP 14, 16. No objection was raised by defense counsel. 6/23/17 VRP 14-25. Defense counsel also referenced the facts as related in the declaration of probable cause. 6/23/17 VRP 15. There is no suggestion in the record that the declaration of probable cause did not accurately portray the video. The videotape (Plaintiff’s Exhibit 1, not admitted) and declaration of probable cause (CP 2-3) are a part of the record on review.

RCW 9.94A.030(55); RCW 9.94A.734(1)(a). The sentencing court did not violate due process, double jeopardy, or equal protection by refusing to grant credit for home detention. See *Reanier v. Smith*, 83 Wn.2d 342, 346-47, 517 P.2d 949 (1974).

- a. Appellant has not presented a record sufficient for review of his equal protection, due process, and double jeopardy claims.

The conditions of appellant's presentence electronic home monitoring are generally unknown. Four clues exist in the record below: (1) Appellant was ordered to "reside/stay only at" a specified arrest.¹² (2) Appellant was required to comply with "Electronic Home Monitoring: **EHM upon release.**"¹³ (3) Appellant could drive an automobile while on EHM.¹⁴ (4) Appellant's travel was restricted to Pierce, King, Thurston, and Kitsap Counties.¹⁵ The record is devoid of any expression of how much pretrial residential confinement, if any, was imposed upon appellant; and, other than the four county geographical restriction,¹⁶ how much restriction was imposed upon appellant's pretrial freedom of movement. Appellant asks this Court to conclude that he was subjected to "partial

¹² CP 4; CP 37.

¹³ CP 4; CP 37.

¹⁴ "The defendant is not to drive a motor vehicle without a valid license and insurance." CP 4.

¹⁵ CP 4

¹⁶ CP 4, CP 37.

confinement,” as defined in RCW 9.94A.030(36). Appellant’s Brief at 28-29. But there is no evidence in the record sufficient to demonstrate that appellant was subject to “confinement . . . ordered by the court . . . in an approved residence, for a substantial portion of each day with the balance of the day spent in the community.” RCW 9.94A.030(36).

As a practical matter, this court cannot tell whether or not appellant was essentially on a curfew that required him to be home at certain hours of the day, or whether appellant was on a looser, or tighter, restriction. The sentencing court’s broad discretion in pretrial release conditions is governed by CrR 3.2 and the record in this case does not demonstrate how restrictively that power was exercised. Appellant’s credit for time served claim should be rejected because a sufficient record is not presented for review. *See State v. Tracy*, 158 Wn.2d 683, 691, 147 P.3d 559 (2006); *Story v. Shelter Bay Co.*, 52 Wn. App. 334, 345, 760 P.2d 368 (1988).

State v. Speaks, 119 Wn.2d 204, 829 P.2d 1096 (1992) does not help appellant avoid this problem. In *Speaks*, credit for presentence home detention was statutorily required and no constitutional issue was implicated. *Speaks*, 119 Wn.2d at 209. The law has since changed. *Speaks* was decided on straightforward statutory language:

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.

Speaks, 119 Wn.2d at 207 (emphasis in original). That language is retained in RCW 9.94A.505(6), but Laws of 2015, Chapter 287, § 10 introduced the following language:

(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;

. . .

*Id.*¹⁷ Murder in the second degree is a violent offense and credit for time served on electronic home monitoring is not authorized. RCW 9.94A.030(55), RCW 9A.32.050(2).

Reanier v. Smith, 3 Wn.2d 342, 517 P.2d 949 (1974) held that sentencing credit for pretrial detention was constitutionally required. *Reanier*, 3 Wn.2d at 352-53. *Reanier* is distinguishable from this case because the Supreme Court in *Reanier* was comparing actual presentence incarceration with actual post-sentence incarceration. In this case, appellant asks the Court to compare actual presentence incarceration with an indefinite *something*.

¹⁷ Except that partial confinement in the Department of Corrections' (DOC's) parenting program is authorized. RCW 9.94A.734(1). The DOC parenting program is not at issue in this case.

State v. Medina, 180 Wn.2d 282, 292, 324 P.3d 682, 687 (2014)

addressed a pretrial released program called CCAP. Like this case, the record about what that pretrial release program entailed was sparse.

Medina, 180 Wn.2d at 286. The opinion discussed *Reanier*:

The *Reanier* decision absolutely bars the legislature from distinguishing between rich defendants and poor defendants for the purpose of credit for time served, but the legislature remains free to draw many other distinctions. In *Harris v. Charles* . . ., this court held that neither the Fourteenth Amendment to the United States Constitution nor article I, section 12 of the Washington Constitution prohibited the legislature from crediting felons, but not misdemeanants, for time served on EHD prior to trial. 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*. This distinction is rational.

(emphasis added and citations omitted). *Medina*, 180 Wn.2d at 292–93.

For appellant to satisfy *Medina*, he must demonstrate that his electronic home monitoring amounts to “confinement,” and the record presented on appeal fails to establish that.

Appellant also asks this Court to compare the denial of credit for murderers who post bail and serve pretrial electronic home monitoring with murderers who are released on their personal recognizance.

Appellant’s Brief at 31. The rational basis for that distinction is readily found in CrR 3.2, which addresses release conditions. People released on their own personal recognizance present less of a flight risk, or less of a

danger to the community, than people released on bail and complying with electronic home monitoring. *Id.* The idea that rationally imposed non-confinement pretrial conditions must be credited as confinement at sentencing is irrational and illogical. Although appellant asserts that he did undergo pretrial confinement, that claim evaporates without evidentiary support.

Appellant's double jeopardy claim should fail for the same reason that his due process and equal protection claims should fail: Appellant has presented an insufficient record for review. The record below does not provide for a sufficient description of his pretrial release conditions. Appellant's failure to show that his pretrial release conditions amount to punishment is a failure to demonstrate that he was subjected to multiple punishments. *See North Carolina v. Pearce*, 395 U.S. 711, 718, 89 S. Ct. 2072, 2077, 23 L. Ed. 2d 656 (1969).

b. Appellant's due process, equal protection, and due process claims are not well taken.

In the federal system, no credit is given for time spent in a halfway house or on home detention—only for time spent in “official detention.” 18 U.S.C. § 3585(b). *Reno v. Koray*, 515 U.S. 50, 52, 115 S. Ct. 2021,

132 L. Ed. 2d 46 (1995).¹⁸ The weight of federal authority holds that there is a rational basis for denying credit for time served for pretrial home detention or pretrial time spent in a halfway house. See *United States v. Edwards*, 960 F.2d 278, 281 (2d Cir.1992);¹⁹ *Moreland v. United States*, 968 F.2d 655, 661 (8th Cir. 1992); *Fraley v. United States Bureau of Prisons*, 1 F.3d 924, 926 (9th Cir.1993); *United States v. Woods*, 888 F.2d 653, 656 (10th Cir.1989), *cert. denied*, 494 U.S. 1006, 110 S. Ct. 1301, 108 L. Ed. 2d 478 (1990); *Dawson v. Scott*, 50 F.3d 884, 895 (11th Cir. 1995).

Harris v. Charles, 171 Wn.2d 455, 256 P.3d 328 (2011) compared credit for time served for electronic home monitoring for misdemeanors (credit not statutorily authorized) with credit for time served for electronic home monitoring for felonies (credit statutorily mandated). *Harris*, 171 Wn.2d at 458-59. Applying the highly deferential rational basis standard, the Supreme Court found that the challenger had failed to show that the classification between felons and misdemeanants for purposes of granting sentencing credit for time on EHM is irrelevant to a legitimate

¹⁸ *Reno* is a case of statutory interpretation. *Reno v. Koray*, 515 U.S. at 55 n.2. The frequency of federal appellate cases addressing constitutional claims to credit for time spent in pretrial home detention or time spent in halfway houses appear to have diminished after the United States Supreme Court held that credit for time spent in a community treatment center while “released” on bail was not entitled to sentencing credit pursuant to statute. *Reno v. Koray*, 515 U.S. at 52.

¹⁹ See also, *Cucciniello v. Keller*, 137 F.3d 721, 723-24 (2d Cir. 1998).

governmental purpose. *Harris*, 171 Wn.2d at 466. In this case, Appellant asks this court to compare the denial of credit for time served for murder with the availability of credit for other, less serious felonies.²⁰ Appellant's Brief at 30. Relative seriousness is a sufficiently rational reason for granting credit for less serious offenses and denying credit for more serious offenses.

Appellant's double jeopardy argument is foreclosed by *Harris v. Charles*. CrR 3.2 is not a punitive court rule. *Harris*, 171 Wn.2d at 467-469. Appellant has not demonstrated that his EHM was any more restrictive than the EHM in *Harris*, and has accordingly failed to demonstrate that his EHM "was so punitive as to trigger double jeopardy's prohibition against multiple punishments for the same offense." *Id.* at 473.

D. CONCLUSION.

Appellant requested an exceptional sentence downward. No objections were presented at the sentencing hearing. Appellant presented the findings of fact and conclusions of law entered by the trial court. The

²⁰ Appellant also argues that RCW 9.94A.505(7) unfairly discriminates against drug sellers. Appellant was not convicted of a drug offense and lacks standing to assert that claim. At any event, a successful assertion of the discrimination against drug sellers claim would only invalidate RCW 9.94A.505(7)(c), and that would be of no aid to appellant.

adequacy of those findings of fact and conclusions of law are undisputed. Appellant's claims of procedural error at his sentencing, raised for the first time on appeal, should be rejected.

Respondent's credit for time served while on electronic home monitoring argument fails for want of a sufficient record.

This appeal should be denied.

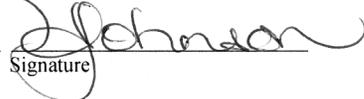
DATED: March 6, 2018

MARK LINDQUIST
Pierce County Prosecuting Attorney



MARK von WAHLDE
Deputy Prosecuting Attorney
WSB # 18373

Certificate of Service:
The undersigned certifies that on this day she delivered by ^{file} ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/6/18 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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